Re Howarth and ASIC - [2008] AATA 278

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ADMINISTRATIVE APPEALS TRIBUNAL

CATCHWORDS – CORPORATIONS *– banning order – whether the power to make a banning order mandatory or discretionary – the meaning of "fraud" – whether applicant has been convicted of fraud – weight to be accorded facts found and remarks made in County Court – whether reason to believe that applicant will not comply with the financial services law – meaning of "reason to believe" – whether banning order should be imposed – consideration of an enforceable undertaking as an alternative to a banning order – length of banning order - decision affirmed.*

Administrative Appeals Tribunal Act 1975 ss 37 and 43
Australian Securities and Investments Commission Act 2001 ss 11(1), 93AA
Corporations Act 2001 ss 9, 128, 184(2)(a), 206B(1)(b)(ii), 466, 481, 513D, 590, 592, 596, 601FB, 761A , 766A, 885C, 890A, 892C, 911A , 911B, 912A , 913A , 913B, 914A, 915B , 915C , 915F, 916A , 916B, 916D, 916F, 917A, 917B, 917C, 917F, 920A, 920B, 920C, 920D, 920E, 1041F, 1041G, 1041I, 1041M, 1071G and 1101E
Crimes Act 1914 (Cth) s 72
Crimes Act 1958 (Vic) ss 81(4) and 82
Financial Services Reform Act 2001

Alabarran v Members of the Companies Auditors and Liquidators Disciplinary Board (2007) 234 ALR 618
Alexandra Private Geriatric Hospital v Blewett (1984) 2 FCR 368; 56 ALR 265
Australian Securities and Investments Commission v Forge [2007] NSWSC 1489
Australian Securities and Investments Commission v Vizard (2005) 145 FCR 57; 219 ALR 714; 54 ACSR 394
Australian Securities Commission v Donovan (1998) 28 ACSR 583
Australian Securities Commission v Kippe (1996) 67 FCR 499; 137 ALR 423; 20 ACSR 679
Australian Securities Commission v Lord (1991) 33 FCR 144; 105 ALR 347; 6 ACSR 350
Boucaut Bay Co Ltd v The Commonwealth (1927) 40 CLR 98
CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384; 141 ALR 618
Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission and Others (2000) 203

CLR 194; 174 ALR 585
Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297; 35 ALR 151
Cullen v Corporate Affairs Commission (1989) 7 ACLC 117
Director of Public Prosecutions v Kose [2006] VSCA 119
Drake v Minister for Immigration and Ethnic Affairs (1979) 24 ALR 577; 2 ALD 60
Elliott v Australian Securities and Investments Commission (2004) 205 ALR 594; 48 ACSR 621
Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106
Finance Facilities Pty Ltd v Federal Commissioner of Taxation (1971) 127 CLR 106
GAS v R; SJK v R (2004) 217 CLR 198; 78 ALJR 786; 206 ALR 116
Hardcastle v Commissioner of Police (1984) 53 ALR 593
Kamha v Australian Prudential Regulation Authority (2005) 88 ALD 620; [2005] FCAFC 248
Leach v R (2007) 232 ALR 325
Minister for Immigration and Ethnic Affairs v Pochi (1980) 4 ALD 139
New South Wales Bar Association v Evatt (1968) 117 CLR 177
New South Wales Bar Association v Hamman (1999) 217 ALR 553; [1999] NSWCA 404
Nicholas v Corporate Affairs Commission (1987) 5 ACLC 258
Pillai v Messiter [No.2] (1989) 16 NSWLR 197
Power v Hamond [2006] VSCA 25
R v Cuerrier (1998) 162 DLR (4^{th}) 513
R v Cushion (1997) 150 ALR 45
R v D'Orta-Ekenaike [1998] 2 VR 140; 99 A Crim R 454
R v Duong [1998] 4 VR 68; 99 A Crim R 218
R v Isaacs (1997) 41 NSWLR 374; 90 A Crim R 587
R v Storey [1998] 1 VR 359; 89 A Crim R 519
R v Tonks and Goss [1963] VR 121
Re Civica Investments Ltd [1983] BCLC 456
Re Dollas-Ford and Australian Securities and Investments Commission (2006) 91 ALD 747; [2006] AATA 704
Re Donald and Australian Securities and Investments Commission (2001) 38 ACSR 10; [2001] AATA 366
Re HIH Insurance Ltd (in prov liq) (2002) 42 ACSR 80
Re Mann and Capital Territory Health Commission (No. 2) (1983) 5 ALN N261
Re One.Tel Ltd (in liq); Australian Securities and Investment Commission v Rich (2003) 44 ACSR 682
Re Radge, Dagg and Harvey and Commissioner of Taxation (2007) 95 ALD 711
Re Tasmanian Spastics Association; ASC v Nandan (1997) 23 ACSR 743
Re Wertheim and Department of Health (1984) 7 ALD 121
Rich v Australian Securities and Investments Commission [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354
Smith v Repatriation Commission (1987) 74 ALR 537
Story v National Companies and Securities Commission (1988) 6 ACLC 560
TCN Channel Nine Pty Ltd v Australian Mutual Provident Society (1982) 42 ALR 496
The Queen v Vasic (2005) 11 VR 380
Visnic v Australian Securities and Investments Commission (2007) 234 ALR 413
WA Pines Pty Ltd v Bannerman (1980) 41 FLR 175; 30 ALR 559
Wacando v The Commonwealth (1981) 148 CLR 1; 37 ALR 317
Ward v Williams (1955) 92 CLR 496

ADMINISTRATIVE APPEALS TRIBUNAL)
) V 2006/547
GENERAL ADMINISTRATIVE DIVISION)

Re: DUNCAN HOWARTH

Applicant

And: AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION

Respondent

DECISION

Tribunal: Deputy President S A Forgie
Dr Gordon Hughes, Member

Date: 8 April 2008
Place: Melbourne
Decision: The Tribunal affirms the decision of the respondent dated 30 May 2006.

SA Forgie
Deputy President
REASONS FOR DECISION

On 30 May 2006, a delegate of the Australian Securities and Investments Commission (ASIC) made a banning order against Mr Duncan Ernest Howarth

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under s 920A of the *Corporations Act 2001* (Corporations Act). That banning order prohibited him from providing any financial services from 31 May 2006. [1] Mr Howarth had been convicted of four counts of obtaining financial advantage by deception contrary to s 82 of the *Crimes Act 1958* (Vic) and one count of use position (as a director of a Company) dishonestly with the intention of gaining an advantage contrary to s 184(2)(a) of the Corporations Act . We have affirmed the decision.

BACKGROUND

[1] Documents lodged under s 37 of the *Administrative Appeals Tribunal Act 1975* (Exhibit 1) at 8 and see also 21-28

2. For the purposes of the hearing, Mr Howarth and ASIC agreed that the document entitled "*Summary of Facts*" accurately reflects the facts in this matter.[2] As the proposition was put in Mr Howarth's Statement of Facts and Contentions:

   "*The applicant for the purposes of the hearing, admits the facts as contained in the summary of facts in the County Court of Victoria criminal proceeding.*"[3]

That Summary of Facts was prepared by the office of the Director of Public Prosecutions for the purpose of the charges laid against Mr Howarth. Having regard to that document and to the evidence given at the hearing, we make the findings of fact set out in the paragraphs in this section our reasons.

[2] Statement of Facts and Contentions of Mr Howarth at (C) and of ASIC at B[12]-[13] and transcript at 5 and noted again at 45.
[3] Transcript at 45

Establishing and carrying on the businesses of PFS and PIS

3. In 1998, Mr Howarth and a partner established an insurance brokerage. To that end, they incorporated a company called Presidential Insurance Brokers Pty Ltd (PIB). It was incorporated on 20 August 1998 and, at the relevant time, operated its business from offices in Ringwood. Initially, Mr Howarth was appointed as a director and the secretary of PIB but, after 7

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October 1999, became its sole director and secretary when he and his partner went their separate ways. Its name has changed from PIB to Presidential Financial Services Pty Ltd (PFS).

4. The shares in PFS are equally divided between Mr Howarth and JJG Investments Pty Ltd (JJG). That company was incorporated on 29 January 1999 and acts as trustee for the Howarth family trust. In the first year of its existence, Mr Howarth was the sole director and secretary of JJG but he ceased to hold those positions on 1 July 2000 when his wife, Mrs Jillian Robyn Howarth was appointed to each of them. Mrs Howarth owns all of the shares in that company.

5. Presidential Insurance Services Pty Ltd (PIS) was incorporated on 11 June 2003 and, at all relevant times, operated its business from the same offices in Ringwood. Mr Howarth was appointed its sole director and secretary. The ASIC records do not record the shareholdings in PIS.

6. PIB (and later PFS) and PIS were variously licensed to carry on business as a general insurance broker and also as a multi-agent for life insurance. In view of the changes to the licensing requirements introduced by the *Financial Services Reform Act 2001* with effect from 11 March 2002, Mr Howarth decided that he would become an Authorised Representative (AR) rather than continue as a small suburban insurance broker. On 1 November 2003, Mr Howarth was appointed as an AR of Mawson Securities Pty Ltd (Mawson). Under their authorised representative agreement, PFS is authorised to carry on a financial service business to provide basic financial product advice for deposit and payment products. He remained Mawson's AR until 2 June 2006. From 11 November 2003 until 12 January 2006, Mr Howarth was an AR of National Adviser Services Pty Ltd (NAS). Under their agreement, PIS was authorised to carry on a financial services business to provide financial product advice for general insurance products to retail and wholesale clients.

Facilitating premium funding

7. Mr Howarth offered a service whereby he assisted clients in arranging short term loans for the purpose of their paying their insurance premiums. Loans for that purpose are known as "*premium funding*". All that PFS's clients had to do was to complete a one page application form and repay the loan, together with interest, over the term of the loan. That term was generally ten months.

8. In order to arrange premium funding, Mr Howarth would first contact Premier Funding Services Pty Ltd (Premier Funding). Premier Funding is a finance company specialising in the provision of short term loans for the purpose of financing domestic insurance premiums. It also acts as an intermediary between insurance brokers seeking funding on behalf of their commercial clients and other premium funding firms. Those premium funding firms with which it deals include, but are not limited to, Centrepoint and BMW Finance. Mr Howarth had used Premier Funding as an intermediary to arrange premium funding for his clients with either Centrepoint Funding Ltd (Centrepoint) or with BMW Australia Finance Ltd (BMW Finance) from July 2001 and continued to do so until September 2005.

9. Mr Howarth would contact Premier Funding by telephone or email for a quotation after advising of the premium amount required, the name and other details of the client requiring the premium funding, details regarding the insurance sought and the commission rate. A staff member of

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Premier Funding would send these details to either Centrepoint or BMW Finance in order to obtain the loan application documents. Once it had received that documentation, it would send it on to PFS.[4]

[4] Statement of Mr Bernard Michael Dunn, Manager and a director of Premier Funding, Exhibit 1 at 330-331, [4]-[13]

10. Mr Howarth then arranged for the documentation to be completed and signed by PFS's client. It showed the loan amount, credit charges and the amount and number of repayments required. The client was required to nominate a bank account from which monthly instalments could be deducted by direct debit.[5] In addition, both Centrepoint and BMW Finance required evidence that an insurance policy existed as they used them as security against the loan.[6] In the absence of an insurance policy, no funding would have been approved.[7] Both Centrepoint and BMW Finance relied on the loan application completed and signed by PFS's client. They also relied on a copy of a tax invoice from PFS showing the client's insurance details as evidence of the premium payable for the insurance policy.[8] The amount of the loan that each client applied for comprised the amount shown on the tax invoice as the premium payable and an amount charged by PFS as fees and charges.

[5] Statement of Mr Bernard Michael Dunn, Manager and a director of Premier Funding, Exhibit 1 at 332, [14]-[15]
[6] Statement of Mr Bernard Michael Dunn, Manager and director of Premier Funding, Exhibit 1 at 333, [17]
[7] Statement of Mr Robert Dodd, director of Centrepoint, Exhibit 1 at 70, [13] and Mr Matthew James Newman, Account Executive, Insurance Premium Finance, of BMW Finance, Exhibit 1 at 308, [13].
[8] Statement of Mr Robert Dodd, Director of Centrepoint, Exhibit 1 at 69-70, [11]-[12] and Mr Matthew James Newman, Account Executive, Insurance Premium Finance, of BMW Finance, Exhibit 1 at 307-308, [11]-[12].

11. Once its client had signed and returned the application form, PFS would send a copy of the application and the tax invoice to Premier Funding by facsimile and arrange for the original to be sent by mail or to be hand delivered.

Facilitation of 22 short term loans from Centrepoint and BMW Funding

12. Between 1 May 2004 and 30 June 2005, Mr Howarth arranged 19 short term loans on behalf of PFS's clients. In all, the loans applied for and approved totalled $1,415,568.90. Sixteen were made to and approved by Centrepoint for a total of $1,058,449.75 and another three were made to and approved by BMW Finance for a total of $357,119.15. In respect of each of the 19 applications, Mr

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Howarth sent documentation in the form in which it was required by Centrepoint and by BMW Funding. All but three of the applications were accompanied by a document that either purported to be an insurance policy from CGU Insurance Ltd (CGU) and was not or, if it was such a policy, showed a premium that was higher than the actual premium payable. The same was true for the two documents forwarded as policies from Zurich Australian Insurance Limited (Zurich) and the one document forwarded as a policy from Suncorp Metway Insurance Limited.

13. Mr Howarth also applied for three short term loans for his own benefit. One was in the name of PFS for an amount of $10,682.30 and two in the name of JJG for a total of $16,723.25. Each of the three applications was accompanied by a PFS tax invoice referring to a policy that was said to be in the name of JJG but that did not exist. The money lent by Centrepoint as a result of the three applications was deposited in PFS's bank account. It was withdrawn from that account to pay amounts owed to the Australian Taxation Office (ATO).

14. Both Premier Funding and PFS received commissions from Centrepoint and BMW Funding in respect of the business that they referred. Commission was paid on a contract by contract basis. Centrepoint and BMW Finance sent the commissions to Premier Funding at a rate between 1% and 2.5% of the premium together with Goods and Services Tax (GST). The commission rate payable to PFS varied between 1% and 2.5%. Both Centrepoint and BMW Funding paid any commissions to Premier Funding. Premier Funding would retain that payable to it and forward that payable to PFS to it by electronic funds transfer. [9]

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[9] Statement of Mr Bernard Michael Dunn, Manager and director of Premier Funding, Exhibit 1 at 334, [21]-[22]

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15. In relation to all 22 loan applications, Centrepoint and BMW Finance paid a total of $1,442,974.45 via electronic funds transfer into a bank account in the name of PFS. From that money, PFS forwarded a total of $1,383,000 to its clients. It retained the sum of $32,568.90 for fees and charges in respect of the 19 loan applications it submitted on behalf of its clients and a further $27,405.55 that it had applied for as loans in the name of JJG. The two amounts totalled $59,974.45.[10]

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[10] Exhibit A10, Summary of Facts at [22]

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16. Centrepoint and BMW Funding also paid a total amount of $50,923.66 to Premier Funding by way of commission. Premier Funding forwarded $37,301.15 of that sum to PFS as the commission it had earned in referring the 19 premium funding loan applications.

17. Neither Mawson nor NAS received any notification from PFS, PIB or Mr Howarth about the premium funding loan applications detailed in these reasons.

The charges

18. The charges, to which Mr Howarth pleaded guilty at the committal mention at the Melbourne Magistrates' Court on 10 October 2006 and again in the County Court, were:

Count	Charge
Counts 1-4	Obtain financial advantage by deception contrary to s 82 of the *Crimes Act 1958* (Vic)
Count 5	Use position (as a director of a Company) dishonestly with the intention of gaining an advantage contrary to s 184(2)(a) of the Corporations Act

19. Count 1 referred to loan money obtained from Centrepoint and Count 3 to that obtained from BMW Finance. Together, they referred to a total sum of $59,974.45, which was paid to PFS either as fees and charges in respect of 19 of the loan applications ($32,568.90) or as the amounts paid as a result of JJG's two loan applications and PFS's one loan application ($27,405.55). Counts 2 and 4 related to the sum of $37,301.15 paid to PFS as commission in respect of the 19 loan applications that did not relate to JJG or to PFS.

Sentencing remarks of Judge Shelton

20. In sentencing Mr Howarth for each of the four counts, Judge Shelton of the County Court first noted that the maximum penalty for an offence contrary to s 82 of the *Crimes Act 1958* (Vic) is 10 years' imprisonment or a fine of 1,200 penalty units or both. For an offence contrary to s 184(2)(a) of the Corporations Act , which was the subject of the fifth count, the maximum penalty is a fine of 2,000 penalty points or imprisonment for five years or both.

21. As to the circumstances leading to Mr Howarth's being charged, Judge Shelton said:

"*The circumstances leading to your being charged with the offences to which you have pleaded guilty are comprehensively set out in a helpful document entitled 'Summary of Facts' which the prosecutor ... read into the transcript. I annexe a copy of that document to, and incorporate it in, these sentencing remarks.*

I make the following further comments on the circumstances of your offending: The loans made were not secured as the lenders, Centrepoint Funding Ltd and BM Value Australia Finance Ltd [sic]*, were led to believe that they were. Fortunately, the lenders were repaid the loans in full by your clients and, in three cases, your companies. In respect of the loans the lenders paid commission to Premier Funding Services Pty Ltd of $50,923.66, of which your two companies received $37,301.15. Payment of this commission was a normal business expense for the lenders in lending funds, and I do not regard it as a loss to the lenders. It may have been otherwise if a borrower had defaulted.*

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Further, your companies received $32,301.15 by way of fees and charges levied. Again, these would have been payable by the borrowers, in any event, had the loans been properly obtained. Still, there was a financial benefit received by your companies.

Your offending was protracted over a period of 12 months and involved 22 transactions. False documentation was prepared in respect of each transaction. Unusually, in the case of such offending, there was no misappropriation of funds."[11]

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[11] Exhibit A, A11 at [2]-[5]

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22. Judge Shelton then turned to Mr Howarth's personal circumstances and the effect of his actions on his professional and business activities. He said to Mr Howarth:

"*... You are aged 48. You went to year 12 level at school, and then commenced work with National Australia Bank; and since then you have been working regularly in the finance and insurance fields until last year. In 1998 you commenced your own insurance brokering business which, from all accounts, was quite successful. You hold diplomas in financial services.*

As a result of your offending, ASIC on 31 May 2006 permanently banned you from providing financial services which covers insurance services. I understand that this determination by ASIC is presently under appeal to the Commonwealth Administrative Appeals Tribunal. In any event, even if the ban is for a limited number of years, the effect has been severe in that you are banned from carrying on from business in an area where it appears you have considerable experience and ability. You were forced to sell your business as a result of the ASIC ban last year, and obtained a sale price of $260,000.

You married in 1981 and have three children aged 24, 21 and 13.

...

... I take into account, to your credit, that between 1977 and 2000 you were in the Army Reserve, and since 2001 you have been heavily involved with Army Cadets, and since the middle of 2006 have had the title of Captain, Officer in Command of a cadet unit."[12]

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[12] Exhibit A, A11 at [6]-[12]

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23. With regard to Mr Howarth's response to ASIC's investigations and the subsequent charges, Judge Shelton said:

"*On the second interview by ASIC investigators on 18 January 2006 you made substantial admissions. You indicated a guilty plea at the earliest possible time. In the circumstances, and given comments made by you in that second record of interview, I accept your plea of guilty as showing remorse on your part, as well as saving the cost and inconvenience of a trial."*[13]

His Honour went on to refer to a number of Mr Howarth's clients who had given references although he was not sure whether those clients had been aware that Mr Howarth was facing criminal charges as well as the banning order. Another referee had also given a positive reference as had a former client, who was called to give evidence and who had found Mr Howarth to be very competent in arranging the insurance of his businesses. That witness would engage Mr Howarth again if the opportunity were to arise.

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[13] Exhibit A, A11 at [10]

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24. Having recited these matters, Judge Shelton said:

"*I feel I can be confident in saying that you are unlikely to re-offend.*"[14]

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[14] Exhibit A, A11 at [13]

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25. In sentencing Mr Howarth, Judge Shelton referred to the principles of general deterrence:

"*In sentencing you – that is, to deter others from offending in a similar fashion to you – is an important sentencing consideration. See for example Q v. Darren Kingsley Brown [2002] VSCA 99 at paragraph 52 by O'Bryan, J. I also noted the comments of Eames, J. in DPP v. Page VSCA [2006] 224 at paragraph 37.*

> *The Courts have made many statements about the seriousness of white collar crime.*

Then cases supporting that proposition are quoted. Then Eames J. continues:

> *As noted in* Bulfin*, it is a feature of such offending that the offenders are likely to have no prior convictions, to have good character references, to have good prospects of rehabilitation. ---- For such offences these personal mitigatory factors must be given less weight than the factor of general deterrence.*"[15]

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[15] Exhibit A, A11 at [14]

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26. Having regard to all of these matters including the submissions and the principles in *Director of Public Prosecutions v Kose* [2006] VSCA 119, Judge Shelton imposed terms of imprisonment in respect of each count but suspended them. In relation to the four counts relating to the State offences, he imposed nine months' imprisonment on Count 1, three months on each of Counts 2

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and 4 and six months on Count 3. In respect of the Commonwealth offence that was the subject of Count 5, Judge Shelton imposed a sentence of three months' imprisonment.

27. The sentences were partially cumulative:

"*To reflect the totality of your criminality and given the sentence I shall shortly impose upon the Commonwealth offence, Count 5, I direct that three months of the sentence imposed on Count 3 be served cumulatively upon the sentence imposed upon Count 1 and that otherwise the sentences be served concurrently with these sentences and with each other. That results in a total effective sentence of 12 months' imprisonment. I wholly suspend that sentence for a period of two years.*"[16]

With regard to Count 5, Judge Shelton directed that Mr Howarth be released forthwith upon his giving a recognizance to be of good behaviour for a period of two years.[17]

LEGISLATIVE BACKGROUND

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[16] Exhibit A, A11 at [20]
[17] Exhibit A, A11 at [23]

Requirement to hold an AFSL if providing a financial service

28. Chapter 7 of the Corporations Act is concerned with the regulation of financial services and markets. A "*financial service*" is not defined as such. Rather, s 766A describes six circumstances in which a person "*provides a financial service*". They occur if the person:

"*(a) provide*[s] *financial product advice (see section 766B); or*

(b) deal[s] *in a financial product (see section 766C); or*

(c) make[s] *a market for a financial product (see section 766D); or*

(d) operate[s] *a registered scheme; or*

(e) provide[s] *a custodial or depository service (see section 766E); or*

(f) engage[s] *in conduct of a kind prescribed by regulations made for the purposes of this paragraph.*"[18]

A person is not taken to provide a financial service if that person's conduct is done in the course of work ordinarily done by clerks.[19] Part 7.1 develops the circumstances in which a person provides a financial service.

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[18] s 766A(1). Regulations may be made to narrow or extend the circumstances in which a person is taken or not taken to provide a financial service. They may also extend the range of persons taken to provide a financial service to those who facilitate the provision of a financial service in certain circumstances: s 766A(2).
[19] s 766A(3)

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29. Subject to s 911A, a person who carries on a "*financial services business in this jurisdiction*" must hold an Australian Financial Services Licence (AFSL) covering the provision of the financial services.[20] A "*financial services business*" is a business of providing financial services. [21] There are exemptions to the requirement to be licensed[22] and regulation of the circumstances in which a person may provide a financial service on behalf of another person who carries on a financial services business.[23] The exemption relevant in this case applies if the financial service is provided as a representative of a person who carries on a financial services business and who holds an AFSL covering the provision of the service in issue.[24] Those who are licensed to provide financial services must comply with the obligations set out in Division 3 of Part 7.6. The general obligations are set out in s 912A of the Corporations Act .

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[20] s 911A(1) Section 911D prescribes when a financial services business is taken to be carried on in this jurisdiction.
[21] s 761A
[22] s 911A(2)-(5)
[23] s 911B
[24] s 911A(2)(a)

When will an AFSL be granted?

30. The manner in which a person applies for a licence is set out in s 913A of Division 4 of Part 7.6 . Sec tion 913B(1) provides that:

"*ASIC must grant an applicant an Australian financial services licence if (and must not grant such a licence unless):*

(a) the application was made in accordance with section 913A; and

(b) ASIC has no reason to believe that the applicant will not comply with the obligations that will apply under section 912A if the licence is granted; and

(c) The requirement in whichever of subsection (2) or (3) of this section applies is satisfied; and

(ca) the applicant has provided ASIC with any additional information requested by ASIC in relation to matters that, under this section, can be taken into account in deciding whether to grant the licence; and

(d) the applicant meets any other requirements prescribed by regulations made for the purposes of this paragraph."

ASIC may impose conditions on any AFSL it issues.[25]

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[25] s 914A

What are the obligations of the holder of an AFSL?

31. As I have said, the general obligations of the holder of an AFSL are set out in s 912A of the Corporations Act . Section 912A(1) provides that:

"*A financial services licensee must:*

(a) do all things necessary to ensure that the financial services covered by the licence are provided efficiently, honestly and fairly; and

(aa) have in place adequate arrangements for the management of conflicts of interest that may arise wholly, or partially, in relation to activities undertaken by the licensee or a representative of the licensee in the provision of financial services as part of the financial services business of the licensee or the representative; and

(b) comply with the conditions on the licence; and

(c) comply with the financial services laws; and

(ca) take reasonable steps to ensure that its representatives comply with the financial services laws; and

(d) unless the licensee is a body regulated by APRA--have available adequate resources (including financial, technological and human resources) to provide the financial services covered by the licence and to carry out supervisory arrangements; and

(e) maintain the competence to provide those financial services; and

(f) ensure that its representatives are adequately trained, and are competent, to provide those financial services; and

(g) if those financial services are provided to persons as retail clients--have a dispute resolution system complying with subsection (2); and

(h) unless the licensee is a body regulated by APRA--have adequate risk management systems; and

(j) comply with any other obligations that are prescribed by regulations made for the purposes of this paragraph."

32. A "*financial services law*" refers to a provision of Chapters 5C, 6, 6A, 6B, 6C and 6D as well as of Chapter 7. It also refers to a provision of Chapter 9 as it applies to a provision referred to in one of those seven Chapters, a provision of Division 2 of Part 2 of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) and any other Commonwealth, State or Territory legislation covering conduct relating to the provision of financial services. [26]

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[26] s 761A

When can an AFSL be varied, cancelled or suspended?

33. Division 4 of Part 7.6 is also concerned with the suspension and cancellation of licences. Where an AFSL is held by a natural person, s 915B provides that:

"*ASIC may suspend or cancel and Australian financial services licence held by a natural person, by giving written notice to the person, if the person:*

(a) ceases to carry on the financial services business; or

(b) becomes an insolvent under administration; or

(c) is convicted of serious fraud; or

(d) becomes incapable of managing their affairs because of mental or physical incapacity; or

(e) lodges with ASIC an application for ASIC to do so, which is accompanied by the documents, if any, required by regulations made for the purposes of this paragraph."

34. There is no requirement in s 915B that ASIC give the person any notice of the suspension or cancellation. Section 915C provides for other circumstances in which ASIC may cancel or suspend an AFSL after giving the licensee an opportunity to appear, or be represented, at a private hearing before ASIC and to make submissions to ASIC on the matter.[27] Those circumstances occur if:

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[27] s 915C(4)

"*(a) the licensee has not complied with their obligations under section 912A;*

(aa) ASIC has reason to believe that the licensee will not comply with their obligations under section 912A ;

(b) ASIC is no longer satisfied of the matter in whichever of subsection 913B(2) or (3) applied at the time the licence was granted (about whether the licensee, or the licensee's representatives, are of good fame and character);

(c) a banning order or disqualification order under Division 8 is made against a representative of the licensee and ASIC considers that the representative's involvement in the provision of the licensee's financial services will significantly impair the licensee's ability to meet its obligations under this Chapter."[28]

"*(a) the application for the licence was false or misleading in a material particular or materially misleading; or*

(b) there was an omission of a material matter from the application."[29]

The cancellation or suspension takes effect when written notice of it is given to the licensee.[30]

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[28] s 915C(1)
[29] s 915C(2)
[30] s 915F

What is, and what are the responsibilities of, an authorised representative?

35. An "'**authorised representative** *' of a financial services licensee means a person authorised in accordance with section 916A or 916B to provide a financial service or financial services on behalf of the licensee.*" [31] Section 916A(1) provides that a financial services licensee may give a person a written notice authorising the person to provide a specified financial service or financial services on behalf of that licensee. It is an authorisation given for the purposes of Chapter 7 of the Corporations Act .[32] Any authorisation to provide a financial service that is not covered by the AFSL of the licence holder or that is contrary to a banning order or disqualification under Division 8 of Part 7.6 is void.[33] The holder of an AFSL cannot be the AR of another holder of an AFSL.[34]

[31] s 761A
[32] s 916A(1)
[33] s 916A(3)
[34] s 916D(1)

36. The holder of an AFSL who authorises an individual as an AR must tell ASIC of the authorisation within 15 business days.[35] Division 6 of Part 7.6 provides for the liability of financial services licensees for representatives. That Division applies to the conduct of any representative of a financial services licensee that relates to the provision of a financial service on which a third person could reasonably be expected to rely and on which that person in fact relies in good faith.[36]

[35] s 916F
[36] s 917A(1)

37. Section 917B provides that:

"*If the representative is the representative of only one financial services licensee, the licensee is responsible, as between the licensee and the client, for the conduct of the representative, whether or not the representative's conduct is within authority.*"

Section 917C makes particular provision where a person is an AR of more than holder financial services licensee. If the licensee is responsible for the conduct of the AR under Division 6, the client has the same remedies against the licensee as the client has against the AR.[37]

[37] s 917F(1)

What is a banning order and what is its effect?

38. Depending upon its terms, a banning order is a written order prohibiting a person either from providing any financial services or from providing financial services in specified circumstances or capacities. [38] The order may prohibit the person against whom it is made from providing a financial service:

"*(a) permanently; or*

(b) for a specified period, unless ASIC has reason to believe that the person is not of good fame or character." [39]

A banning order takes effect, or a variation or cancellation of it, takes effect when it is given to the person against whom it is made.[40]

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[38] s 920B(1)
[39] s 920B(2)
[40] s 920E(1)

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39. The application of a banning order may be modified in certain circumstances. It may allow the banned person to do specified acts or specified acts in specified circumstances even though its terms otherwise prohibit that person from doing those acts or doing them in those circumstances. The modification of the application of the banning order may be made subject to specified conditions. That is the effect of s 920B(3) .

40. ASIC cannot grant an AFSL to a person against whom a banning order has been made if to do so would be contrary to that banning order.[41] A person contravenes s 920C if the person engages in conduct that breaches a banning order.[42]

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[41] s 920C(1)
[42] s 920C(2)

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41. Should there be a change in any of the circumstances on which ASIC made a banning order, it may vary or cancel it.[43] ASIC may do that on its own initiative or the person against whom the banning order was made may make an application in accordance with any regulations.[44]

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[43] s 920D(1)

[44] s 920D(2)

When may ASIC make a banning order?

42. ASIC may only make a banning order after giving the person an opportunity to appear, or be represented, at a private hearing before ASIC and to make submissions to ASIC on the matter. [45] The circumstances in which ASIC may make a banning order occur if:

[45] s 920A(2)

"*(a) ASIC suspends or cancels an Australian financial services licence held by the person; or*

(b) the person has not complied with their obligations under section 912A; or

(ba) ASIC has reason to believe that the person will not comply with their obligations under section 912A ; or

(bb) the person becomes insolvent under administration; or

(c) the person is convicted of fraud; or

(d) (Repealed)

(e) the person has not complied with a financial services law; or

(f) ASIC has reason to believe that the person will not comply with a financial services law." [46]

The expression "*financial services law*" has the same meaning as it does in relation to s 912A(1) .[47]

[46] s 920A(1)
[47] See [32] above

Enforceable undertaking

43. Section 93AA of the ASIC Act is concerned with written undertakings. It provides that:

"*(1) ASIC may accept a written undertaking given by a person in connection with a matter in relation to which ASIC has a function or power under this Act.*

(2) The person may withdraw or vary the undertaking at any time, but only with the consent of ASIC.

(3) If ASIC considers that the person who gave the undertaking has breached any of its terms, ASIC may apply to the Court for an order under subsection (4).

(4) If the Court is satisfied that the person has breached a term of the undertaking, the Court may make all or any of the following orders:

(a) an order directing the person to comply with that term of the undertaking;

(b) an order directing the person to pay to the Commonwealth an amount up to the amount of any financial benefit that the person has obtained directly or indirectly and that is reasonably attributable to the breach;

(c) any order that the Court considers appropriate directing the person to compensate any other person who has suffered loss or damage as a result of the breach;

(d) any other order that the Court considers appropriate."

THE EVIDENCE

Professional experience in the financial services industry

44. While he was an AR for Mawson and NAS, Mr Howarth said, he was subject to compliance reviews every 12 months. He always met them and, in relation to general insurance, was asked to address a conference regarding the way in which he ran his business. The compliance reviews included a review of the way in which he managed his accounts. At the compliance review conducted by Inspector Compliance Pty Ltd (Inspector Compliance) for Mawson on 22 March 2006, Mr Howarth said that he received a high compliance rating for all aspects of his financial advisory business with the exception of the 22 files involved in the premium funding loan applications.[48] The report contained the following general comments:

"*Overall displayed a high standard of compliance with regard to operational activities and advice provided to clients with the exception of the issues surrounding the pending ASIC investigation. Advice was provided to clients in a timely manner and based on current client information. Advice was also provided in accordance with client's goals and objectives.*"[49]

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[48] Exhibit A, A9 at [12]

[49] Exhibit A, A9 at [12] at DH-1, overall summary

45. When life insurance was concerned, all moneys were payable to the relevant life insurance company and he had responsibility only for the paperwork. When Mr Howarth ran his own brokerage firm under its own licence, he maintained a trust account through which moneys passed from the client to the underwriters. As an AR, the moneys were paid into NAS's trust account. Mr Howarth remained responsible for some cash that he would pay into NAS's trust account. There has never been any suggestion of any shortfall in the accounts or of any misappropriation of clients' funds.

46. Mr Howarth said that he had not worked in the investment field. In so far as life insurance was concerned, Mawson had an approved product list and he, as an AR, could not offer products that were not on that list.

47. At the time that he arranged the premium funding loans, PFS had approximately 900 files relating to a number of clients fewer than 900. Only 1% of these files were involved in the premium funding loan applications.[50]

[50] Exhibit A9 at [10]

Compliance reviews

48. Mr Howarth said that he had met his solicitor, Mr Xenidis, through Inspector Compliance as Mr Xenidis would attend the professional development sessions organised by Mawson. He was aware that Mr Xenidis was a director of Inspector Compliance. Mr Howarth put forward the report of Inspector Compliance to show ASIC the type of business that he was running. It was an expert opinion that he was conducting his business in a proper way apart from the matters relating to premium funding. Mr Howarth was asked:

"*... And can I ask whether you see any conflict in having the person who represents you as your representative also being the person who gives you expert evidence assistance?*"[51]

Mr Howarth responded that it was "*... not a matter for me to answer. That's for the tribunal or – to answer that question.*"[52]

[51] Transcript at 54-55
[52] Transcript at 55

49. Mr Howarth's attention was drawn to several passages from Inspector Compliance's report:

"*... The areas covered in the review include those considered when providing expert evidence as to standards expected from participants within the financial services industry.*

The Compliance Report is typically based on a sample of randomly selected files which may not be a true cross section of the Representative's client base. ...

The Compliance Report is not to be used as a basis for making representations as to quality of service or advice to any third party and no third party ought to rely on this Compliance Report for such purposes."[53]

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[53] Exhibit 1 at 11

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50. Mr Howarth did not think that the last statement diminished the weight that could be given to the Compliance Report and agreed that the files selected by Inspector Compliance might not reflect a true cross-section of the client base.

51. Mr Howarth agreed that the Compliance Report did not assign a compliance rating to him in its overall summary. It showed that the files of three clients had been reviewed.[54] Each file related to life insurance as that was of concern to Mawson.

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[54] Exhibit 1 at 12

Arranging premium funding

52. Mr Howarth said that, in some States, insurance premiums could not be paid in instalments. As some clients could not pay them in a lump sum, he would arrange premium funding for them. He would receive the funds and then send them to the client. It was common practice in the insurance sector, Mr Howarth said, and he explained that:

"*... Not long after I got into the business, I was introduced that, you know, if you need to help people out, you can just do a premium funding loan. As long as the loan is repaid, there's no questions asked.*"[55]

He understands from the fact that he was introduced to the practice by other brokers that it is a common practice in the insurance industry.

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[55] Transcript at 16

53. In the interview with Mr Malinaric on 9 May 2006, Mr Howarth had explained :

"*How I came across it was many years ago when I first started in the industry we needed to purchase a computer and didn't have the cash flow at the time because it was a new start-up business and actually an experienced broker put me on to the – how to do it and so there's a way of getting money by doing it this way, so I was shown it by somebody else in the industry.*"[56]

Mr Howarth said to Mr Malinaric that:

"*... The majority of the money was used for WorkCare funding, so the mechanism I was using for the WorkCare funding was flawed because 10-odd years you could borrow money – you couldn't premium fund WorkCare. Today you can and I'd never changed my procedures. So the majority of the money was used for WorkCare funding.*

MR MALINARIC: But not all of it.

MR HOWARTH: No, there was some in there that – some people – some clients took advantage of the system. So they were using it for other purposes, but most of it was WorkCare, the majority of the funds were WorkCare, some of the loans weren't, the smaller loans, but they were directors of the company that legitimately were using it for WorkCare and so --- "[57]

[56] Exhibit 1 at 975-976
[57] Exhibit 1 at 976

54. When speaking at the earlier interview with Mr Flynn of ASIC about what Centrepoint and BMW Finance thought that they were financing, Mr Howarth said:

"*Well, as far as I'm concerned it was for insurance purposes. It wasn't actually for the policies, the policies that they thought they were getting covered against, yes.*

MR FLYNN: Yes, do you think they may have been a bit deceived?

MR HOWARTH: Well, when I think about it, in July last year when this came up and I, you know, it was all brought up, then when I started to think about it, yes they probably, you know, they were but Centrepoint said at the time they still would have lent the money to the client on the WorkCare, so it was just a matter of the procedures I was using were out of date and I should have changed them some years earlier.

...

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MR HOWARTH: That's a mistake I made. I've continued on with a wrong process, doing it wrong, and I stated back in those documents I've given you, I made a statement right at the beginning where I stated that these invoices I provided were incorrect, that they were dummy or false or whatever term you want to use."[58]

[58] Exhibit 1 at 936

55. In cross-examination, Mr Howarth said that he thought at the time that this was an adequate explanation for his conduct. Mr Robert Dodd, who is a director of Centrepoint, had drawn his attention to the fact that Centrepoint lent money for work care whereas some years earlier premium funding firms had not. He had not updated the template on his computer and he should have updated his procedures.[59]

[59] Transcript, 41

56. As far as Mr Howarth is aware, there has been no change to premium funding procedures. In cross-examination, the following exchange occurred between Mr Howarth and Mr Knowles:

"*And might it be that the reason why it's been thought unnecessary to change the procedures, is that people would assume that others would abide by – would not be falsifying documents in such applications? --- I can't answer that question. I'm not the executive of the premium funding companies.*"[60]

[60] Transcript at 33

57. As to the way in which he would place the business, Mr Howarth said:

"*The client always requested the amount of the funding they required. I would obtain quotes and I would send the contracts through to the client. The client would sign the contracts and send them back to me and they would be onforwarded to the premium funding. So I never signed any contracts, except for I think there's two loans there that belong to companies of which I had an association with.*"[61]

[61] Transcript at 18-19 and see also transcript at 20 when Mr Howarth repeated that he had not signed any contracts on behalf of a client.

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58. All the moneys were repaid by the clients directly to the company funding the loan by direct debit. Mr Howarth had nothing to do with the clients' repayments of the loans.

59. When comparing his work as an AR for Mawson with premium funding, Mr Howarth said that premium funding was not regulated:

"*... as far as I could see. Premium funding – there didn't appear to be any rules, as long as people paid the money back, the funders didn't seem to take – I mean, it was, you know, a one-page contract for the amount of money. It was just – it was unbelievable. Like – because I came out of the banking industry, so it absolutely floored me that you could get this sort of money with such little paperwork.*

And so you are more than capable to abide by regulations imposed on you by a financial services licensee? --- Most definitely."[62]

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[62] Transcript at 18

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60. In cross-examination, Mr Howarth was taken through a tax invoice that he prepared and sent to Centrepoint. It showed amounts for base premium, fire levy, GST, stamp duty and broker fee totalling $71,465.50.[63] The tax invoice bore a number and a date as well as the details of the Reflections Group (i.e. Reflections Group Services Pty Ltd), to which it was addressed, and the details of a policy said to be with Zurich. Mr Howarth said that all of the details shown on the tax invoice were false. In this case, there was no insurer, no policy and no policy number. In other cases, there was a policy and he would show the correct policy number but the amount of the premium would not be correct. In the case of the tax invoice showing a figure of $71,465.50, the amounts shown for base premium, fire levy, GST, stamp duty and broker fee were all made up. There were only two components to the loan amount: the amount that went to the client and the amount that went to him as a fee or charge.[64]

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[63] Exhibit 1 at 350
[64] Transcript at 28-29

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61. With regard to the three loans arranged for JJG, Mr Howarth said that the properties given as the risks insured existed but had nothing to do with him or with JJG.

62. In an exchange with Mr Grant during the interview on 18 January 2006, Mr Howarth denied that he had known that his clients used the loans for purposes other than the payment of their insurance premiums. Had he known that was happening, he would not have had anything to do with it.[65] At the hearing, he continued to deny that he had known that the loans were used for a multitude of purposes. His attention was drawn to the description of the use of the loans given in the DPP's Summary of Facts. The two in relation to JJG were shown as "*Payment to ATO*" as was another to PFS. Mr Howarth said that the loans made to JJG were used to pay the tax bill of "*proba bly PFS, I would imagine.*"[66] Seven were shown as "*RGS Worker's* [sic] *Compensation Premium*".[67]

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They were shown against all entries in relation to the Reflections Group. Two of the entries concerned a racehorse; either its purchase or its being serviced. Four were shown as "*Injection of working capital*" and another four for the repayment of personal debt. The final payment was to "*payout former shareholder of QHS*."[68]

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[65] Exhibit 1 at 938
[66] Transcript at 36
[67] Exhibit A, A10 at [21]
[68] Exhibit A, A10 at [21]

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63. In cross-examination, the following exchange took place between Mr Knowles and Mr Howarth regarding the loans made to entities other than the Reflections Group:

"*And none of the others relate to workers* [sic] *compensation – is that right – none of them? Is that right from the table? --- Well, that's what the prosecution put forward. I never agreed with that. I just said that – I agreed with the loans and all that, but I never agreed with that. When it came to court, it was a simple matter of my barrister saying to me, 'Well', he said, you know, 'you're admitting to the loans. What they were used for at the end of the day, we're not going to argue that here because we're pleading guilty.' So what's the point of arguing against it if I'm pleading guilty, and I had already pleaded guilty before this – before this was presented for those loans.*

So, are you saying that in relation to these other amounts, you were told incorrectly – and put aside your own companies, we'll get to that? --- Yes.

In relation to these other amounts you were told falsely by the people applying for the money that it was for a workers compensation premium. Is that what you're saying? --- That's correct.

So, in all of these cases you're saying that? --- What I'm saying is that when I was asked to provide the loan by the clients, my understanding is it was for work care.

What? Were you told that? --- Well, in some cases I didn't ask. It was just because it was something that I was doing.

So you wouldn't know, because they didn't tell you? --- Possibly.

And you didn't ask. You couldn't know what the money was going to be used for, could you? --- Well, I can't answer that question, can I? I man, I didn't --- Well, you couldn't.

... --- Well, you know, as far as I was concerned they were for work care, and if the client just asked for the money, I didn't always confirm that they had a work care bill, which was obviously in hindsight ---".[69]

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[69] Transcript at 35-36

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64. Mr Howarth acknowledged that he had not told Mr Grant of the purposes for which JJG and PFS had used the amounts they received. Those loans had not come to mind at the time that he was answering the questions as he was answering in regard to his clients' loans and not his own. He continued to deny that he knew that other loans had been obtained in order to repay debts.[70] Hi s attention was drawn to a further exchange between him and Mr Grant when Mr Grant asked him why Mr David Bailey, an employee of the Reflections Group, would be wanting loans of $20,000 each time. Mr Howarth told him that it "*... was something to do with owing money to Jeff and it was the only way he could get the money back or something.*"[71] "*Jeff*" is Mr Jeffrey Crewes of Crewes Holdings Pty Ltd, which is part of the Reflections Group, and of the loan, Mr Howarth said:

"*... it was organised by Jeff, so I didn't actually speak to David as such, except to confirm that it was going to come from – that he was wanting the funds but I didn't actually ask him what was going on.*

MR GRANT: Okay. So would it be fair to say that those funds, 20 and 20,000, were not for workers comp?

MR HOWARTH: Yes."[72]

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[70] Transcript at 36-37
[71] Exhibit 1 at 955
[72] Exhibit 1 at 955

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65. At the hearing, Mr Howarth acknowledged that he had consistently described the loans as being, at least initially, as being all for workers' compensation premiums.[73] He then acknowledged that five of them were not. They were those for PFS, JJG and Mr Bailey. Putting aside PFS and JJG and those made to the Reflections Group, all the other loans were obtained for persons associated with the Reflections Group. The conversation that he had with those people was: "*Yes, I can organise work care funding,' and obviously, in the case of David Bailey, they've used me for getting a loan.*"[74]

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[73] Transcript at 39
[74] Transcript at 39

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66. Mr Howarth said in the course of giving evidence that he did not always ask for the name of the insurer with whom his clients were dealing. In the last few years, he had not asked them for the insurer's notice advising the amount of the premium payable.

The purpose for which premium funding obtained

67. In the DPP's Summary of Facts, there appears the following statement:

"*PFS clients have indicated that funds received in respect of short term loans were used for various business /personal purposes, including payment of Worker's Compensation premiums, settling outstanding personal /business debts, purchase of racehorses and the injection of working capital. Some clients have indicated that they told the Accused what the funds were going to be used for, i.e. for purposes other than paying insurance premiums.*"[75]

[75] Exhibit A, A10 at [31]

68. The Summary of Facts also recorded Mr Howarth's statement that, as far as he was aware, the loans were used to pay worker's compensation premiums. He denied being aware that, in some instances, the funds were used for other purposes although he admitted that he used those he obtained for JJG to pay taxation liabilities.[76]

[76] Exhibit A, A10 at [36]

Prejudice resulting from 22 premium funding arrangements

69. When asked in cross-examination whether any person had experienced any hardship due to his actions in arranging the premium funding as he had, Mr Howarth replied:

"*No. In fact, yes, they have because, since I've not had the – I don't do – I haven't been able to do it any more, they've – some of them have had – you know, have found it difficult to get funding for WorkCare. So, in that respect, they've had – they've had some hardship.*"[77]

[77] Transcript at 17

70. All the loans were repaid by the clients and nobody incurred any financial loss. Mr Howarth explained that "*The client asked for the loans – for their payments, and they paid for it themselves, so … they were very happy with the service.*"[78] There was no dissatisfaction with the service he provided.[79] There was never any intention that they would not repay the loans. They needed the money to pay their WorkCare premiums and they did not have the cashflow to pay them in one lump sum. The loans that he obtained for JJG were used to pay his taxation liabilities and were repaid through monthly repayments.[80]

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[78] Transcript at 17
[79] Transcript at 18
[80] Transcript at 19

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71. During cross-examination, Mr Howarth agreed with Mr Knowles that the rationale for his giving Centrepoint or BMW Finance a tax invoice was to provide evidence that there was an insurance policy. The reason the two premium funders wanted that evidence was because the insurance policy was the security for the repayment of the amounts they lent. It was security because, if the borrowers were to default on their loans, the premium funders could cancel the policies and obtain a refund of the premiums paid. Therefore, if there is no policy, there is no security although Mr Howarth pointed out that, in some cases, premium funders lent against policies that were non-cancellable.

72. The subject of repaying the loans was also addressed during cross-examination. Mr Howarth's attention was drawn to the following exchange he had with Mr Grant, an ASIC officer. Mr Grant had asked him, in effect, whether he had any concern that Centrepoint might not have had any way of recovering its money in the absence of a policy:

"*MR HOWARTH: I relied on the fact that I'd been doing this for quite some time and that the money that the Reflections Group turns over is – it's all paid out of trust account funds because they – most of their money comes from shopping centres and they're contracts that are signed for three years. In most cases they've got three-year contracts for each shopping centre. So therefore the income that they had was virtually guaranteed, unless something dramatically went wrong, and if they were to lose only one shopping centre they clean – I don't know – 70, 80 or how many shopping centres they've got today.*

...

MR GRANT: Would it not be a case of having to rely upon the individuals at Reflections Group to be honest enough to say, 'We must make this payment because it's our requirement,' rather than guaranteed money? I mean, a lot of people that have lots of money have still got to pay the bills. Is that something you ever thought of; that what if Centrepoint people think – what if Reflections Group say, 'No, we're not going to pay this month. We've got a lot of bills to pay.'

MR HOWARTH: I'd never thought of that. That was – I mean, they've never missed a beat. So ---

MR GRANT: No, they haven't missed, but in the instances where they may have – other instances where other individuals may put that as a second option and pay that money somewhere else, which would leave Centrepoint pretty much high and dry. What I am saying is, but for the goodwill of the client, the money was paid. Had it been someone of less repute in a similar situation, the chances of money not being paid, therefore Centrepoint having nowhere to go to recover their funds.

MR HOWARTH: So are you – I'm not – asking me am I – was that a concern of mine, or was that ---

MR GRANT: Yes, At the time.

MR HOWARTH: I've never thought about it.

MR GRANT: Okay. Okay. So what you're saying is that you have consciously misled Centrepoint to believe that there was an insurance policy in place for each of the 22 – 21 applications that they could fall back on, when you knew that there weren't such policies to fall back on?

MR HOWARTH: I haven't – I wouldn't say that I consciously did that. When I set it up originally, these are money that was used for WorkCare premiums that had to be paid. The client had to pay their WorkCare across three states.

...

MR HOWARTH: And that was helping out the client with their cash flow in respect of their WorkCare. Instead of having to come up with huge sums of money to pay for WorkCare, they were spreading out the payments over a period of months. So, you know, I'd never thought any more of it than that. It's just a way of funding their WorkCare."[81]

Mr Howarth confirmed that this passage reflected his thinking at the time he procured the loans for his clients.[82]

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[81] Exhibit 1 at 933-934
[82] Transcript at 31

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73. Mr Howarth agreed with Mr Knowles that he received fees and commission on each of the 22 transactions that were the subject of the convictions as well as those transactions of that nature occurring in earlier years. Mr Howarth agreed with Mr Flynn in the interview on 18 January 2006 that the amount that he included on the top of the amount required by his client was something he "*sort of made up*":[83]

"*... I had a rough idea, if it was going to be over 100* [$100,000] *I would charge two and a bit thousand, if it was between 50 and 100 it was, sort of, in between. If it was below that it would be a lower amount again. So just sort of an estimate.*"[84]

As to the way in which he could justify the amount that he charged, Mr Howarth said that if his clients wanted the money, then that was the charge. It all stemmed back to the early days when his clients could not get funding for WorkCare. The amount was disclosed to them.

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[83] Exhibit 1 at 945
[84] Exhibit 1 at 946

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74. Mr Adrian Forsyth, the director of Capital Projects (Queensland) Pty Ltd (Capital Projects), said that he met Mr Howarth through Mr Crewes, who had told him that he knew somebody who was able to arrange short term business finance.[85] They met over the telephone through Mr Crewes, who told Mr Howarth that he, Mr Forsyth, would be able to repay a loan of $60,000. Mr Forsyth said in his statement that he had explained to Mr Howarth that he required that amount but, to the best of his recollection, did not explain why he needed it. Mr Howarth asked him for the name in which he wanted to borrow the funds and Mr Forsyth told him to use the name of Capital Projects. Mr Howarth did not explain the terms of the loan or the interest that was payable other than to say that it would be repayable in ten monthly instalments. He told him, Mr Forsyth, that he would send him a form to sign. The form that was sent to him showed Capital Projects as the applicant, the details of the loan amount, the credit charges and details of the amount and number of the repayments from Capital Projects' bank account. The total amount shown on the application form was $61,724.50 together with a credit charge of $4,542.92. It was repayable in ten monthly instalments of $6,626.74 commencing on 5 May 2005. Capital Projects received a direct debit of $60,000 on 20 May 2005.[86]

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[85] Exhibit 1 at 168, [4]
[86] Exhibit 1 at 169-170

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75. Mr Forsyth has been shown a tax invoice dated 9 May 2005 from PFS and addressed to Capital Projects for an amount of $61,724.50. He noted that the tax invoice relates to an Industrial Special Risks insurance policy for Capital Projects with CGU for the period 5 May 2005 to 5 May 2006. The amount of the premium payable was $61,724.50. Mr Forsyth said in his statement that he had not seen the document before being shown it by ASIC officers.[87] To the best of his knowledge, at no stage did Capital Projects hold or apply for an Industrial Special Risks Policy with CGU either through Mr Howarth or PFS. All repayments had been made to Centrepoint as they fell due but Mr Forsyth said:

"*Had I been aware at the time of organising the loan through Duncan that Duncan was using what appears to be false documentation to secure the loan, I would not have proceeded with the application through Duncan.*"[88]

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[87] Exhibit 1 at 170, [16]
[88] Exhibit 1 at 171, [19]

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76. Mr Howarth answered "*no*" to the suggestion that other clients might share Mr Forsyth's view. When asked whether he thought that they might be happy to have false documentation put in support of a loan application, he replied:

"*I can't answer how they feel. I'm not them.*"[89]

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[89] Transcript at 58

77. In re-examination, Mr Howarth said that the signature on the bottom of the application to Centrepoint by Capital Projects for finance was not his. He believed it to be that of Mr Forsyth.[90] The figure of $61,724.50 matched that on the tax invoice, which would never have been sent to Mr Forsyth although it was sent to Centrepoint.

[90] Exhibit 1 at 59

78. The document began with the words "*An offer to borrow is made by the Insured/s named below for an advance to finance insurance premiums …*".[91] In re-examination, Mr Howarth's attention was drawn to this statement and he said that he was not aware that the loan was to be used for any purpose other than to finance insurance premiums.[92]

[91] Exhibit 1 at 173
[92] Exhibit 1 at 60

79. His attention was not drawn to what followed. That included details of Capital Projects. Details of the loan as set out in [74] above followed a printed statement: "*Details of Insurance Premiums to be Funded and Calculation of Monthly Instalments (Please attach copy of the Insurance schedule with this Offer)*".[93] Before the signature block is a statement:

"*By signing this Offer, the Offeror's declare that they have received and understood the terms of the Facility set out in this Offer. The Offeror/s declare and warrant to Centrepoint that the credit to be provided by Centrepoint is to be applied wholly or predominantly for business or investment purposes (or for both purposes).*

IMPORTANT You should not sign this declaration unless this loan is wholly or predominantly for business or investment purposes. By signing this declaration you may lose your protection under the Consumer Credit Code."[94]

[93] Exhibit 1 at 173
[94] Exhibit 1 at 39

Conversations with Mr Dodd of Centrepoint and Mr Dunn of Premier Funding

80. The material in this and the following paragraph is taken from the Summary of Facts prepared by the DPP and with which Mr Howarth agreed. In mid June 2005, Mr Robert Dodd, who is a director of Centrepoint, asked Mr Howarth, through Premium Funding, to supply a sample of the supporting documentation that had been referred to in PFS's tax invoice as "*attached schedules*" but that had not in fact been attached. On 24 June 2005, Mr Dodd received six samples of the schedules sent by PFS. Each related to CGU policies but, on contacting CGU about the policy shown on one of the tax invoices, Mr Dodd was advised that the policy number shown on one tax invoice did not exist.

81. When, on 28 June 2005, Mr Dodd and Mr Bernard Dunn of Premier Funding approached Mr Howarth, the following conversations occurred. Mr Howarth is reported as saying that:

"*... he had been dealing with Unauthorised Foreign Insurers and did not think Centrepoint would accept the business, so he used false CGU invoice details. Dodd then asked ...* [Mr Howarth] *to provide the name of the insurance broker used to place the insurance and ...* [Mr Howarth] *indicated that he would not do so until he had spoken with the broker. At the meeting, Dodd also asked ...* [Mr Howarth] *about the loans to JJG and ...* [Mr Howarth] *admitted there was no insurance cover involved and that the funds obtained were for his own personal use for the payment of a debt to the ATO.*

The following day, ... [Mr Howarth] *contacted Mr Dodd and said he wished to clarify what he had said at the meeting. He advised that the premium funding he had arranged for his clients related to worker's compensation policies and he did not think that Centrepoint would have provided funding for these policies without financial information being supplied. ...* [Mr Howarth] *also sent Dodd an e-mail on that day (29 June 2005) in which he indicated that a number of the loans were for the purpose of payment of worker's compensation premiums for Reflections Group Services Pty Ltd. ...* [Mr Howarth] *also indicated to Dodd that he would arrange for the balance of the outstanding loans to be paid.*"[95]

On 1 August 2005, Mr Dodd reported the matter to ASIC.

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[95] Exhibit A, A10 at [28]

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82. In giving evidence, Mr Howarth said that he understood that Mr Dodd had selected his loan applications for examination because they were higher than the average. He and Mr Xenidis had the following exchange:

"*Were you nervous when you were approached? --- Yes, because it was out of the blue. It was said to me that he would be in the area and he just wanted to meet me. So when they came to the office I wasn't – he sort of – I was put on the spot and I just didn't know what to – I didn't know how to answer.*

...

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So when you were confronted, you were taken aback. Is that right? --- That's right. I didn't know – I didn' t know what to say because I didn't want to – my concern was for the clients, for them to be involved in anything, so I didn't really know how to answer. I had to make something up on the spot.

Did you intend to deceive Mr Dodds as to your response? --- Are you – before he came or when he was there?

Before he came? --- Before he came, no, because I though[t] *he was just coming to meet me as a normal business meeting, to meet, you know, a person who was using their services. So no, I had no intent at the time to deceive him. I didn't know the purpose of his visit."*[96]

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[96] Transcript at 19-20

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83. When asked in cross-examination why he had not told Mr Dodd the truth, Mr Howarth repeated his concern for his clients and did not agree with Mr Knowles' proposition that he did not want to get himself into trouble.[97]

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[97] Transcript at 30

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84. Also during cross-examination, there was an exchange between Mr Knowles and Mr Howarth regarding the six sample schedules that he had prepared in response to Mr Dodd's request. During the ASIC interview, Mr Howarth had said that he had been only slightly concerned when he had been asked for them. He continued:

"*... at that stage, I still thought, well, these loans are being repaid, there's no problems with the repayments, and I thought it was just an audit process. They just wanted to, you know, do audit, so at that stage, no, I wasn't thinking anything at that particular point in time.*"[98]

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[98] Exhibit 1 at 966

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85. Mr Howarth confirmed that this reflected his thinking at the time. He would give the false schedules to Mr Dodd and that would be an end of the matter. His practice of providing false tax invoices would not be discovered by Centrepoint. At that stage, he would have continued to engage in that practice. But for being discovered, he would have continued to engage in that conduct.[99]

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[99] Transcript at 33

Interviews with ASIC officers

86. Mr Howarth said that he had proffered "*No comment*" answers at his first interview with ASIC's officers. By the time of the second interview, he had spoken with his legal advisers and answered all questions asked of him. In giving evidence, Mr Howarth also said that he assisted ASIC's officers and did not conceal or destroy any evidence in so far as he was aware. His responses of "*No comment*" in the first interview had resulted from legal advice that he had been given.[100] He decided to make a frank admission of the facts at the second interview. But for his legal representative's advice to the contrary, he would have done that in the first interview.

[100] Transcript at 17-18 and 23

Mr Howarth's view of his conduct

87. In his affidavit sworn on 29 June 2006, Mr Howarth said:

> "*I understand that ASIC had concerns about my honesty and integrity in providing financial services but I submit that only a small percentage of my overall client base were involved in the premium funding loans and as such it was an isolated incident of my overall financial services practice.*"[101]

In cross-examination, Mr Howarth confirmed his view that the premium funding activities were isolated.[102] They involved 22 instances in a period when he sent out something between 800 and 900 invoices a year.[103]

[101] Exhibit 1 at 7, [18]
[102] See also letter dated 19 May 2006 from Mr Xenidis to ASIC: Exhibit 1 at 982
[103] Transcript at 43-44

88. Mr Howarth's attention was drawn to his statement to Mr Grant on 18 January 2006 that premium funding for the Reflections Group had started back in 1993 or 1994. Premium funding of the sort in relation to which he was convicted had been going on for some 12 years. He would not have organised 22 of them in each of those years as there would have been far fewer. Some of the

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companies had only been introduced to him in the previous one or two years. In relation to premium funding to pay his own tax bills, he had not sought it every year but "*There might be the odd one here and there ---*".[104]

[104] Transcript at 44

89. When asked by ASIC's officers whether he thought what he had done was wrong, Mr Howarth told them that "*... with hindsight, what he did was wrong and that he shouldn't have been doing it.*"[105] In giving evidence whether he regretted what he had done, Mr Howarth replied: "*Today I do, yes, of course. ... Definitely. I've regretted it from the time that ASIC knocked at the door.*"[106] Later, he said that he showed his remorse to the court when he pleaded guilty to the charges.[107] As to his awareness that his behaviour had been illegal, Mr Howarth had the following exchange with his solicitor, Mr Xenidis:

"*Were you aware that this was illegal? --- I wasn't aware that it was illegal. I was aware that it was probably on the grey – on the grey edges of what was being done.*

But was it illegal? --- Well, obviously, now, I realise it is illegal, yes.

But you didn't have that understanding at that time? --- No.

Would you continue operating in such a manner? --- No, of course not.

In any other capacity? --- Well, apart from the premium funding, I've never done anything else wrong."[108]

[105] Exhibit A, A10 at [38]
[106] Transcript at 17
[107] Transcript at 17
[108] Transcript at 17

90. Mr Howarth said that he approached the largest client, the Reflections Group, and offered to repay it the commission and fees that he had charged.

91. In cross-examination, Mr Howarth was asked by Mr Knowles whether his conduct had been dishonest. He replied:

"*When I look back now, yes. The provision of false invoices – correct.*"[109]

[109] Transcript at 25

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92. In re-examination, Mr Howarth said that his conduct had been dishonest. He would not repeat it " *... because I've lost enough money now and reputation.*"[110]

[110] Exhibit 1 at 62

93. We also asked Mr Howarth about his view of his conduct and the following is part of the exchange:

"*THE D. PRESIDENT: And what is it that you think you did wrongly? --- There's no doubt that I presented false invoices for the obtaining of the loans.*

And do you think that's a bad thing to do? --- I believe that I should be punished for what I've done. I just feel that the penalties are far too harsh for what I've done.

And why is that? --- Well, I falsified the documents to get those loans, but the loans were asked for by the clients; they did sign the documents; they were aware of the amount of money. They received the money, and they paid back the money themselves, so there was no money misappropriated in any way, and I fell that a life ban is far – is very excessive, when I loot at what – other people have stolen money, put it in their pocket, if I had stolen the money myself by taking the money off the clients, I would – I would have accepted a life ban for that.

And do you think the lender was misled as well? --- Yes, in the false invoices. Yes.

And if someone has falsified documents in relation to one area, should there be any concern about whether the person falsifies them in another area of the conduct of a business? --- I can understand why people look at that question, and that's why we presented some audit reports, to show that, apart from these premium funding clients, my business was always conducted in a very efficient and honest method. And also, from the letters from the clients, to show that they would be willing to deal with me again, even though they know that I've been banned."[111]

[111] Transcript at 65

94. Mr Howarth has indicated that he is more than happy to undertake a course on ethics but he has only been able to find one. That course is conducted by the Financial Planning Association.

Current work

95. Mr Howarth said that he works in his son's café where he handles cash every day. There has never been any deficiency in the cash.[112]

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[112] Transcript at 20

Character witnesses

96. Six written character references were admitted in evidence on behalf of Mr Howarth. Five made no reference to the charges Mr Howarth faced or his subsequent convictions. Three of the five were from small family businesses and the fourth appears to be so. The fifth is from the Reflections Group Pty Ltd, which employs over 3,000 people. One of the three was signed by Dr Victor Tadros as the Managing Director of a small family business. He wrote:

"*I have known Duncan for the last 12 years through business dealings and his father. He has always impressed me to be very helpful, honest, and try his best for everyone.*

Duncan is of the highest integrity in all aspects of his business.

I highly recommend him to various business associates, and the feedback has

always been very impressive.

I have no hesitation, he will be successful in future business."[113]

[113] Exhibit A, A3

97. In cross-examination, Mr Howarth agreed that each of these letters predated his convictions.[114] He said that he had told the authors of them that he was under investigation by ASIC for arranging premium funding loans but that he had not told them what the premium funding loans were for.[115] Mr Howarth has never arranged premium loan funding for these authors for any purpose other than paying their premiums. In re-examination, Mr Howarth said that he had told the authors of each of the letters about the banning order.

[114] Transcript at 50
[115] Transcript at 50

98. Mr James C Patterson is himself an AR of a Aurora Financial Services, which is part of the Mawson group, and continues to practise in the insurance industry. He is a Justice of the Peace and a former City Mayor and Councillor. He stated in his letter that he understood that the charges against Mr Howarth related to dishonesty. His letter to the County Court continued:

"*I have known the Defendant both professionally and personally for over 10 years and these offences are entirely out of character. Duncan is a very loyal friend and law abiding person yet I can understand that he would have been trying to help his clients in difficult financial circumstances finding a way to pay their compulsory insurances.*

I believe the fact that he was paid commissions by the finance companies involved would not have motivated him.

In the circumstances I believe that the Lifetime ban was excessive and more than enough punishment to fit the crime.

I would urge you to be lenient in considering any further penalty on him."[116]

[116] Exhibit A, A2

99. Mr Patterson gave evidence at the hearing. He said that he had known Mr Howarth for a long time as they work in the same group associated with Mawson. His involvement in the finance industry has, since 1990, been as either a financial planner or as a life broker. They would see each other at conferences and professional development days but were not friends. Mr Patterson said that he was aware that the charges related to fraud but did not know the detail of them. In general terms, he knew that they related to the alleged misuse of premium funding. He understood that the charges had arisen because Mr Howarth had been "*... stupid enough ... to continue a practice that I was aware that took place ...in the industry to – well, say, since the industry became very regulated ....* Mr Patterson said that he had never engaged in the practice but understood its history:

"*... Premium Funding really was something that evolved, because workers compensation premiums and other insurance premiums became extremely high, and clients had a great deal of difficulty in paying that, so, whilst many of the insurance companies in fact gave a lot of latitude in payment - they give some sort of terms - eventually it tightened up, and there was an opportunity, I guess, that the companies coming in - financial companies coming in and offering funding on the basis that they would advance the premiums, and they would have a guarantee that if the policy folded the refunds would come back to them, and so it was a method of it being able to help a client pay his premiums. And I understand that later they actually paid you commission to - brokers who used premium funding. It certainly wasn't the case in the earlier days when I was aware of it.*"[117]

[117] Transcript at 68

100. As he understood matters, Mr Howarth had issued dummy invoices in order to allow clients to fund their workers' compensation premiums. Mr Howarth told him that he had been doing that for a number of years. He could not recall Mr Howarth's saying that the loans were being used for purposes other than to fund workers' compensation premiums.

101. Mr Amin Badawi was also called to give evidence on behalf of Mr Howarth. Mr Howarth had worked for him for two years and, since then, has engaged Mr Howarth as his insurance broker. Mr Badawi said that he was aware that Mr Howarth had received a banning order but did not know the reasons for it. He was also aware that Mr Howarth had been convicted of charges in relation to dishonestly obtaining a financial advantage. Mr Badawi's view of Mr Howarth was:

"*As an employee he was very sincere man. He conducted himself thoroughly as we, according to the Act. I never seen any breach or any misconduct of his behalf during his employment and when he left after two years in my employment, voluntarily, he found another career for himself as an insurance broker. I continue with him. I found him to be very honest, sincere, conduct himself professionally. I have to say, I trust him very much. Time comes for renewal of my insurance, either – I'm investor as well as licensed estate agent, I've got a few properties and a few businesses. He was handling all the insurance for those. He usually come to me when insurance due and say, Duncan – I give him the cheque book. He writes the cheque and I sign it. I never found him to be dishonest or any difference.*"[118]

[118] Transcript at 71

102. Mr Badawi said that he had not gone into details with Mr Howarth as to the nature of the offences because he felt that they were a personal matter and he, Mr Badawi, did not want to go there. Mr Howarth did not tell him that he had falsified documents.

103. We have also had the benefit of a further character reference that was not available to the County Court. That is a reference by Major Peter Reardon, Operations Officer, of the Victoria Australian Army Cadets Brigade. It reads in part:

"*It gives me great pleasure therefore to provide a statement of the service for Mr Duncan Howarth that he may wish to use in regards to an application for employment.*

Duncan is a former member of the Army Reserve who served between 1977 and May 2000. Soon after his discharge, he applied to become an Officer of Cadets and was duly appointed in March 2001. Over the next two years, he completed the full range of development courses for Officers of Cadets, and these included courses in Administration, Logistics and Training.

In 2006, he completed the Officer of Cadets Command Course. This is a nine-day fully residential course that covers the skills and knowledge to effectively carry out the role of a Unit Commander in the Australian Army Cadets.

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His current rank is Captain (ACC) and he is currently the Officer Commanding of 302 Army Cadet Unit, Oakleigh. AT the last census in September 2006, this unit had 45 members parading on Thursday nights ... "[119]

[119] Exhibit B

104. Mr Howarth said that he had not told Major Reardon of the banning order or the circumstances giving rise to it. Major Riordan does know of the convictions as they showed up on Mr Howarth's police check.

105. Mr Howarth said that his friends and acquaintances have not disassociated themselves from him. He thinks that is because:

"*... they're shocked that – when they know the story, they can't believe I was banned.*

Is that in light of your particular character as well? --- Yes."[120]

[120] Transcript at 22

Proposed enforceable undertaking

106. The draft of an enforceable undertaking put forward by Mr Howarth's solicitors acknowledged ASIC's beliefs that Mr Howarth had contravened ss 1041E and 1041F of the Corporations Act when organising 19 premium funding loans but made no reference to any acknowledgment by Mr Howarth that ASIC's beliefs were justified.[121] Mr Howarth said that he could not answer a question as to why it did not do so as it had been prepared by a lawyer and his lawyer needed to answer the question. It needs to be reworded since his conviction.

[121] Exhibit 1 at 984

107. In Mr Howarth's view, the draft enforceable undertaking would require him to have an independent and suitably qualified person, who had been approved by ASIC, to oversee the running of his business and his training and compliance. Supervision would take place on a much more regular basis than the audits conducted by Mawson and NAS. It would be six monthly

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rather than yearly. Mr Howarth thought that the enforceable undertaking would require him to undertake a course on the study of ethics but agreed that there was no particular reference to it or to any requirement that he undertake any further training. All that is required in Clause [3.3] is that a consultant report on whether his training, supervision and compliance programme is adequate and appropriate to ensure compliance with the Corporations Act and whether his professional skills and knowledge are adequate to ensure that he understands his obligations under that legislation and appropriate industry standards.[122] Clause [3.2] makes a similar recommendation in relation to the training, supervision and compliance procedures. Clause [3.4] would require Mr Howarth to implement all recommendations made by the consultant within two weeks.

[122] Exhibit 1 at 984

108. Clause [3.7] would require Mr Howarth to send a copy of the undertaking to all clients who acquired short term premium funding loans through PFS and to Mawson. He would also have to explain the circumstances giving rise to the undertaking and disclosing all commissions paid to him.

109. Unless ASIC approved, he could not, for a period of three years, either in his own right or as a director of a company to become the holder of an AFSL. That was the effect of clause [3.8].[123] PI B had held its own licence when he established it in 1998. He had not held a licence in his own name and whether he would be reinstated as an AR of Mawson if the ban were lifted is unknown.

[123] Exhibit 1 at 985

CONSIDERATION

110. There are two main issues to be decided. The first is whether ASIC, and so this Tribunal, has power to make a banning order. In this case, that requires a consideration of the issues raised ss 920A(1)(c) and (f). If there is such a power, the second question arises. It comprises a number of sub-issues. The first is whether a banning order must be made or whether there is a discretion as to whether or not it is made. If discretionary, a decision must be made as to whether it should be imposed and, if so, whether permanently or for a period. Each issue raises other issues and we will deal with them below.

Power to make a banning order: has Mr Howarth been convicted of fraud?

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111. The question we have posed in the heading requires us to consider first what is meant by "*fraud*" as that is the ground raised by s 920A(1)(c) . As it is commonly used, it means

> "... ***1*** *an act of deliberate deception, with the intention of gaining some benefit.* ***2*** colloq *someone who dishonestly pretends to be something they are not; a cheat* She turned out to be a fraud. ..."[124]

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[124] Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

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112. "*Fraud*" is a word, or derivatives of it, that is used in many provisions in the Corporations Act . [125] It is not defined although it is used in defining two other words: "*misconduct*" and "*serious fraud*". Those definitions are:

> "**misconduct** *includes fraud, negligence, default, breach of trust and breach of duty.*"
>
> "**serious fraud** *means an offence involving fraud or dishonesty, being an offence:*
>
> *(a) against an Australian law or any other law; and*
>
> *(b) punishable by imprisonment for life or for a period, or a maximum period, of at least 3 months.*" [126]

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[125] See ss 9, 128, 466, 481, 513D, 590, 592, 596, 601FB, 885C, 890A, 892C, 913B, 915B, 1041I, 1041M, 1071G and 1101E .
[126] s 9

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113. Although the second definition defines the term "*serious fraud*" by reference to one of its elements – "*fraud*" – we do not accept the proposition put in [26] of ASIC's Statement of Facts and Contentions that:

> "*Consistent with this definition, 'convicted of fraud' for the purposes of paragraph 920A(1)(c) of the Act would require conviction for an offence involving fraud or dishonesty.*"

Parliament has chosen to define the composite term "*serious fraud*" in a particular way but it does not logically follow that it would intend "*fraud*" to mean "*fraud or dishonesty*". If it intended that, why would there be any need in the definition of "*serious fraud*" to refer to dishonesty at all? After all, that would be understood by reference to the word "*fraud*" alone. Why would the Corporations Act make separate reference to a conviction of "*an offence that involves dishonesty*" and that is punishable by imprisonment for at least three months, without any reference to fraud? It does so in s 206B(1)(b)(ii) when providing that such a conviction leads to the disqualification of a person from managing corporations.

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114. We also have difficulties with ASIC's position regarding the meaning of "*fraud*" when we note that the definition of "*serious fraud*" refers not only to an offence involving fraud and dishonesty. It refers also to such an offence that has the two qualities referred to in (a) and (b) of the definition. In view of that, we do not understand a submission based on that definition to the effect that "*fraud means an offence involving fraud or dishonesty*" but without any reference to those other qualities. If fraud means an offence involving fraud or dishonesty, must that offence also have those other qualities referred to in (a) and (b) of the definition of "*serious fraud*" or are they meant to qualify only the word "*serious*" in the definition of "*serious fraud*". If that is so, how is that conclusion reached in terms of reasoning?

115. The case of *Australian Securities Commission v Lord* ,[127] to which our attention was directed, does not assist. In considering whether the then Australian Securities Commission (ASC) had power to issue a notice to produce to documents to Mr Lord, Davies J considered s 28 of the ASC Law of Western Australia (WA) (ASC Law). It provided that the power could only be exercised in relation to, other matters:

"*an alleged or suspected contravention of a law of this jurisdiction, being a contravention that concerns the management or affairs of a body corporate, or involves fraud or dishonesty and relates to a body corporate, securities or futures contract*".

In considering the meaning of "*involves fraud or dishonesty*", Davies J said:

"*... The word 'involves' does not denote that fraud or dishonesty must be an element of the offence as charged, merely that the contravention suspected must have involved fraud or dishonesty.*" [128]

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[127] (1991) 33 FCR 144; 105 ALR 347; 6 ACSR 350
[128] (1991) 33 FCR 144; 105 ALR 347; 6 ACSR 350 at 149 ; 352; 355; [13]

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116. Davies J was considering the issue in the context of s 28 which appears to suggest that fraud and dishonesty may be separate concepts and that one is not incorporated in the other. We are not aware of any definition of "*serious fraud*" or of "*fraud*" in the Companies Code (WA) at the time. That his Honour saw them as separate concepts is confirmed when he weighed up whether the officer had been entitled to issue the notice to produce on the basis that he suspected that Mr Lord had contravened s 296(4) of the Companies Code (WA). He said:

"*Fraud was not suspected. Dishonesty was. It was suspected that Mr Lord did not tell the truth to the investigator and deliberately did not do so. I am satisfied that the officer of the Commission who gave the notice ... was entitled to act on the footing that he did that he suspected that Mr Lord had contravened s 296 (4) of the Code and had done so deliberately and dishonestly. It was not necessary that the dishonesty be an essential element of the offence suspected. ...*" [129]

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[129] (1991) 33 FCR 144; 105 ALR 347; 6 ACSR 350 at 150 ; 353; 356; [16]

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117. In view of what we have said, it seems to us that we should revisit the proper interpretation of "*fraud*". As we have said, the definition of "*serious fraud*" does itself seem to make an apparent distinction between "*fraud*" and "*dishonesty*". That is important because, in some instances, "*fraud*" has been interpreted to mean no more than "*dishonesty*". One example is found in the second, but not in the first, of its ordinary meanings to which we have already referred.[130] The ordinary meanings of the word "*dishonest*" are "*... not honest; likely to deceive or cheat; insincere ...*".[131]

[130] See [111]-[112] above
[131] Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

118. Another example of the interpretation of the word "*fraud*" is found in *R v Cushion* [132] when the Court of Appeal (Queensland) considered the meaning of the then s 72 of the *Crimes Act 1914* (Cth) (Crimes Act). In part, that section provides that a person is guilty of an offence if that person "*... being a Commonwealth officer, fraudulently and in breach of his duty ... makes any false entry in any ... document ...*". [133] The court was asked to consider several questions beginning with whether an intention to defraud was a necessary element of the offence and, if it is not, whether the provisions of s 72 of the Crimes Act are restricted to the property interests of the Commonwealth. McPherson JA, with whom Cullinane J agreed, said, in part:

" *The word 'fraudulently' is, unfortunately, another word that is capable of more than one meaning or shade of meaning depending on the context in which it is used. In* Jackson v R *(1976) 134 CLR 42 at 45; 9 ALR 65 at 66, Barwick CJ said that s 441* [of the Queensland Criminal Code] *dealt with 'the making of false entries by a servant in the master's books of account with intent to defraud, that is to say fraudulently'. ...*

> *On the other hand, there is a good deal of authority to show that 'fraudulently' in legislation creating statutory offences is often used to mean no more than 'dishonestly', and it is not, or not necessarily, confined in meaning to depriving someone of a right or advantage. Use of 'fraudulently' in English criminal law extends back over many centuries, as can be gathered from ...* Scott v Metropolitan Police Commission *[1975] AC 819 ... in considering the meaning of 'defraud' in that and in various statutory contexts, Viscount Dilhorne appears to have accepted (at 836-7) that 'fraudulently' was ordinarily to be equated with 'dishonestly'. On the point in issue in that case, Lord Diplock was content to accept (at 841) that 'dishonesty of any kind is enough'. A similar approach was adopted in* R v Maher *(1987) 72 ALR 351; [1987] 1 Qd R 171, in relation to the offences of conspiracy to defraud under s 86 of the Crimes Act and s 430 of the Criminal Code. The Court of Criminal Appeal there accepted that 'what the law looks to in searching for fraudulent intent is prejudice to some person' as a consequence of giving effect to the conspiratorial agreement. ...*" [134]

[132] (1997) 150 ALR 45 at 52-53
[133] Crimes Act, s 72(a)

[134] (1997) 150 ALR 45 at 50

119. In the same case, *R v Cushion* , Williams J approached the matter in a different way although he reached the same conclusion as McPherson JA and Cullinane J regarding the answers to the questions asked of them i.e. they were not required by the context of s 72 "*... to give the term 'fraudulently' a construction requiring the presence of an intent to deprive the Commonwealth of some proprietary interest before the offence is established.*" [135] Williams J said:

> " *The essential meaning of 'fraudulent' is 'guilty of or addicted to fraud; deceitful, dishonest':* Shorter Oxford English Dictionary. *In* Butterworth's Australian Legal Dictionary *'fraud' is defined as 'an intentional dishonest act or omission done with the purpose of deceiving'. In its everyday usage, and frequently when used in the context of the criminal law, 'fraudulently' simply means dishonestly; it does not necessarily carry the connotation of the intentional deprivation of someone's property rights.*
>
> > *At common law it was recognised that it was rape for a man to have carnal knowledge of a woman where her apparent consent had been induced by a wilful and fraudulent representation made by the male:* R v Flattery *(1877) 2 QBD 410 and* R v Williams *[1923] 1 KB 340. That concept has been picked up in the definition of 'rape' in s 347 of the Criminal Code :*
> >
> > > *Any person who has carnal knowledge of another person without that person's consent or with that person's consent if it is obtained by ... means of false and fraudulent representations as to the nature of the act ...*
>
> *Used in that context, the term 'fraudulent' does not imply any adverse effect on property rights; it really means no more than dishonestly or with moral opprobrium.*" [136]

[135] (1997) 150 ALR 45 at 53
[136] 150 ALR 45 at 52-53

120. The meaning of "*fraud*" in criminal law in England and in Canada was summarised by Cory J, with whom Major, Bastarache and Binnie JJ agreed, in *R v Cuerrier* [137] when he said:

[137] (1998) 162 DLR (4 th) 513

> "*110 From its inception, the concept of criminal fraud has had two constituent elements. Stephen,* A History of the Criminal Law of England *(1883), vol. 2, described them in this way at pp. 12122:*
>
> > *. . . there is little danger in saying that whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime two elements at least are essential to the*

commission of the crime; namely, first, deceit or an intention to deceive or in some cases mere secrecy; and, secondly, either actual injury or possible injury or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy.

111 This was the approach adopted in In re London and Globe Finance Corp. *, [1903] 1 Ch. 728. Buckley J. described the act of fraud as follows, at pp. 73233 :*

To defraud is to deprive by deceit: it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.

112 A broader definition of fraud was given in Scott v. Metropolitan Police Commissioner *, [1975] A. C. 819 (H.L.). There, the definition of fraud which was adopted did not include deceit as an essential element. Rather, dishonesty and deprivation were held to be basic to the concept.*

113 In R. v. Olan *, [1978] 2 S.C.R. 1175, 41 C.C.C (2d) 145, 86 D.L.R. (3d) 212 , the reasoning in* Scott *was adopted and it was held that the two elements of fraud are dishonesty and deprivation. It was put in these words (at p. 1182):*

Courts, for good reason, have been loath to attempt anything in the nature of an exhaustive definition of 'defraud' but one may safely say, upon the authorities, that two elements are essential, 'dishonesty' and 'deprivation'. To succeed, the Crown must establish dishonest deprivation.

As well the requirement of deprivation was widened so that the risk of deprivation alone is sufficient. Thus, the defrauded party need not show actual harm or loss resulted from the actions of the accused (at p. 1182):

The element of deprivation is satisfied on proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim. It is not essential that there be actual economic loss as the outcome of the fraud.

114 The Olan *approach was endorsed in* R. v. Théroux *, [1993] 2 S.C.R. 5, 79 C.C.C. (3d) 449, 100 D.L.R. (4^{th}) 624. There the importance of defining the offence of fraud in light of the underlying objective of promoting honesty in commercial dealings was emphasized. McLachlin J. described the requisite elements of criminal fraud in these words, at pp. 2526 :*

To establish the actus reus *of fraud, the Crown must establish beyond a reasonable doubt that the accused practised deceit, lied, or committed some other fraudulent act. . . . [I]t will be necessary to show that the impugned act is one which a reasonable person would see as dishonest. Deprivation or the risk of deprivation must then be shown to have occurred as a matter of fact. To establish the* mens rea *of fraud the Crown must prove that the accused knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means, and that the accused was aware that deprivation could result from such conduct.*

It was held that mere negligent misrepresentation would not amount to a fraudulent act. However, 'deliberately practised fraudulent acts which, in the knowledge of the accused, actually put the property of others at risk' should be subject to criminal sanction.

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*115 Next it must be determined whether nondisclosure can constitute fraud. Traditionally, courts were of the view that fraud does not include nondisclosure (*R. v. Brasso Datsun (Calgary) Ltd. (1977), 39 C.R.N. S. 1 (Alta. S.C.T.D.)). However, Olan, supra, *and* Théroux, supra, *have endorsed a wider interpretation of fraud which can include nondisclosure in circumstances where it would be viewed by the reasonable person as dishonest. This view was upheld in* R. v. Zlatic *, [1993] 2 S.C.R 29, 79 C.C.C. (3d) 466, 100 D.L.R. (4th) 642. At p. 44 McLachlin J. speaking for the majority, held that if the means to the alleged fraud can be characterized objectively as dishonest they are fraudulent. This, it was observed, can include the nondisclosure of important facts.*

116 In summary, it can be seen that the essential elements of fraud are dishonesty, which can include nondisclosure of important facts, and deprivation or risk of deprivation." [138]

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[138] (1998) 162 DLR (4 th) 513 at 556-558

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121. The judgments in *R v Cushion* and *R v Cuerrier* highlight the chameleon-like nature of the word "*fraud*". It is a word that may be interpreted to mean simply dishonestly or it may be interpreted to require additional elements of deprivation of property or an advantage, perhaps, an intention to deprive another of property or an advantage. The definition of "*serious fraud*" in the Corporations Act appears to distinguish between fraud and dishonesty. The word "*dishonest*" is not the subject of a general definition in s 9 for the purposes of the Corporations Act as is "*serious fraud*" but it is the subject of definition for the purposes of ss 1041F and 1041G . Section 1041G provides that:

"*(1) A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service.*

(2) In this section:

Dishonest *means:*

(a) dishonest according to the standards of ordinary people; and

(b) known by the person to be dishonest according to the standards of ordinary people."

The same definition appears in s 1041F(2) in relation to one of the offences created by s 1041F(1) . A person commits an offence if that person "*... induce*[s] *another person to deal in financial products ... (b) by a dishonest concealment of material facts*." [139]

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[139] s 1041F(1)(b)

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122. In view of what appear to be conscious choices that have been made by Parliament to use "*fraud*", "*serious fraud*" and "*dishonesty*" throughout the Corporations Act , it seems to us that we need to give the word "*fraud*" an interpretation that distinguishes it from the others. In particular, "*dishonesty*" does not equate with fraud and vice versa. It seems to us that we should give the word "*fraud*" a meaning consistent with the meaning that it has long had at common law. That requires two elements before fraud can be established. The first is that the person has deceived or had the intention to deceive. That may be demonstrated by, for example, the person's positive acts or statements or by that person's withholding of information. The second is that there has been some loss of property or of an advantage or the possibility of the loss of property or of an advantage.

123. **Following paragraph cited by:**

Moore And Australian Securities And Investments Commission (23 December 2008)

> 24. In *Howarth v Australian Securities and Investments Commission* (2008) 101 ALD 602 Deputy President Forgie and Dr Hughes, Member, offered some views as to the use of the words "fraud", "dishonesty" and "serious fraud" in the Corporations Act (at [121] to [122]). However, these observations were made in a different context to that before us. For the purposes we are considering we prefer the simple analysis which has led us to our conclusion. To the extent to which DP Forgie and Dr Hughes expressed the view, however, that dishonesty alone will not suffice and both elements of fraud must be present in an offence before the definition of "serious fraud" can operate to deem a conviction of an offence to be a "conviction of fraud" for the purposes of s 920A, we do not agree (see *Howarth* at [111] to [129]). We note that in *Howarth* (at [123]) the Tribunal appears to refer to s 912A(1)(c) in error for s 920 A(1)(c) .

Section 912A(1)(c) requires that a person have been "*convicted of fraud*". It seems to us to have a plain meaning. The word "*convicted*" signifies that there has been "*...a determination of guilt, and a determination of guilt must be the act of the court ...*". [140] Equally, it seems to us that the conviction must be one that can properly be described as fraud and so as having the two elements to which we refer in the previous paragraph. We do not consider that it is enough that the circumstances leading to the offence of which the person is convicted involved fraud or dishonesty if the two elements are not essential elements of the offence. Had Parliament intended s 912A(1)(c) to be read in that way, it could easily have adopted the form of words it used in s 206B(1)(b)(ii) to refer to a conviction of an offence "*that involves*" dishonesty.[141] It did not do so and we do not think it appropriate to interpret the expression "*convicted of fraud*" as "*convicted of an offence that involves fraud*".

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[140] *R v Tonks and Goss* [1963] VR 121 at 127 per Herring CJ, Sholl and Little JJ
[141] See [113-114] above

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124. That brings us to s 82 of the *Crimes Act 1958* (Vic) . It provides that:

> *"(1) A person who by any deception dishonestly obtains for himself or another any financial advantage is guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).*
>
> *(2) For purposes of this section deception has the same meaning as in section 81."*

Section 81 is concerned with obtaining property by deception and s 81(4) provides:

> "*For the purposes of this section, deception –*
>
> *(a) means any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including deception as to present intentions of the person using the deception or any other person; and*
>
> *(b) includes any act or thing done or omitted to be done with the intention of causing –*
>
> *(i) a computer system; or*
>
> *(ii) a machine that is designed to operate by means of payment or identification –*
>
> *to make a response that the person doing or omitting to do the act or thing is not authorised to cause the computer system or machine to make."*

125. Reading the definition of "*deception*" into s 82 , it is clear that, in order for an offence to be proved under s 82 , there must be two elements: a deception and the obtaining of a financial advantage whether by the person engaged in the deception or by another. The offence does not extend to an intention to deceive as we think may be incorporated in the word "*fraud*" as it is used in s 920A(1)(c) of the Corporations Act but that is of no consequence. Section 920A(1)(c) covers a range of offences but, within that range, is the offence described in s 82 .

126. This interpretation of s 82 is supported by the judgment of Nettle JA in *The Queen v Vasic* [142] when he said:

> " *Section 82 of the* Crimes Act *was designedly based on s 16 of the* Theft Act 1968 *(UK) ... with the intention that it apply to cases of common fraud involving the dishonest obtaining of credit or services .... As it was put in the explanatory memorandum:...*
>
> ...
>
> *'Section 82 creates a new offence of obtaining a financial advantage by deception. It is needed because certain types of common fraud, involving a dishonest obtaining of another's services (for example, without any intention of paying for them), are not covered by the offence of theft (section 72) or criminal deception (section 81); since no "property" is obtained, neither of those sections is available. It was thought undesirable, because of possible unfortunate repercussions, to deal with the problem by defining 'property' so as to include services.'"* [143]

[142] (2005) 11 VR 380
[143] (2005) 11 VR 380 at 384, [14]

127. A similar analysis leads us to conclude that Mr Howarth's conviction under s 184(2)(a) of the Corporations Act also means that he has been convicted of fraud in respect of that offence. In so far as it is relevant, s 184(2) provides that:

"*A director ... of a corporation commits an offence if they use their position dishonestly:*

(a) with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or

(b) ..."

128. Although not predicated upon the director's actually gaining an advantage, the offence has the two essential elements to characterise it as an offence of fraud within the meaning of s 920A(1)(c) . It has the element of dishonesty as well as the second element in the shape of an intention to gain an advantage either personally or for another. Therefore, Mr Howarth's conviction for an offence under
s 184(2)(a) leads to the conclusion that, for the purposes of s 920A(1)(c) , he has been convicted of fraud in relation to it.

129. It follows from this conclusion that ASIC, and so this Tribunal, has the power to make a banning order against Mr Howarth under s 920A(1)(c)

Do we have reason to believe that Mr Howarth will not comply with a financial services law?

130. Does ASIC also have power to make a banning order under

s 920A(1)(f) ? That provision requires us to consider whether ASIC, and so we, have "*reason to believe*" that Mr Howarth "*will not comply with a financial services law*." That question immediately makes us question how we should conclude whether we have "*reason to believe*" for the language of s 920A(1)(f) of the Corporations Act does not accord with the role that s 43 of the *Administrative Appeals Tribunal Act 1975* (AAT Act) normally ascribes to the Tribunal. It is expected, for example, to make "*findings on material questions of fact*" [144] and not to concluded that it has "*reason to believe* " that a certain state of affairs exists. In *Re Radge, Dagg and Harvey and Commissioner of Taxation* ,[145] I explained that role in the context of a review under the TA Act:

"*20. Putting aside the particular provisions of the TAA , the role of the Tribunal is to review the decision that is the subject of the application made to it. For the purpose of doing that, s 43(1) of the* Administrative Appeals Tribunal Act 1975 (Cth) *(AAT Act) provides that it* '... may exercise all of the powers and discretions that are conferred by any relevant enactment on the person who made the decision ...'. *When it reviews a decision in this way, the Tribunal is often said to be engaged in* 'merits review'. *That*

task is an administrative task and differs in significant respects from the task facing a court engaged in judicial review of a decision. The Tribunal's task is not to enquire whether the decision-maker made an error in making the decision. That is the task of courts under the Administrative Decisions (Judicial Review) Act 1977 *(ADJR Act) or s 39B of the* Judiciary Act 1901 *if a person affected by the decision wants to question it on the basis that it is affected by errors within the scope of those Acts. The Tribunal's task is not to adjudicate upon whether the decision-maker is able to defend the decision he or she made.* [146] *The task of the Tribunal is to determine the correct process it should itself follow and follow it. That process starts with ascertaining the law that is applicable and the issues that are relevant, considering the probative material that is available to it and make findings of fact that are based on that material and relevant to the issues. Having done that, the next step is to ascertain the decision or range of decisions that can correctly be made in light of the law and the facts. If more than one decision can be correctly made, it should then choose the decision that is the preferable decision*" [147]

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[144] AAT Act, s 43(2B)
[145] (2007) 95 ALD 711
[146] *Re Mann and Capital Territory Health Commission (No. 2)* (1983) 5 ALN N261 as set out and adopted in *Re Wertheim and Department of Health* (1984) 7 ALD 121 at 154
[147] (2007) 95 ALD 711 at 716

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131. Unless varied by another enactment, the Tribunal makes any findings of fact on the basis that it is reasonably satisfied of them. [148] This equates with its doing so on the civil standard of proof and so on the basis of the balance of probabilities. [149] Is this the standard that the Tribunal must apply in reviewing a decision that ASIC has reason to believe that Mr Howarth will not comply with a financial services law?

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[148] *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 4 ALD 139
[149] *Smith v Repatriation Commission* (1987) 74 ALR 537

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132. The expression "*reason to believe*" has been considered by the High Court in *Boucaut Bay Co Ltd v The Commonwealth.* [150] Starke J decided that the Court could not determine for itself whether facts existed which could reasonably lead to the Minister's having reason to believe that the appellant had not carried out an agreement between it and the Commonwealth and so determining that agreement. He concluded that:

"*... In my opinion, the belief of the Minister is 'the sole condition of his authority'; 'he is the sole judge of the sufficiency of the materials on which he forms it' (*Lloyd v Wallach [(19150 20 CLR 299 at 304]). *If a man is to form a belief and his belief is to govern, he must form it himself on such reasons and grounds as seem good to him (*Allcroft v Lord Bishop of London [(1891] AC 666 at 678 *). He must not act dishonestly, capriciously or arbitrarily: that would be contrary to the implication of the agreement and so establish a want of belief stipulated as a condition of the exercise of the power of determination. So long, however, as the Minister acts upon circumstances appearing to him to bear upon the case and giving him a*

rational ground for the belief entertained, then, in my opinion, the Courts of law cannot and ought not to interfere with his discretion. ..." [151]

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[150] (1927) 40 CLR 98
[151] (1927) 40 CLR 98 at 101 . Appeal to Full Court (Isaacs ACJ, Gavan Duffy, Powers and Rich JJ) dismissed: (1927) 40 CLR 98

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133. A little more recently, the expression "*reason to believe*" was considered by Lockhart J in *WA Pines Pty Ltd v Bannerman.* [152] The context was that of s 155 of the *Trade Practices Act 1974* , which gave certain persons the power to require another to provide information if those persons had "*reason to believe that a person is capable of furnishing information*". His Honour reviewed the authorities since *Boucaut Bay Co Ltd v The Commonwealth* and said:

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[152] (1980) 41 FLR 175; 30 ALR 559

"*The phrase 'has reasonable cause to believe' was considered by the House of Lords in* Liversidge v. Sir John Anderson *[1941] UKHL 1; 1942 A.C. 206. That case related to a claim for damages for false imprisonment which was brought about by an order made by the Home Secretary under the* Defence (General) Regulations 1939 *(Reg. 18B) of the United Kingdom. It involved a question as to the meaning of the words 'if the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations'. The majority of the House held that those words in their context meant simply that the Secretary of State had honestly to suppose that he had reasonable cause to believe the requisite matter. Provided he acted in good faith he was the only judge of the conditions of his own jurisdiction.*

In Nakkuda Ali v. M.F. De S. Jayaratne *1951 A.C. 66 Lord Radcliffe, who wrote the opinion of the Board, said that Liversidge v. Anderson should be regarded as an authority for the meaning of that phrase in that particular regulation alone. His Lordship said at p. 77 : -*

> 'Their Lordships therefore treat the words in regulation 62 '(i.e. of the Defence (Control of Textiles) Regulations 1945) '"where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" as imposing a condition that there must in fact exist such reasonable grounds, known to the Controller, before he can validly exercise the power of cancellation.'

In Inland Revenue Commission v. Rossminster Limited *1980 1 All E.R. 80 Lord Diplock considered the power of an officer of the Board of Inland Revenue to seize and remove the things that he found on premises which the warrant authorised him to enter and search; but where the source of the power limited the power of seizure and removal to things 'which he has reasonable cause to believe may be required as evidence for the purpose of proceedings' for an offence involving a tax fraud. His Lordship said at p. 92: -*

> 'These words appearing in a Statute do not make conclusive the officer's own honest opinion that he has reasonable cause for the prescribed belief. The grounds on which

> the officer acted must be sufficient to induce in a reasonable person the required belief before he can validly seize and remove anything under the sub-section.'

His Lordship went on to say: -

> 'For my part I think the time has come to acknowledge openly that the majority of this House is *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right'.

In my opinion, the words 'has reason to believe' *in sub-s.155 (1) imply actual belief: see* Boucaut Bay Co. Limited (In Liquidation) v. The Commonwealth *(supra) per Isaacs A.C.J. at p. 106; but do not make conclusive the Commission's (also the Chairman's or Deputy Chairman's) own opinion that it has reason for the requisite belief. Words such as these are found frequently in legislation or regulations conferring powers on Ministers of the Crown or public servants. They must be read as limiting otherwise arbitrary powers. If they are to be read as empowering the person in whom the power is vested, to determine conclusively whether the limitation has been satisfied, the value of the intended limitation is nugatory.*

Plainly, the power must not be exercised dishonestly or in bad faith (see Boucaut Bay Co. Limited (In Liquidation) v. The Commonwealth *(supra) per Starke J. at p. 101); but if that were the sole restraint upon the exercise of the power it would apply only in a very small number of cases, leaving the power arbitrary and unfettered in the great majority of cases.*

In my opinion the words in s. 155 'has reason to believe . . .' mean that the Commission must believe that a person is capable of furnishing information, producing documents or giving evidence; and there must be reasonable grounds or cause for that belief, before the powers conferred by sub-s.155 (1) may be exercised." [153]

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[153] (1980) 41 FLR 175; 30 ALR 559 at 185-186 ; 570-572

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134. In *Power v Hamond* ,[154] Chernov JA, with whom Maxwell P and Ormiston JA agreed on this aspect, cited Lockhart J's judgment and then continued:

"*... It is now settled law that the question whether there is 'reason to believe' a specific matter in a context such as the present is to be determined by the person concerned on an objective basis and that the correctness of the conclusion may be tested in court. Thus, for example, it was said in* George v. Rockett *that '[w]hen a statute prescribes that there must be "reasonable grounds" for a state of mind - including suspicion and belief - it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.' Consequently, in order to have launched the impugned investigation lawfully the Ombudsman had to conclude, on an objective basis, that Power's failure to obtain insurance might amount to misconduct or unsatisfactory conduct. The question, therefore, is whether, in all the circumstances, a reasonable Ombudsman would have so concluded.*

106 It is not necessary in order to satisfy the requirement that there be 'reason to believe' that a prima facie case be made out against the person the subject of the investigation. ... Moreover, in assessing whether the above requirement has been made out, the investigative nature of the powers must be borne in mind. Nevertheless, the belief must rest on objective facts that would induce the relevant state of mind in a

reasonable person. I consider that, given the observations of Cummins, J. to which I have referred earlier,... and having regard to the material before the Court, no reasonable person in the Ombudsman's position would have concluded that there was reason to believe that by continuing to practise without an operative practising certificate due to a bona fide failure to obtain indemnity insurance, Power might be found guilty by the Tribunal of misconduct or unsatisfactory conduct. Put another way, it was not open to the Ombudsman to form that view." [155]

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[154] [2006] VSCA 25
[155] [2006] VSCA 25 at [105]-[106]

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135. **Following paragraph cited by:**

Callychurn and Australian Securities and Investments Commission (25 October 2019) (Deputy President J Redfern)

214. The applicants rely on the decision of Deputy President Forgie in *Horwarth v Australian Securities and Investments Commission* [2008] AATA 278 at [135], where DP Forgie opined about the seriousness of the consequences of a banning order in describing the context of assessing what amounts to reasonable grounds, noting that a banning order "is a power that is exercised on the basis of the protection of the public and not for the punishment of the person banned or to penalise that person." The part of the passage extracted by the applicants focusses on issues relating to the exercise of discretion rather than whether the question of whether the ground for the exercise of the discretion exists. However, what DP Forgie is highlighting, which is undoubtedly correct and consistent with the decision of the Full Federal Court in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, is that in considering whether the Tribunal is satisfied there is reason to believe a person is likely to contravene, when findings of fact may have serious consequences "it may be accepted the Tribunal would exercise greater caution in evaluating the factual foundation for the decision to be reached." [120] In other words, the Tribunal should not rely on inexact proofs and speculative evidence but should be comfortably satisfied about a finding based on objective probative evidence.

Although perhaps trite to say so, what amounts to reasonable grounds will depend on the context. In this case, the immediate context is that of s 920A(1)(f) but the broader context is that of founding a power on which to make a banning order. As we will conclude later in these reasons, that is a power that is exercised on the basis of the protection of the public and not for the punishment of the person banned or to penalise that person. There is no doubt, though, that a consequence of a banning order is to prevent the person banned from undertaking work that person has chosen to do in the past. That may well be work that has provided the person's income and means of supporting him or her self and a family. That is a serious consequence for the

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person just as protecting the public is a weighty endeavour. These sorts of matters will be borne in mind in deciding whether there exist facts sufficient to induce in the mind of a reasonable person a reason to believe that the particular state of affairs exists.

136. In the case of s 920A(1)(f) that state of affairs is that the person "*will not comply with a financial services law*". The state of affairs is not the person "*may not comply with a financial services law*". To our minds, the distinction between what a person will do and what that person may do is very important. A state of mind in which a person has a reason to believe that another person may do something may well be reached before and on less convincing material than is required for a state of mind that the person will do something.

137. In this case, ASIC has pointed to several sections which it submits are among those that there is reason to believe that Mr Howarth will breach. Together with a brief description, they are ss 1041E (false and misleading statement in relation to financial products); 1041G (dishonest conduct in the course of carrying on a financial services business) and 1041H (misleading or deceptive conduct in respect of financial services) of the Corporations Act . They also include ss 12DA (misleading and deceptive conduct in respect of financial services) and 12DB (false and misleading representations in respect of the supply of financial services), which are found in the ASIC Act .

138. While we are clearly concerned about Mr Howarth's actions and, perhaps even more importantly in this case, his lack of understanding of what is required of him in his professional capacity, we are not satisfied that we have reason to believe that he "*will*" breach any of these sections. In view of the lack of understanding that he displayed and which we discuss later in these reasons, we have reason to believe that he "*may*" breach them. We even have reason to believe that there is a "*risk*" or a "*chance*" that he will do. That risk may be lower now than it was before the discovery of his practices that led to his conviction and he will not repeat them in our view. On the evidence that we have, we are satisfied that he did not intend to break the law when it did in fact commit the offences and would not intend to do so in the future. At the time, he took advantage of the procedures that existed for obtaining premium funding loans forgetting altogether that those procedures were based on an assumption that the broker would not play a part in submitting false information. He would not do so again now that he knows that he should not have and we accept that he would not consciously decide to break the law. It is that sense that we understand the sentencing remark made by Judge Shelton that he felt that Mr Howarth was "*...unlikely to re-offend* ". We have reached the same conclusion in that regard but there remains Mr Howarth's inadequate understanding of what is proper. That leaves him vulnerable to committing another offence in the future even though not deliberately so. We recognise that possibility but cannot go so far as to say that he "*will*" do so and so find that s 920A(1)(f) is not satisfied. Consequently, a power to make a banning order cannot be founded on that provision.

Is the power to make a banning order mandatory or discretionary?

139. Section 920A(1) provides that "*ASIC may make a banning order ...*" in the specified circumstances. Does the use of the word "*may*" mean that it is a discretionary power or is it a power that must be exercised? In its ordinary meaning, the word "*may*" include, in so far as they are relevant:

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"*... 1 used to express permission 2 ... used to express a possibility* I may come with you if I get this finished. ..."[156]

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[156] Chambers 21st Century Dictionary, 1999, reprinted 2004, Chambers

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140. A passage from the judgment of Gummow, Hayne, Heydon and Crennan JJ in *Leach v R* [157] illustrates that, in some circumstances, the word "*may*" is regarded as giving permission or power that must be exercised and, in others, is regarded as giving permission or power that is within the decision-maker's discretion to choose whether to exercise it or not. The context of the High Court's consideration was s 19(5) of the *Sentencing (Crime of Murder) and Parole Reform Act 2003* (NT). It provided that:

"*The Supreme Court may refuse to fix a non-parole period if satisfied the level of culpability in the commission of the offence is so extreme the community interest in retribution, punishment, protection and deterrence can only be met if the offender is imprisoned for the term of his or her natural life without the possibility of release on parole.*"

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[157] (2007) 232 ALR 325, Gleeson CJ dissenting

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141. Their Honours concluded that the word "*may*" was not used to convey a discretion but to confer a power that a court was obliged to exercise once it was satisfied of the matters specified in s 19(5). [158] They referred to a passage to the same effect from the judgment of Windeyer J in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation.* [159] His Honour had considered whether the Commissioner of Taxation was obliged to allow a rebate when satisfied that certain conditions had been met as to the non-payment of dividends. As explained by Gleeson CJ and McHugh J in *Samad v District Court (NSW)*, [160] the High Court in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* had decided that:

"*... The context indicated that it was not intended that the Commissioner should have a discretionary power to defeat that right or entitlement. The word 'may' conferred a power; and the statutory intention was that the power be exercised if the condition was fulfilled. ...*" [161]

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[158] *Leach v R* (2007) 232 ALR 325 at 337

[159] (1971) 127 CLR 106

[160] (2002) 209 CLR 140

[161] (2002) 209 CLR 140 at 152-153

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142. When a statutory power is conferred by words of permission, Gleeson CJ and McHugh J said, questions whether it is a mandatory or discretionary power and, if discretionary, the issues that may taken into account in its exercise:

> "*... are to be resolved as a matter of statutory interpretation, having regard to the language of the statute, the context of the relevant provision, and the general scope and objects of the legislation ...*" [162]

Their Honours cited the judgment of Dixon CJ, Webb, Fullagar, Kitto and Taylor JJ in *Ward v Williams* [163] with approval. We refer to one passage from their Honours' judgment in that case:

> "*... One situation in which the conclusion is justified that a duty to exercise the power or authority falls upon the officer on whom it is conferred is described by Lord* Cairns *in his speech in the same case [Julius v Bishop of Oxford* (1880) LR 5 AC 214 at 235]. *His Lordship spoke of certain cases and said of them '[they] appear to decide nothing more than this: that where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.*" [164]

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[162] (2002) 209 CLR 140 at 152
[163] (1955) 92 CLR 496
[164] (1955) 92 CLR 496 at 505-506

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143. The principles to be drawn from these cases require us to look to the purpose of a banning order and the statutory context in which the power is given. We should do that having regard to the principle stated by Mason and Wilson JJ in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*:

> "*... The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole. But in performing that task the courts look to the operation of the statute according to its terms and to legitimate aids to construction.*" [165]

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[165] [1981] HCA 26; (1981) 147 CLR 297; 35 ALR 151 at 320, 169

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144. Regard may be had to the context in which legislation was enacted to ascertain the mischief that Parliament intended to remedy and so ascertain the legislative intent:

> " *It is well settled that at common law, apart from any reliance upon s 15AB of the* Acts Interpretation Act *1901 (Cth)* , *the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure .... Moreover, the modern approach to statutory interpretation*

(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy .... Instances of general instances in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd *(1986) 6 NSWLR 363 at 388, if the apparently plain meanings of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intention ...*" [166]

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[166] *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; 141 ALR 618 at 408 ; 634-5 per Brennan CJ, Dawson, Toohey and Gummow JJ and see also *Wacando v The Commonwealth* (1981) 148 CLR 1; 37 ALR 317 at 25-26 ; 335-6 per Mason J; *TCN Channel Nine Pty Ltd v Australian Mutual Provident Society* (1982) 42 ALR 496 at 507-508 ; and *Alexandra Private Geriatric Hospital v Blewett* (1984) 2 FCR 368; 56 ALR 265 at 375-6 ; 271-2 per Woodward J)

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145. When we go to the immediate context in which s 920A(1) appears, it is a context in which ASIC has power to prevent persons from providing financial services, at least from providing certain types of financial services. It is a power that is not expressly directed to holders of an AFSL and we do not think that it should be read as limited to such persons. It is a power that exists in the broader context of Part 7.6 , which provides for the licensing of providers of financial services. We have summarised the relevant provisions at some length because it becomes apparent from them that Part 7.6 provides for regulation of the providers of financial services in two ways. In the first way, ASIC is directly involved through the grant of AFSLs and in the regulation of the holders of those AFSLs to ensure that they meet their statutory obligations. Quite apart from a banning order or an enforceable undertaking, ASIC may call upon its powers to suspend or cancel an AFSL as part of that regulation.

146. The second way involves the holders of AFSLs supervising those whom they authorise to represent them in the provision of financial services. It does that by holding the holder of the AFSL responsible for the actions of the representative. ASIC does not have power to interfere with a financial services licensee's choice of a representative or with regulating their relationship. Putting to one side an enforceable undertaking, its only means of regulating the activities of a representative is through regulation of the holder of the AFSL or by means of a banning order to prevent the person engaging in the provision of financial services at all.

147. **Following paragraph cited by:**

Ngyuen And Australian Securities And Investments Commission (09 June 2011)

> 15. The public interest in this case, Mr Lo Surdo submitted, includes protecting the integrity of the financial services market, maintaining confidence in the financial services industry and providing a potential deterrent upon others in the

relevant industry (*Re Howath v ASIC* [2008] AATA 278 at [147]). These matters related variously to the public generally, other market participants, and current and prospective clients of the Applicant.

Ngyuen And Australian Securities And Investments Commission (09 June 2011)

26. Moving then to the public interest; ASIC by making a banning order against Mr Nguyen, ensures the protection of the integrity of the financial services market, adds to maintaining of confidence in the financial services industry, and provides a potential deterrent upon others in the relevant industry (*Re Howath v ASIC* [2008] AATA 278 at [147]).

Given the structure of regulation and the myriad of ways in which a person can conduct him or herself, it would seem surprising if Parliament had intended that ASIC would be obliged to make a banning order if any of the circumstances in s 920A were met. If only s 920A(1)(c) and (f) were concerned, that surprise might itself be surprising. As it is, they are not. Section 920A(1)(a) , for example, provides that ASIC may make a banning order if it suspends or cancels an AFSL held by a person. One of the grounds on which it may suspend or cancel a person's AFSL occurs if that person ceases to carry on a financial services business:
s 915B(1) . A person may cease to carry on business for all sorts of reasons and many of them would not attract adverse conclusions regarding the way in which the person had carried on business let alone the need to issue a banning order against the person. Section 920A(1)(e) provides another circumstance in which ASIC may make a banning order. That circumstance is that a person has not complied with a financial services law. This is a very general provision and it is difficult to conceive that Parliament intended that any breach of a financial services law would require ASIC to make a banning order against a person. That difficulty is magnified when regard is had to the authorities that establish that at least a purpose of a banning order is to protect the public and, as part of that protection, to deter others from engaging in misconduct. If protection, rather than punishment, lies at the heart of the imposition of a banning order, Parliament must have intended the regulatory body, ASIC, to have a discretion that enables it to do so.

148. For these reasons, we consider that s 920A does not require ASIC to make a banning order when one or more of the circumstances in s 920A(1) is established. Instead, it gives ASIC a discretionary power to do so. We note that this conclusion is consistent with the statement in the Revised Explanatory Memorandum accompanying the *Financial Services Reform Act 2001* in which it was said that:

"*Section 920 A sets out the circumstances in which ASIC* ***can*** *make a banning order against a person. ASIC* ***will be able*** *to ban persons ...*"[167] (emphasis added).

It does not say that ASIC "*must*" do so.

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[167] Revised Explanatory Memorandum at [11.59]

What are the limits of that discretionary power?

149. Windeyer J commented on the more broadly based constraints when he considered s 46(3) of the *Income Tax Assessment Act 1936* in *Finance Facilities Pty Ltd v Federal Commissioner of Taxation*: [168]

"*... If the scope of the permission be not circumscribed by context or circumstances it enables the doing, or abstaining from doing, at discretion, of the thing so authorized. But the discretion must be exercised bona fide, having regard to the policy and purpose of the statute conferring the authority and the duties of the officer to whom it was given: it may not be exercised for the promotion of some end foreign to that policy and purpose or those duties. ...*" [169]

[168] (1971) 127 CLR 106
[169] (1971) 127 CLR 106 at 134

150. There are other more narrowly based constraints to be found in the legislative context in which each discretionary power is given. Constraints of this type were described by Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission and Others*: [170]

"*'Discretion' is a notion that 'signifies a number of different legal concepts' .... In general terms, it refers to a decision-making process in which 'no one [consideration] and no combination of [considerations] is necessarily determinative of the result' .... Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made .... The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject matter and object of the legislation which confers the discretion .... On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment.*" [171]

[170] (2000) 203 CLR 194; 174 ALR 585
[171] (2000) 203 CLR 194; 174 ALR 585 at 204-205 ; 591-592 and see also *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577; 2 ALD 60 at 590 ; 70 per Bowen CJ and Deane J and 602; 80 per Smithers J

151. **Following paragraph cited by:**

Chapple and Australian Securities and Investments Commission (16 December 2016)

21. The jurisdiction to impose a banning order arises by virtue of the eight fraud convictions against Mr Chapple. Standing in the shoes of ASIC to consider the exercise of the discretion in s 920A , the first question is whether a banning order should issue at all: *Howarth and ASIC* 101 ALD 602 at [151] . The answer to that question must be yes, in that the behaviour in question is serious and fully satisfies the criteria referred to in Regulatory Guide 98.

Having regard to the relationship between ss 920A and 920B , it seems to us that there are two steps to be taken in exercising the discretion. The first is to exercise the discretion relevant to s 920A as to whether a banning order should be issued at all. If it is to be issued, the second, relevant to s 920B , is to determine the length of that banning order.

152. **Following paragraph cited by:**

Allan Vissenjoux and Australian Securities and Investments Commission (24 February 2015) (John Handley, Senior Member)

51. If those objectives are not met, a licensee is at risk of a banning order. In *Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 at [152] the Tribunal decided *the purpose of a banning order is to ensure that members of the public are protected from those who do not meet the standards of behaviour or otherwise expected of a person engaged in the provision of financial services. There is nothing on the face of Pt 7.6 generally or of ss 920A and 920B in particular that suggests that the purpose of imposing a banning order is intended to be punitive*.

If we were to have regard to the licensing framework established by Part 7.6 of the Corporations Act without reference to judicial authorities, it would seem to us that the purpose of a banning order is to ensure that members of the public are protected from those who do not meet the standards of behaviour or otherwise expected of a person engaged in the provision of financial services. There is nothing on the face of Part 7.6 generally or of ss 920A and 920B in particular that suggests that the purpose of imposing a banning order is intended to be punitive. There are separate provisions in the Corporations Act creating criminal offences and yet others providing for civil consequences, such as pecuniary penalties, for the breach of certain provisions of the financial services law.[172] There seems to be a clear separation in the Corporations Act of the regulatory provisions relating to suspension or cancellation of AFSLs, those relating to the imposition of banning orders and those relating to the creation of offences and the criminal and civil consequences of breaching them.

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[172] See Part 9.4 generally

153. It might be thought that this proposition would be contrary to the High Court's conclusion in *Rich v Australian Securities and Investments Commission* [173] when it overruled the judgment of the Full Court of the Federal Court in *Australian Securities Commission v Kippe*. [174] The issue that faced the Full Court and its conclusion were summarised by Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in *Rich* :

"*... In* Kippe*, the question was whether statements made in an examination under s 19 of the Australian Securities Commission Act 1989 (Cth) were admissible in evidence in proceedings before the Administrative Appeals Tribunal in which banning orders were sought under ss 829 and 830 of the Corporations Law . Section 68(3) of the Australian Securities Commission Act provided that the statements were not admissible in 'a proceeding for the imposition of a penalty'. The Full Court of the Federal Court held ... that a proceeding which might result in a banning order was to be characterised as 'protective' in purpose and not as one for the imposition of a penalty'. ...*" [175]

[173] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354, Kirby J dissenting
[174] (1996) 67 FCR 499; 137 ALR 423; 20 ACSR 679
[175] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 147 ; 282-283; 1362; [38]

154. The case of *Rich* itself involved an application by ASIC to the Supreme Court of New South Wales for orders of discovery against Mr Rich and another. Mr Rich claimed that he should not be required to give discovery because the proceedings exposed him to a penalty in the form of declarations of contravention, compensation orders and disqualification orders so that the privilege against penalties and forfeiture applied. Referring to a disqualification order, the majority, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, with whom McHugh J agreed on these aspects, said:

" *If a disqualification order is made, the person against whom the order is made ceases to be a director, or a secretary of a company, ... unless given permission under ss 206F or 206G of the 2001 Act to manage the corporation concerned. The order for disqualification thus causes the person against whom it is made to forfeit any office then held in a corporation and forbids that person from holding office in a corporation for the duration of the disqualification order. Those consequences, whether taken separately or in combination, when inflicted on account of a defendant's wrongdoing, are penalties. That the penalty is not exacted in the form of a money payment does not deny that conclusion. As the authorities referred to earlier in these reasons reveal, equity's concern with penalties was never confined to pecuniary penalties. If exposure to loss of office or exposure to dismissal from a police force ...is exposure to penalty, exposure to a disqualification order is exposure to a penalty.*" [176]

[176] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 147 ; 282; 1362; [37]

155. The majority did not go on to consider the basis on which the discretion to make a disqualification order should be made. They referred to authorities in which it had been said that its purpose was to protect the public rather than to punish but immediately distinguished that line of authorities from the issue that they had to decide. The issue they had to decide was:

"*... how should the general principles of the privileges against exposure to penalties and forfeiture find application in the particular circumstances of these proceedings. That inquiry is not assisted by examining why the orders sought in the proceedings might be made or what purposes might be achieved by their making. Rather, attention must be focused upon the nature of the orders that are sought.*" [177]

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[177] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 146 ; 281-282; 1362; [34]

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156. On our understanding, the majority gave no consideration at all to the factors that are to be taken into account when making disqualification orders. It appears from their judgment that they had no need to do so. Kirby J, who was in dissent, did not need to do so and expressly said so:

"*... Those decisions are not themselves under review in this appeal. Accordingly, their correctness (and in particular the correctness of the 'fifteen point guide' to disqualification orders considered in one of them)* ... [*Re HIH Insurance Ltd (in prov liq)* (2002) 42 ACSR 80 at 97-9 [56] per Santow J] *was not argued or considered in this appeal. Principle and fair procedures require that this court reserve its position upon them.*" [178]

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[178] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 166 ; 298; 1373; [86]

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157. McHugh J, however, did go on to consider them even though he agreed with the majority on the issues they had addressed. He said:

"*... I think that the factors that the courts take into account when ordering disqualification under the corporations legislation make it impossible to hold that the 'civil penalty' provisions and, in particular, the disqualification provisions, are purely protective in nature. Despite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different from what judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation.*" [179]

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[179] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 148 ; 283; 1363; [41]

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158. Later in his reasons, McHugh J went on to analyse 15 propositions that Santow J derived from previous authorities regarding a court's powers under ss 260C and 260E to disqualify a person from managing corporations. Santow J had done that in *Re HIH Insurance Ltd (in prov liq)* [180] and McHugh J described his judgment as the leading authority on the reasons for a court's exercising its powers under ss 206C and 206E of the Corporations Act to order the disqualification of a person from managing corporations. His Honour categorised some of Santow J's propositions as relating to the protection of the public, others as relating to deterrence and yet others as relating to mitigating factors.

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[180] (2002) 42 ACSR 80 at 97-9 [56]

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159. McHugh J also analysed principles stated in other cases concerned with disqualification orders in the same way. In particular, he referred with approval to the judgment of the Victorian Court of Appeal in *Elliott v Australian Securities and Investments Commission* [181] when it said:

" *Many of the propositions and factors listed by Santow J bear a similarity to sentencing principles. Matters going to aggravation and mitigation in relation to contraventions of s 588G [of the Corporations Law] need to be considered and accorded proper weight. But above all else protection of the public and deterrence, specific and general, must also be given appropriate consideration.*" [182]

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[181] (2004) 205 ALR 594; 48 ACSR 621
[182] (2004) 205 ALR 594; 48 ACSR 621 at 631 ; 658

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160. His Honour concluded:

" *Both Santow J's list of propositions and the comments of the Victorian Court of Appeal indicate that the factors taken into account in the criminal jurisdiction — retribution, deterrence, reformation, contrition and protection of the public — are also central to determining whether an order of disqualification should be made under the Corporations Act and, if so, the appropriate period of disqualification. Those factors also support the conclusion that the jurisdiction exercised under this part of the Corporations Act cannot properly be characterised as purely protective.*" [183]

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[183] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 155 ; 289; 1367; [52]

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161. Having analysed the judgments of both the majority and of McHugh J, we find, regrettably, that our understanding of the majority judgment in *Rich* does not accord with the analysis of it by Senior Member Penglis in *Re Dollas-Ford and Australian Securities and Investments Commission* [184] when he said:

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" *The proper basis for the exercise of a discretion to impose a banning order was considered by the High Court of Australia in* Rich v Australian Securities and Investments Commission .... *The High Court rejected the proposition stated in* Australian Securities and Investments [sic] Commission v Kippe ... *the purpose of banning orders is solely to protect the public rather than to punish.*" [185]

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[184] (2006) 91 ALD 747; [2006] AATA 704
[185] (2006) 91 ALD 747; [2006] AATA 704 at 750 ; [13]

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162. We note that Finkelstein J reached the same conclusion as Senior Member Penglis in *Australian Securities and Investments Commission v Vizard* [186] when he considered the pecuniary penalty that should be imposed as well as whether a disqualification order should be made. His Honour said:

" *It could hardly be denied that, as a rule, directors of publicly listed companies are sensitive to risk. The few that may be tempted to gain prestige, wealth and security by illegal means can be dissuaded from that course if the risk of detection and serious punishment is too great. Although the civil penalties are not substantial when compared with the possible gains from corporate crime, other penalties may act as a better deterrent.*

> *This is where the possibility of disqualification from office can play an important function. It may be accepted that the principal object to be achieved by a disqualification order is protective: protection of the company and its shareholders against the likelihood of repetition of the offending conduct. The mistake is to treat this as the sole purpose of a disqualification order. That error has now been exposed. In Rich v Australian Securities and Investments Commission (2004) 209 ALR 271 ; 50 ACSR 242 ; [2004] HCA 42 the High Court made it clear that a disqualification order can be imposed not only to protect the company's shareholders against further abuse, but also by way of punishment and, importantly, for general deterrence. I am confident the fear of losing both their position from business life, as well as their good reputation, will be an effective deterrent in the case of many a director who is contemplating a dishonest course for gain. Few corporate crimes are spontaneous. There is always time to consider the consequences. The risk of a long period of disqualification, for example so long that it will keep the director forever out of public corporate life, may well tip the scales.*" [187]

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[186] (2005) 145 FCR 57; 219 ALR 714; 54 ACSR 394
[187] (2005) 145 FCR 57; 219 ALR 714; 54 ACSR 394 at 65 ; 723; 403; [43]

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163. Any disagreement we might have with a judgment of the Federal Court is, when all is said and done, irrelevant if what is said in that judgment is not *obiter dicta* and if there is no relevant conflicting authority from a superior court. McHugh J's judgment accorded with the statements made in these two cases but not so the majority's. The majority were at pains to distinguish between an enquiry that was relevant to the resolution of the issue it had to decide – the nature of

the orders sought – and an issue it did not have to decide – why an order might be made and the purposes it might achieve.

164. The judgment of Finkelstein J places us in a very difficult position as we are bound by judgments of superior courts. In trying to resolve our dilemma, we note that what McHugh J said in *Rich and Australian Securities and Investments Commission* is *obiter dicta*. What Finkelstein J said in *Australian Securities and Investments Commission v Vizard* is not necessarily so but it is not consistent with conclusions reached on the same or analogous issues in other superior courts. We will begin by referring to passages from judgments to which McHugh J referred in *Rich and Australian Securities and Investments Commission*.

165. After analysing passages from the judgment of Bryson J in *Re One.Tel Ltd (in liq); Australian Securities and Investment Commission v Rich* [188] when ordering that persons were disqualified from holding office as company officers, McHugh J concluded:

> " *It is difficult to read these passages without concluding that there is little difference in the approach of his Honour and the approach of judges making orders or imposing sentences in the criminal jurisdiction. It is hard to escape the conclusion that, in determining the period of disqualification, the courts consider that the larger the loss the longer the period of disqualification that is justified. If that is so, and I think that it is, it indicates that* retribution *is as much a factor as protection of the public. There is no* a priori *reason why the protection of the public requires a person who is responsible for the loss of $100m to be disqualified for a longer period than a person who is responsible for the loss of $100,000. The person responsible for the smALL ER loss may be a far greater danger to the public than the person responsible for the larger loss. Yet, given the approach of the courts, if other things are equal, the person responsible for the major loss will almost certainly receive a far longer period of disqualification.*
>
> > *Another matter which suggests that retribution is a factor behind the making of a disqualification order, including the appropriate length of disqualification, is the relevance of the defendant's having obtained some personal benefit from the conduct that gives rise to the application for disqualification. Thus, in* Australian Securities Commission v Donovan, *Cooper J said... that in determining whether a disqualification order is appropriate and, if so, the length of such disqualification, the extent to which the person benefited from the conduct personally or tried to conceal it are relevant matters.*
> >
> > *Further, the fact that courts take into account mitigating factors suggests that the jurisdiction is not purely protective. For example, both the Victorian Supreme Court and the Court of Appeal in* Australian Securities and Investments Commission v Plymin (No 2) ... [(2003) 21 ACLC 1237] *and* Elliott ... [(2004) 205 ALR 594 ; 48 ACSR 621] *and Gzell J in the New South Wales Supreme Court in* Australian Securities and Investments Commission v Whitlam (No 2) ... [(2002) 42 ACSR 515] *took into account mitigating factors when determining whether to order disqualification and when assessing the appropriate period of disqualification of the defendant company directors. In* Plymin *and* Elliott *such factors included the defendants' previous unblemished corporate record, remorse and their cooperation with relevant authorities, including the Australian Securities and Investments Commission and external administrators... In* Whitlam (No 2)*, Gzell J also took into account the loss to the community of the defendant's services if he were disqualified and the irreparable effect of the proceedings upon the defendant's reputation, income, career and family.*" [189]

[188] (2003) 44 ACSR 682
[189] [2004] HCA 42; (2004) 220 CLR 129; 209 ALR 271; 78 ALJR 1354 at 156-157 ; 290-291; 1368; [56]-[58]

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166. The case of *Australian Securities Commission v Donovan* ,[190] to which McHugh referred in this passage required Cooper J to consider s 1317EA(3)(a) of the *Corporations Law* giving the Court power to make an order prohibiting persons whom it has declared to have contravened certain provisions in certain ways, from managing a corporation. Cooper J described s 1317EA(3)(a) as "*... a protective provision designed to protect the public and to prevent a corporate structure being used by individuals in a manner which is contrary to proper commercial standards.*" [191] He cited *Re Tasmanian Spastics Association; ASC v Nandan* ,[192] which had considered the same section as well as *Nicholas v Corporate Affairs Commission* ,[193] which had considered s 562A(3) of the *Companies (Victoria) Code*. Cooper J concluded:

"*Because the power under s 1317EA(3)(a) is predominantly protective, it is relevant to have regard to the officer's prior corporate conduct, to the present activities of the officer, to the likelihood that the officer will repeat or engage in conduct of the type which constituted the contravention of s232(4) which gives rise to the application, including whether or not the officer shows contrition or accepts responsibility for his or her conduct, and the extent to which the officer benefited from the conduct personally or tried to conceal it.*" [194]

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[190] (1998) 28 ACSR 583
[191] (1998) 28 ACSR 583 at 602
[192] (1997) 23 ACSR 743 at 751 per Merkel J
[193] (1987) 5 ACLC 258
[194] (1998) 28 ACSR 583 at 606

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167. Contrary to the earlier passage to which we have referred, Cooper J described the power in this passage as " ***predominantly*** *protective*" (emphasis added). That modification followed his reference to the cases of *Re Civica Investments Ltd* [195] and *Cullen v Corporate Affairs Commission.* [196] In each, consideration was given to whether the relevant power to disqualify should be exercised for the maximum period or for something less. In *Re Civica Investments Ltd* , Nourse J considered a power to disqualify that was limited to a five year period. He said that the court should:

"*... what the court has to do is to impose such a period of disqualification, if any, as it thinks appropriate, bearing in mind the upper limit of the power and disregarding its further power to give leave to act in the future notwithstanding the disqualification. Speaking for myself, I certainly would not think it right to impose the maximum period of disqualification irrespective of the degree of blame and then leave it to the person concerned to come back and seek leave to act in the future.*

Secondly, the fact that the five year period is a maximum must, on general principles, mean that the longer periods of disqualification are to be reserved for cases where the defaults and conduct of the person in

question have been of a serious nature, for example, where defaults have been made for some dishonest purpose, or wilfully and deliberately, or where they have been many in number and have not been substantially alleviated by remedial action and convincing assurances that they will not recur in the future. " [197]

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[195] [1983] BCLC 456 per Nourse J
[196] (1989) 7 ACLC 117 per Young J
[197] [1983] BCLC 456 at 458

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168. Cooper J also referred to this passage from the judgment of Young J in *Cullen v Corporate Affairs Commission (NSW)*. Young J was considering an appeal from a notice that the Corporation Affairs Commission (NSW)(CAC) had given Mr Cullen prohibiting him from being in any way concerned in or taking part in the management of a corporation. The CAC had issued the notice under s 562A(3) of the *Companies (NSW) Code* which, at the relevant time, permitted it to impose a prohibition for a period not exceeding five years. It was in that context that Young J said:

" *The next question is for what period should that disqualification be. There is not much authority on this point. In* Re Civica Investments Ltd *(1983) BCLC 456,* Nourse *J held that the maximum period of disqualification should be reserved for defaults of a serious nature such as dishonesty or a large number of defaults not substantially alleviated by appropriate remedial action and/or convincing assurances that they would not recur. As far as I know that case has never been departed from although I must confess I do not know of any other cases in the reports that deal with this point.*

> *The present case was not the worst case. The delegate did not find, nor did the liquidator find, any fraud or dishonesty. The case was one of, there, inefficiency, or as the learned delegate put it, bungling. The director did not take appropriate action quickly enough to minimise loss. That he intermingled the affairs of different corporate entities, that he did not fully understand the obligations of a director and, most importantly, did not pay over group tax.*
>
> *The learned delegate said that unless there were strongly persuasive circumstances which would warrant a reduction of five years he should not reduce it. He said this notwithstanding the submission of counsel for the Corporate Affairs Commission that on the facts before him it was not the worst case. Learned counsel says that he does not adhere to that submission before me because further facts have come out which make the case more serious than the evidence before the delegate suggested.*
>
> *It seems to me, with respect, the learned delegate overlooked the words of* Nourse *J and took the view that five years' disqualification was the norm. I am of the view that I should follow the view of* Nourse *J. This is not the worst case, but on the other hand it is not a trivial case and I think in all the circumstances, especially as this is one of the first cases where this sort of conduct has come under consideration for disqualification, that disqualification for two years from today would be appropriate. I have taken into account the fact in fixing this period that de facto the director has not been involved in being a director of a company since last May.*" [198]

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[198] (1989) 7 ACLC 117 at 128-129

169. It is important to note that both *Re Civica Investments Ltd* and *Cullen v Corporate Affairs Commission (NSW)* concerned provisions that permitted the disqualification periods to be no more than five years. That was a feature recognised by Cooper J in *Australian Securities Commission v Donovan* wh en he surmised that a maximum of that length must mean that the longer periods of default must, on general principles, be reserved for the cases where the person's defaults and conduct has been more serious. That can be read as introducing an element of punishment but, when read in the context of a maximum period, need not necessarily be read in that way at all.

170. **Following paragraph cited by:**

Parker and Australian Securities and Investments Commission (01 December 2016)

180. In *Musumeci v ASIC* [2009] AATA 524 the Tribunal also made it clear that a banning order serves a protective purpose:

> 65. *A fundamental and often repeated concept is that the banning power is a protective power. Its principal purpose is to contribute to the public interest by limiting the conduct of financial services business to people with the requisite capacity and integrity to provide the services in a lawful and competent manner: Santow J's propositions (i) to (iv) reflect this stated purpose and are supported by numerous cited authorities: see Australian Securities and Investments Commission v Adler (2002) 42 ACSR 80 page 97 at [56] .*
>
> 66. *A corollary of this often repeated concept is the proposition that the exercise of the banning power is not concerned with punishment and may be regarded as entirely protective: Re Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602; [2008] AATA 278 especially at [170] , [176] and [180] .*

Any notion that punishment is relevant in the imposition of a period of disqualification was dispelled by the Full Court of the Federal Court in *Kamha v Australian Prudential Regulation Authority,* [199] which was decided after *Rich* . It said:

73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power: Police Service Board v Morris & Martin *[1985] HCA 9; (1985) 156 CLR 397 at 403 and 407 . Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct*." [200]

[199] (2005) 88 ALD 620; [2005] FCAFC 248 per Emmett, Allsop and Graham JJ
[200] (2005) 88 ALD 620; [2005] FCAFC 248 at 637-638 ; [73] and for a similar approach see the more recent judgments of the High Court in *Alabarran v Members of the Companies and Auditors Liquidators Disciplinary Board* (2007) 234 ALR 618 at 623-624 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 641 per Kirby J and *Visnic v Australian Securities and Investments Commission* (2007) 234 ALR 413 at 416-417 per Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ and 418-419 per Kirby J

171. More recently, in 2007, in *Australian Securities and Investments Commission v Forge* ,[201] White J of the Supreme Court of New South Wales considered whether to make a disqualification order against Mr Forge for a greater or lesser period or to accept an enforceable undertaking. Earlier in his reasons, his Honour had quoted the passage from McHugh J's judgment that the factors of retribution, deterrence, reformation, contrition and protection of the public are also central to determining whether an order for disqualification should be made under the Corporations Act an d, if so, the appropriate period of disqualification. [202] White J also referred to the fact that McHugh J had cited with approval the observations of Bryson J in *Re One.Tel Limited (in liq); Australian Securities and Investments Commission v Rich* that only limited guidance can be obtained from other decisions with respect to disqualification orders and the period for disqualification. That is so because each decision is related to its own facts and the circumstances of each defendant are special and vary greatly. [203]

[201] [2007] NSWSC 1489
[202] [2007] NSWSC 1489 at [67]
[203] [2007] NSWSC 1489 at [68]

172. Somewhat in contrast to these passages, when White J came to consider whether an enforceable undertaking should be accepted in lieu of a disqualification order, White J said:

" *The proffered undertaking is in narrower terms than a banning order. A banning order would prohibit Mr Forge from managing a corporation. That expression is defined by s 91A of the* Corporations Law *. It extends to the person being in any way (whether directly or indirectly) concerned in or taking part in the management of a corporation. However, I understood that the proffered undertakings were intended to extend to managing a corporation in this sense, as well as being a director of a corporation. It was submitted for Mr Forge that the proffered undertaking would fully protect the public. Indeed, unless a disqualification order were made for life, it was said that the public would have greater protection by the acceptance of such an undertaking than it would if a disqualification order were made. That is because the undertaking is proffered as a perpetual undertaking.*

> *I do not accept this submission. A disqualification order is protective of the public for the period of disqualification against misconduct by the person disqualified. However, that is not its only purpose. The object of general deterrence is also of great importance. That object is served by the public disapproval of the impugned conduct being marked not only by a declaration that the conduct has contravened the Act, but by an order for disqualification of*

the contravener from managing a corporation either for a fixed period or for life. The shame or embarrassment which accompanies such an order is not designed as punishment, although it might have that effect, but serves as a general deterrent to others who might be tempted to breach their duties as directors or officers of a company. In my view, the objective of general deterrence would not be sufficiently served by the acceptance of the proffered undertaking. [204]

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[204] [2007] NSWSC 1489 at [102]-[103]

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173. This passage clearly excludes punishment as a factor in the imposition of a banning order even though it notes that punishment may be an effect of its imposition. White J had referred to McHugh J' judgment but appears not to have read it in the way that led him to reach the conclusion reached by Finkelstein J in *Australian Securities and Investments Commission v Vizard* .

174. The conclusion reached by White J is also consistent with earlier authorities. We refer, for example, to *Story v National Companies and Securities Commission* ,[205] in which Young J (in Eq) considered s 60 of the *Securities Industry (New South Wales) Code*. That section provided that the then National Corporations and Securities Commission (NCSC) could revoke the licence held by a dealer in certain circumstances. One of those circumstances arose where the NCSC had reason to believe that the dealer had not performed the duties of the holder of such a licence. One of the grounds on which the NCSC could revoke a licence was that the person was not performing his or her duties efficiently, honestly and fairly.

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[205] (1988) 6 ACLC 560

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175. Among other matters, Young J considered whether the dealer's licence should have been revoked. In doing so, he said that a finding that a dealer had been inefficient was not necessarily sufficient to justify a conclusion that his or her licence should be revoked. He considered what matters should be taken into account when he said:

"*On the matter as to whether revocation should follow an opinion of inefficiency, various matters have to be weighed. One of these is the public interest that people should be permitted to follow a trade or profession which they are qualified to follow. Another is that the public expect those who fall short of minimum standards to be removed from the profession, at least until such time as the regulatory body can be assured that they are able to perform their functions efficiently. A third consideration is that the step of revocation is purely for the public benefit and is not punitive.*" [206]

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[206] (1988) 6 ACLC 560 at 581

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176. Although not part of the *ratio decidendi* of the case, the Full Court of the Federal Court maintained that theme in *Australian Securities Commission v Kippe and Another*. [207] They said in relation to a banning order made under s 829 of the *Corporations Law* as in force at the time against a dealer's representative:

> "*The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventive in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing that person from participation therein.*" [208]

A similar them are found in the judgment of Emmett, Allsop and Graham JJ in *Kamha v Australian Prudential Regulation Authority* [209] when they said:

> "*73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power (* Police Service Board v Morris & Martin *[1985] HCA 9; (1985) 156 CLR 397 at 403 and 407). Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct.*" [210]

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[207] (1996) 67 FCR 499; 137 ALR 423, Von Doussa, Cooper and Tamberlin JJ
[208] (1996) 67 FCR 499; 137 ALR 423 at 508 ; 431
[209] [2005] FCAFC 248
[210] [2005] FCAFC 248 at [73]

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177. This approach is consistent with the approach taken by superior courts in relation to statutory powers to regulate other professional, business and other activities that affect members of the public. The judgement of the New South Wales Court of Appeal in *New South Wales Bar Association v Hamman* [211] provides an example. The court considered disciplinary proceedings against a legal practitioner and said:

> "*... Disciplinary proceedings against a legal practitioner are concerned with the protection of the public (* W entworth v New South Wales Bar Association *(1992) 176 CLR 239 at 250-251). The object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession. ...*" [212]

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[211] (1999) 217 ALR 553; [1999] NSWCA 404 per Mason P, Priestley JA and Davies AJA, 29 October 1999
[212] (1999) 217 ALR 553 ; [1999] NSWCA 404 at 556 ; [21]

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178. Authorities such as *New South Wales Bar Association v Evatt* [213] and *Hardcastle v Commissioner of Police* [214] acknowledge that, in achieving the objects of public protection and the maintenance of proper professional standards, an order made in disciplinary proceedings may involve great deprivation for the person who is the subject of that order. Despite that, the object of the order is not to punish or to extract retribution.

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[213] (1968) 117 CLR 177 per Barwick CJ, Kitto, Taylor, Menzies and Owen JJ
[214] (1984) 53 ALR 593 per Bowen CJ, Gallop and Lockhart JJ

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179. Intentionally committing a wrong-doing is not the only reason to cancel or suspend a person's right to engage in his or her chosen profession. As

Kirby P said in *Pillai v Messiter [No.2]*: [215]

"*... The public needs to be protected from delinquents and wrong-doers within professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements. Such people should be removed from the register or from the relevant roll of practitioners, at least until they can demonstrate that their disqualifying imperfections have been removed. ...*". [216]

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[215] (1989) 16 NSWLR 197
[216] (1989) 16 NSWLR 197 at 201

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180. **Following paragraph cited by:**

Whittle and Australian Securities and Investments Commission (18 June 2018) (Mrs J C Kelly, Senior Member)

70. The Tribunal accepts the submission made by counsel for Ms Whittle that the predominant purpose of s 130F of the SIS Act is to protect the public, not to punish the auditor, although the latter may be the practical outcome. [3] That is consistent with the numerous authorities he cited.

via

[3] *Howarth and Australian Securities and Investments Commission* [2008] AATA 278 at [180] .

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Downey and Australian Securities and Investments Commission (26 June 2017) (Deputy President DR C Kendall)

100. ASIC also submitted that a banning order would act as a form of general deterrence and promote consumer confidence:

> ***General Deterrence & Consumer Confidence***
>
> *14. The Applicant's conduct, albeit short in duration, was serious in nature in that it involved misleading or deceptive statements about investments in a financial product, which were necessary to obtain a Significant Investor Visa. Those statements were made to the Australian Government in support of a decision about granting certain rights to an overseas national within Australia.*
>
> *15. The consequences of such conduct ought to be a banning order for an appropriate length of time, for reasons of specific and general deterrence and consumer confidence.*
>
> *16. General deterrence will be achieved by demonstrating that engaging in conduct that misleads the Government in relation to an overseas national's investment status will result in a person being banned from providing any financial services.*
>
> *Without imposing a banning order in this case, others will not be dissuaded from engaging in such conduct.*
>
> *17. As Deputy President Forgie held in Howarth v ASIC (2008) 101 ALD 602 at [180] ,* 'the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.' *Such deterrence is ultimately for the public protection.*
>
> *18. A banning order also has an educative effect on an individual and the industry at large. It informs other participants in the industry that certain conduct is neither acceptable nor tolerated.*
>
> *19. A banning order promotes and maintains consumer confidence in the market. As stated in section 760A of the Act , the object of the law in relation to financial services and markets is to promote* 'confident and informed decision making by consumers of financial products and services' *and* 'fai rness, honesty and professionalism by those who provide professional services.'
>
> *20. For these laws to achieve those objectives in this particular case, the conduct of the Applicant needs to be condemned and a banning order is appropriate to ensure such objectives.*
>
> *21. The Respondent notes that a banning order will also act as a personal deterrent to the Applicant in relation to how he conducts himself in the future with respect to financial services laws once the banning order period ends.*

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JSKN and Australian Securities and Investments Commission (01 June 2017) (Senior Member T. Tavoularis)

19. The regime to be followed by this Tribunal involves an assessment of whether ASIC's order to permanently ban the Applicant is the proper order in all of the circumstances, having regard to the protection of the public, specific and general deterrence, and the desire to maintain public confidence in the profession. [13] Regard must be had to the factors appearing in established authority, [14] and ancillary guides to applicable legislation.[15]

via

[13] *Horwarth v ASIC* [2008] AATA 278 at [180] .

Chapple and Australian Securities and Investments Commission (16 December 2016)

15. Another purpose of a banning order is deterrence. In *Howarth and ASIC* 101 ALD 602 Deputy President Forgie discussed the effect of earlier decisions with respect to disqualification orders for unprofessional conduct, and came to this conclusion (at [180]):

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance [industry]. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. As was said in Re Donald and Australian Securities and Investments Commission, the Tribunal said:*
>
> > *116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.*
> >
> > *117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand,*

a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed.

McCormack v Australian Securities and Investments Commission (14 December 2016)

50. Much has been written about the purpose to be achieved by making a banning order or a disqualification order. Deputy President S A Forgie in *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 101 ALD 602; 48 AAR 10 (Howarth) canvassed many of the authorities dealing with such decisions, noting that they were not necessarily consistent. She concluded, at [180] :

> *The weight of authority in the Federal and Supreme Courts to whose judgements we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of the penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the offence. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. ...*

Chong and Australian Securities and Investments Commission (26 May 2016)

154. Based on the misconduct of Mr Chong in providing financial services, as set out above (noting, in particular, his contravention of s 1041H(1) of the Corporations Act), the Tribunal finds that the imposition of a banning order for a three to ten year period is appropriate in Mr Chong's case. More specifically, the Tribunal finds that the imposition of a five year banning period is appropriate in the circumstances of Mr Chong's case. In reaching this is finding, the Tribunal notes, in particular, the following:

· the seriousness and duration of Mr Chong's misconduct which cannot be characterised as simply "careless" or "inadvertent" (i.e. which would warrant a lesser banning period). Mr Chong's conduct involved repeated/systemic compliance failures. Imposing a substantial banning order in such circumstances is likely to help participants in financial markets to better understand their obligations;

· the absence of any obvious remorse or insight shown by Mr Chong and the lack of insight displayed by Mr Chong to the consequences of his misconduct. Mr Chong has repeatedly tried to shift the blame for his own failure to comply with the Corporations Law (and, in particular, "financial services laws") onto Meritum (refer to paragraphs 139 and 140 above) rather than taking responsibility for his own conduct as a financial services provider;

· the importance of maintaining standards on the profession - a banning order protects the public from people like Mr Chong being involved in the

financial services industry for the period of the order. A banning order may also have the effect of maintaining investor confidence in the financial industry: *Felden and Australian Securities and Investments Commission* (2003) 45 ACSR 111 at [398] . Members of the public are entitled to expect that those who fall short of minimum standards are removed from their profession for a period of time: *Story v National Companies and Securities Commission* (1988) 6 ACLC 560 at 581 .

· there is a strong protective effect for the public and reinforcement of the integrity and reputation of the financial services industry - It is well established that the purpose of a banning order is to protect members of the public from those who do not meet the standards of conduct expected of a person engaged in the provision of financial services: *Howarth and Australian Securities and Investments Commission (ASIC), Re* (2008) 101 ALD 602 at [152] -[180] per DP Forgie. A banning order is not made to punish a person even though punishment or the imposition of a penalty may be the practical outcome of such an order; and

· the errant behaviour of Mr Chong, and others committing like contraventions of the Corporations Act , is more likely to change for the better if Mr Chong is banned for a significant period of time. Deterrence is also relevant to the protection of the public: *Howarth and Australian Securities and Investments Commission, Re* (2008) 101 ALD 602 at [180] per DP F orgie. A banning order does not only provide deterrence to the person the subject of the order but also to others who are involved or might potentially become involved in the industry. A banning order may also have an educative effect on the person concerned and the industry at large. That is, it may inform other participants in the industry, including advisers and clients, that certain conduct is neither acceptable nor tolerated.

Liu v Australian Securities and Investments Commission (31 October 2014) (Ms J L Redfern, Senior Member)

119. *Adler* concerned a breach of civil penalty provisions and, in particular, breach of director's duties. Santow J helpfully set out the guiding principles to be taken into account when the disqualification of a director is being considered. These principles have subsequently been adopted in a number of disqualification cases and in my view the principles are equally relevant to the exercise of the discretion under s 920A(1) of the Corporations Act . As observed by the Tribunal in *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602; [2008] AATA 278 at [180] :

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of*

the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.

Re Coshott v Australian Securities and Investments Commission (17 September 2014) (Ms J L Redfern, Senior Member)

149. *Adler* concerned a breach of civil penalty provisions and, in particular, breach of directors duties. Santow J helpfully set out the guiding principles to be taken into account when the disqualification of a director is being considered. These principles have subsequently been adopted in a number of disqualification cases and in my view the principles are equally relevant to the exercise of the discretion under s 920A(1) of the Corporations Act . As observed by the Tribunal in *Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602; [2008] AATA 278 at [180] :

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.*

Re George and Australian Securities and Investments Commission. (27 March 2014) (Deputy President RP Handley)

64. In its 'Statements of Facts, Issues and Contentions', ASIC referred the Tribunal to s 1(2) of the *Australian Securities and Investment Commission Act 2001* (the ASIC Act) which provides that in performing its functions and exercising its powers, ASIC must strive to "promote the confident and informed participation of investors and consumers in the financial system". The Tribunal must, therefore, decide whether a banning order is appropriate having regard to (a) the protection of the public, (b) specific and general deterrence, and (c) maintaining public confidence in the profession. In *Howart h and Australian Securities and Investment Commission* [2008] AATA 278 , at [180] , the Tribunal noted:

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of*

the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. ...

Tarrant v Australian Securities and Investments Commission (20 December 2013) (President D Kerr, Ms J L Redfern, Senior Member)

384. *ASIC v Adler* was about breach of civil penalty provisions and, in particular, breach of directors duties. Santow J helpfully set out the guiding principles to be taken into account when the disqualification of a director is being considered. These principles have subsequently been adopted a number of disqualification cases and in the Tribunal's view the principles are relevant to the Tribunal's discretion. As observed by the Tribunal in *Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602; [2008] AATA 278 at [180] :

The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.

Tweed v Australian Securities and Investments Commission (19 June 2008)

167. In *Howarth*, Dr Hughes and I spent some time exploring the purposes for which the power under s 920A(1) could be properly exercised. There has been some suggestion that it can be used as a punitive measure against a person whose behaviour brings him or her within one of the paragraphs of s 920A (1). We rejected

that suggestion and I adopt our reasons for doing so. [181] I repeat our conclusion that:

"180. The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a

deterrent both to an individual and to all of those engaged in that industry. As was said in Re Donald and Australian Securities and Investments Commission, [182] *the Tribunal said*:

> '116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.
>
> 117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand, a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed.' [183] " [184]

via
[184] [2008] AATA 278 at [180]

The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. As was said in *Re Donald and Australian Securities and Investments Commission* ,[217] the Tribunal said:

"*116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.*

117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour

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and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand, a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed." [218]

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[217] (2001) 38 ACSR 10; [2001] AATA 366, per Deputy President Forgie and Mr McLean and Mr Elsum AM, Members

[218] (2001) 38 ACSR 10; [2001] AATA 366 at 36-37 ; [116]-[117]

What weight should be accorded facts found and remarks made in the County Court?

181. While giving evidence, Mr Howarth was asked about the purposes for which his clients were to use the loans he arranged for them. Those purposes had been included in the Summary of Facts submitted to the County Court and he had admitted them for the purposes of the hearing. Mr Howarth sought to distance himself from that admission during the hearing in relation to the purposes for which the loans were obtained. At the same time, reference was made to the passage from Judge Shelton's sentencing remarks that he could feel confident in saying that Mr Howarth was unlikely to re-offend. We will return to both of these matters but, for the moment, will look at the general principles that will be relevant when we do so.

182. As Mr Howarth pleaded guilty to the offences of which he was convicted, we note that a:

"*... plea of guilty amounts to a formal confession of the existence of every ingredient necessary to constitute the offence: see* De Kruiff v Smith *[1971] VR 761 at 765 ;* R v Henry *[1917] VLR 525 at 526 .*" [219]

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[219] *R v D'Orta-Ekenaike* [1998] 2 VR 140; 99 A Crim R 454 (Court of Appeal) at 146-147 ; 462 per Winneke J

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183. The role of the judge in sentencing a convicted person is the same whether or not conviction follows a plea of guilty or trial by jury:

"*1. Where, following a trial by jury, a person has been convicted of a criminal offence, the power and responsibility of determining the punishment to be inflicted upon the offender rest with the judge, and not with the jury ...*

2. Subject to certain constraints, it is the duty of the judge to determine the facts relevant to sentencing. Some of these facts will have emerged in evidence at the trial; others may only emerge in the course of the sentencing proceedings. The fixing of an appropriate sentence ordinarily involves an exercise of judicial discretion, and it is for the judge to find the facts which are material to that exercise of discretion ...

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3. *The primary constraint upon the power and duty of decision-making referred to above is that the view of the facts adopted by the judge for purposes of sentencing must be consistent with the verdict of the jury. This may produce the result that, in a particular case, the view of the facts which the judge is obliged to take is different from the view which the judge would have taken if unconstrained by the verdict ...*[This] *is an inevitable consequence of the division of functions inherent in trial by jury.*

4. *A second constraint is that findings of fact made against an offender by a sentencing judge must be arrived at beyond reasonable doubt.*

5. *There is no general requirement that a sentencing judge must sentence an offender upon the basis of the view of the facts, consistent with the verdict, which is most favourable to the offender ... However, the practical effect of 4 above, in a given case, may be that, because the judge is required to resolve any reasonable doubt in favour of the accused, the judge will be obliged, for that reason, to sentence upon a view of the facts which is most favourable to the offender. When that occurs, it will be because of the application of the principle referred to in 4 to the facts of the particular case, and not because of some principle requiring sentencing on the basis of leniency ...*". [220]

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[220] *R v Isaacs* (1997) 41 NSWLR 374; 90 A Crim R 587 (CCA) at 377-8 ; 591-2 per Gleeson CJ, Mason P, Hunt CJ at CL Simpson and Hidden JJ

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184. A five member Court of Appeal in Victoria has set out the standard of proof that must be applied by a sentencing judge:

"[T]*he judge may not take facts into account in a way that is* adverse *to the interests of the accused unless those facts have been established beyond reasonable doubt. On the other hand, if there are circumstances which the judge proposes to take into account* in favour *of the accused, it is enough if those circumstances are proved on the balance of probabilities.*" [221]

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[221] *R v Storey* [1998] 1 VR 359; 89 A Crim R 519 at 369 ; 530

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185. In *Re Ngu and Minister for Immigration and Citizenship* [222] one of us summarised the outcome of the application of these principles when sentencing follows a guilty plea:

"*Where sentencing follows a guilty plea, the findings beyond the elements of the offence must be made on the basis either of an agreed statement of facts or on evidence given to the court.* [223] *Any facts beyond those elements must either be proved by evidence or be admitted by agreement between the prosecutor and the defence.* [224] *Where facts have been agreed, a judge may only depart from those facts, or from facts inferred from those facts, if the parties are given sufficient notice to consider whether to challenge that departure and, if appropriate, to withdraw the plea.* [225] " [226]

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[222] [2007] AATA 1047

[223] *GAS v R ; SJK v R* (2004) 217 CLR 198; 78 ALJR 786; 206 ALR 116 at 211 ; 793-4; 126 at per Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ. Where a person has pleaded guilty to an offence, the elements of that offence are necessarily admitted. There is no need to lead any evidence in relation to them.

[224] *GAS v R; SJK v R* (2004) 217 CLR 198; 78 ALJR 786; 206 ALR 116 at 210-211 ; 793-4; 125-6; [28] -[31]

[225] *R v Duong* [1998] 4 VR 68; 99 A Crim R 218 (CA) at 77 ; 228 per Kenny JA

[226] [2007] AATA 1047 at [81]

186. In that same case, consideration was also given to the way in which regard is had to these principles when considering conflicting evidence given in the course of proceedings concerned with the merits review of an administrative decision. It was said:

82. In light of these authorities in the criminal jurisdiction, how should I regard Mr Ngu's view of events when reviewing an administrative decision? This question has been the subject of consideration in several cases. These include Minister for Immigration and Multicultural Affairs v SRT, *[227]* Minister for Immigration and Multicultural Affairs v Daniele, *[228]* Minister for Immigration and Multicultural Affairs v Gungor, *[229]* Ridley v Secretary, Department of Social Security [230] *and* Saffron v Commissioner of Taxation (Cth) (No 2). *[231]*

[227] (1999) 91 FCR 234; 56 ALD 349 (Branson, Lindgren and Emmett JJ)

[228] (1981) 61 FLR 354; 39 ALR 649 (Fisher, Davies and Lockhart JJ)

[229] (1982) 63 FLR 441; 42 ALR 209 (Fox, Fisher and Sheppard JJ)

[230] (1993) 42 FCR 276; 113 ALR 655 (Spender, Gummow and Lee JJ)

[231] (1991) 30 FCR 578; 102 ALR 19 (Davies, Lockhart and Beaumont JJ)

83. These cases were reviewed by Branson J in Minister for Immigration and Multicultural Affairs v Ali. *[232] Her Honour recognised that some legislative provisions operate by reference to the fact that a person has been convicted of a criminal offence. Section 200 of the Migration Act is such a section for it permits the Minister to deport persons to whom Division 9 of Part 2 of the Act applies. Such a person is a person who, as well as meeting other criteria, has been convicted of a criminal offence and sentenced to a period of imprisonment of not less than one year. In those circumstances, Branson J concluded:*

[232] (2000) 106 FCR 313; 62 ALR 673

'... the administrative decision-maker is entitled to receive evidence of a conviction and sentence and to treat it as probative of the factual matters upon which the conviction and sentence were necessarily based ([General Medical Council v*] Spackman [[1943] AC 627]), Daniele, Gungor and SRT).'* [233]

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[233] (2000) 106 FCR 313; 62 ALR 673 at 325 ; 684

By way of contrast, where a legislative provision does not operate by reference to the fact of a conviction and a conviction is merely one aspect of the evidence in the case, proof of the conviction is not regarded as proof of the essential facts upon which that conviction was based. As Davies J said in Saffron v Commissioner of Taxation (Cth) (No 2):

"A conviction is a decision in rem which establishes, while it stands, that the person convicted has been convicted of certain crime. If the person has been convicted of a felony, it establishes that the person is a felon. Such a matter is one which the convicted person may challenge only by seeking to set aside the conviction. In the taxation appeals, the taxpayer may not challenge the fact that he has been convicted of conspiracy to defraud the Commonwealth. But of course the taxpayer does not seek to do so and the fact of conviction itself is irrelevant. As is stated by G S Bower and A K Turner, *The Doctrine of Res Judicata* 2nd ed, 1969, p 215, a conviction is conclusive merely of that which it establishes, namely, the fact of conviction for the offence, but not of the facts lying behind that conviction.

... where a conviction is the foundation for the exercise of a power, no challenge can be made to the fact of the conviction or to the essential facts on which it was based. But by making clear the circumstance in which no such challenge may be made, the cases establish that, where the exercise of the power is not founded on a criminal conviction, then even if the conviction be relevant, a challenge may be made to the essential facts on which it was based. In Australia, an example is the decision of the High Court of Australia in *Ziems v Prothonotary of Supreme Court* (NSW) (1957) 97 CLR 279 ." [234]

84. Even though it is regarded in these circumstances as part of the evidence and not determinative of the grounds on which the conviction was based, caution should be exercised in considering whether to reach a conclusion that runs counter to those grounds. Branson J set out the policy considerations that underpin that caution when she said in Minister for Immigration and Multicultural Affairs v Ali*:*

'... although there is no absolute rule that the Tribunal may not consider material which challenges the grounds on which a prior conviction was based (*Ridley* at FCR 281-282; ALD 731-732; ALR 662), policy considerations suggest that the legislature intended that the Act, to the extent that it is concerned with the control in the public interest of the presence of non-citizens in Australia who have been convicted of criminal offences, should be administered in a way which:

(a) recognises that the criminal justice system is pre-eminently suited to the determination of the guilt of persons charged with criminal offences (see *Gungor* per Fox J at FCR 445-446; ALD 578; ALR 212-13); and

(b) limits inconsistency between decisions of the criminal courts and those of tribunals (see *Gungor* per Sheppard J at FCR 469; ALD 597; ALR 234).' [235] " [236]

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[234] (1991) 30 FCR 578; 102 ALR 19 at 581-582 ; 21-22
[235] (2000) 106 FCR 313; 62 ALD 673 at 325 ; 684
[236] [2007] AATA 1047 at [82]-[84]

Is it appropriate to make a banning order against Mr Howarth?

187. Having regard to the purpose of a banning order against a background of all of the evidence and the possibility of requiring Mr Howarth to give an enforceable undertaking, we have decided that we should make a banning order against Mr Howarth for the protection of the public. In reaching that conclusion, we have also had regard to his willingness to give an enforceable undertaking.

188. In this case, there are three major areas of Mr Howarth's behaviour that have caused us grave concern. The first relates to the premium funding loans. On the basis of his own evidence, we find that he has proffered documents to Centrepoint and to BMW Finance knowing that the information that they contained was false. He knew that it was false either in the sense that the amounts shown as the premiums for the policies for which funding was sought had been inflated beyond the true premiums or in the sense that the policies did not exist at all and no premiums were payable at all. Mr Howarth claimed that he did not know that the loans sought would be used for purposes other than the payment of insurance premiums and in fact understood that they would be used to pay workers' compensation premiums. We do not accept his evidence in that regard. It is contrary to that of Mr Forsyth whose recollection is that Mr Howarth did not ask him for what purpose he wanted a loan. It is contrary to the use that his own family company, JJG, made of the money and he not only knew of that use but was instrumental in using the loans to pay taxation. It is contrary to his admission that, where there was a genuine policy, he inflated the premium payable. If the amount has been inflated, the loan will be more than is required to pay the premium and the balance must logically be for another purpose.

189. The second major area of Mr Howarth's behaviour to cause us concern is that of his preparedness to attempt to distance himself from what he has done. He has given explanations for his behaviour or, perhaps, attributed his behaviour to four factors. One is his attempt to explain his actions by reference to his not having updated the template on his computer to take account of changes to premium funding. It is difficult to understand how any failure to update a template can explain Mr Howarth's knowingly preparing tax invoices containing false information and deliberately submitting them to Centrepoint and BMW Finance with the purpose of obtaining

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loans for companies associated with him and his family in three instances and for others in 19 other instances.

190. Another example of Mr Howarth's attempting to distance himself from what he has done is to be found in his attitude to his attempt to distance himself from the statement in the Summary of Facts given to the County Court as to the purposes for which his clients had used the loans. A finding as to those purposes was not an essential element of those convictions that, under s 920A(1)(c), support our power to impose a banning order. Therefore, any finding by the County Court on that aspect does not bind us and we do not see it or Mr Howarth's admissions in that court in that light. What we do see, though, is Mr Howarth's failure, at best, to understand the significance of his agreeing to the Summary of Facts. In the County Court he made a comment to the effect that, as he was pleading guilty, it did not matter whether his clients had used the money for one purpose or another. His comment is correct but, what causes us concern is that he is prepared not only to agree to the contents of a document in the County Court and then again in this Tribunal without qualification and then to walk away from aspects of it.

191. A second feature of Mr Howarth's attempt to distance himself from what he has done is to lay blame at the doors of his clients while purporting to protect them. His purported protection, we find, led to his lying to Mr Dodd about the loan applications. His distancing himself, we find, led Mr Howarth to agree initially with a proposition that his clients had given him false information regarding the purpose for which the loans were obtained before moderating that statement that it was his understanding that they were to pay premiums for workers' compensation insurance. He then moved to acknowledging that he had not asked his clients about the purpose for obtaining a loan in some instances and then to not having asked them. Mr Howarth has also attempted to lay the blame at the doors of Centrepoint and of BMW Finance by suggesting that their forms and practices enabled him to take advantage of them to do what he did.

192. Even though we consider them unsuccessful, Mr Howarth's attempts to lay the blame at the doors of others should be seen in conjunction with what we also find to be his minimisation of what he has done. Minimisation is the third factor. We find that he has minimised his conduct and its consequences by referring to the fact that all of the loans have been repaid to Centrepoint and to BMW Finance and that his clients have been happy with the service he provided in obtaining loans for them. His focus was entirely upon the financial loss or, more importantly, on the lack of any financial loss to any of the lenders or borrowers. We have considered his evidence with care but have concluded that Mr Howarth has very little understanding of the risk to which he exposed Centrepoint and BMW Finance. On the basis of his own evidence, we find that was not a risk to which he turned his mind when he was submitting the false documentation. It is not a risk to which he appeared to have turned his mind before the interviews with the ASIC officers. At the hearing, Mr Howarth continued to see his actions in terms of helping his clients and their intentions to repay the loans rather than extending his sights to the potential risk to which he exposed Centrepoint and BMW Finance.

193. Having regard to all of the evidence, we are not satisfied that Mr Howarth has an appropriate understanding of what is required of him as an AR in the financial services industry. It is all very well to say that loans were obtained and repaid without loss to Centrepoint or to BMW Finance. The three features that we have identified in Mr Howarth's behaviour lead us to believe that he does not have either the knowledge or, perhaps more importantly, the innate instinct to know what is the proper way in which to behave in relation to others. He does not understand the risks that must be weighed up by a lender when considering whether to make a loan. In the

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context of premium lending, we find that he either does not understand that a premium lender requires a policy to secure the loan or he, consciously or sub-consciously, thinks that he, rather than the lender, is best placed to assess the risk. His assessment has clearly proved correct in that none of his clients defaulted on the loans but his evidence on that point indicates quite clearly that he did not understand the position of the lender.

194. Even in relation to his character witnesses, Mr Howarth has not shown the forthrightness that could be expected of a person who has a sense of what other people need to know about in order to make decisions. Take Mr Badawi as an example. While he did not press Mr Howarth for an explanation of his behaviour that led to the banning order and the convictions, it would be thought that a person who did have a sense of what other people needed to know would have told Mr Badawi of the falsification of the documents. The same can be said of Mr Howarth's disclosures to Mr Patterson. Mr Patterson could not recall that Mr Howarth had told him that he had obtained the loans for purposes other than those of funding premium payments. Having considered the whole of the evidence, we are satisfied that Mr Patterson's memory would be more likely to be correct than not and that Mr Howarth did not tell him. In not telling him, Mr Howarth left Mr Patterson in a position to give character evidence on a basis that did not fully inform of the nature of the behaviour that is at the heart of these proceedings.

195. In view of our findings, we have concluded that the protection of the public requires that we make a banning order. We do not see this as having any element of punishment of Mr Howarth for what he has done in relation to the 22 matters at the heart of the five convictions. In reaching that conclusion, we have considered the submission by Mr Xenidis that Mr Howarth should be required to give an enforceable undertaking rather than our making a banning order. As s 11(1) of the ASIC Act provides that ASIC has the functions and powers conferred on it by or under that Act or the Corporations Act and as it has a power to make a banning order under s 920A of the Corporations Act , it must be regarded as having power to accept an enforceable undertaking. That is the effect of s 93AA(1) of the ASIC Act .

196. Section 93AA does not expressly set out any matters that must be taken into account when considering whether or not to accept an enforceable undertaking. It seems to us, however, that the matters to which regard must be had are implicit in s 93AA(1) . Those matters will be the matters in connection with which the enforceable undertaking is given and in relation to which ASIC has a function or power. Therefore, in this case, the matter is Mr Howarth's falsification of the tax invoices leading to his committing and being convicted of fraud. That is a matter in relation to which ASIC has a power to make a banning order. That means that the matters to be taken into account when considering whether or not to accept an enforceable undertaking are those matters relevant to the making of a banning order i.e. protection of the public.

197. We do not consider that an enforceable undertaking in any form would satisfy the need to protect the public. The form in which it was put forward on Mr Howarth's behalf, it would leave him unsupervised for much of the period. It would subject him to two audits each year but he would be unsupervised in between them. Mr Howarth would not be required to undergo any form of training or professional development when, in our view, he clearly requires further education in how to conduct himself ethically and in the risks and liabilities that arise from the contracts that he is brokering on behalf of others. Instead, the effect of the draft enforceable undertaking would be that a consultant would decide what he needs. In view of the findings we have made, this provides far too little protection to the public. In our view, the only way in which the public can be protected is for Mr Howarth to be removed from the industry by virtue of a banning order.

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For what period should the banning order be imposed?

198. Our consideration of this question begins with our understanding of

> [237] s 920B(2)(b)

s 920B(2) . In broad terms, it permits a banning order to be made either permanently or for a specified time. A banning order cannot be made for a specified period, though, if "... *ASIC has reason to believe that the person is not of good fame or character.*" [237] That does not mean that ASIC must make a permanent banning order if it has reason to believe that the person is not of good fame or character. It simply means that it may not make a banning order for a specified time. If it makes a banning order, it must be permanent but, as the making of a banning order is discretionary in our view, it may decide not to make a banning order at all.

199. Section 920B(2) does not mean that there must first be a finding that a person is not of good fame or character being before a permanent banning order can be made. It is clear from the face of it that a permanent banning order can be made without such a finding. In view of that and in view of our conclusion that Mr Howarth should be the subject of a permanent banning order, we do not propose to consider what s 920B(2)(b) means when it refers to a person who "*is not of good fame or character*". We propose instead to explain why the banning order made against Mr Howarth should be permanent rather than for a specified period.

200. Mr Xenidis drew our attention to various lengths of banning orders that ASIC had imposed in various circumstances. That was considered to have some relevance in cases such as *Cullen v Corporate Affairs Commission (NSW)* and *Re Civica Investments Ltd* where the maximum period of disqualification that could be imposed was a five year period. The fact that Parliament imposes a maximum period immediately raises the possibility of determining periods by reference to notions of culpability or perhaps punishment. If protection were the only element to be considered or at least an element of significance, it would be expected that Parliament would leave the period open ended to cater for the case in which the public needs protection for a longer period or permanently. That is what Parliament has done in s 920B(2) . It has left the period to be determined by ASIC and so by this Tribunal. That might well be relevant if we were engaged in a punitive exercise. For the reasons that we have given above, we consider that we are not engaged in that exercise but in an exercise intended to protect the public. It is an exercise that protects the public from being able to engage the services of a person who does not, as we have found, a proper sense of what is the proper thing to do in the one area of activity that we have examined in detail and that . It protects the public while and until he gains that understanding.

201. **Following paragraph cited by:**

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Australian Securities and Investments Commission v McCormack (15 June 2017) (O'Callaghan J)

> 42. The Tribunal was bound to take into account, as a factor among others, maintaining public interest or confidence in the financial services industry. That much is apparent from the decision of the Tribunal in *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; 101 ALD 602 at [201] . The Tribunal in this case cited that decision and quoted from it as follows:
>
> > So much in our professional and business lives depends on trusting that what is stated is in fact so. So much depends on not taking advantage of others. The confidence of those in the financial services industry depends on it and the public is entitled to expect a financial services industry that operates on an ethical basis.
>
> (*Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; 101 ALD 602 at [201] . The difficulty is that the Tribunal, having quoted that passage, paid no apparent regard to it in its reasons.)

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>
> (*Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; 101 ALD 602 at [201] . The difficulty is that the Tribunal, having quoted that passage, paid no apparent regard to it in its reasons.)

In our view, Mr Howarth has yet to gain an insight into what he has done that has led to his current circumstances. That is most unfortunate for we also conclude on the evidence that he is at heart a good man, who makes a considerable contribution to the community through his work with Army Cadets. He is a good friend to those who know him and a good man to his family. Indeed, it is probably these fine qualities that have, together with his lack of understanding of, or perhaps regard for, those who are more at arm's length from him and those he cares for, led in part to his undoing. He has placed his friends and clients above his duties as an AR brokering a contract with premium lenders. He has placed his own needs to obtain funds to pay JJG's taxation liabilities above those duties. In doing so, he has falsified documents on

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which Centrepoint and BMW relied to assess their risks and to make their decisions. So much in our professional and business lives depends on trusting that what is stated is in fact so. So much depends on not taking advantage of others. The confidence of those in the financial services industry depends on it and the public is entitled to expect a financial services industry that operates on an ethical basis.

202. Mr Howarth has yet to understand that. Until he does so, he should not be permitted to work in the financial services industry. That does not mean that he is not able to rehabilitate himself and demonstrate that he is now a person who should not be the subject of a banning order. He can apply for a variation or cancellation of the banning order in due course under s 920D but, in the meantime, we consider that he should be the subject of a permanent banning order.

203. For these reasons, we affirm the decision of the respondent dated 30 May 2006.

I certify that the two hundred and three preceding paragraphs are a true copy of the reasons for the decision herein of Deputy President S A Forgie,

Signed: .....
Jayne Haydon Associate

Date of Hearing 2 August 2007

Date of Decision 8 April 2008
Solicitor for the Applicant Mr J. Xenidis
Legal Financial Services Pty Ltd

Counsel for the Respondent Mr R. Knowles

Cited by:

Van Dieren and Australian Securities and Investments Commission [2019] AATA 4777 (15 November 2019) (Deputy President Boyle)
Howarth and Australian Securities and Investments Commission [2008] AATA 278
Jeffers and Australian Securities and Investments Commission

Van Dieren and Australian Securities and Investments Commission [2019] AATA 4777 (15 November 2019) (Deputy President Boyle)

24. The Respondent's submissions under this consideration are to the following effect:

(a) The Respondent has various statutory functions under the *Corporations Act* and the *Australian Securities and Investments Commission Act 2001 (Cth)* (***ASIC***

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Act). These include the functions as set out in s 1(2) of the *ASIC Act* and s 760A of the *Corporations Act* .

(b) The Respondent's powers to ban under s 920A of the *Corporations Act* mu st be considered in light of the above provisions.

(c) The purpose of a banning order is to protect the public – specifically, existing and future clients of the person banned, the market and the public generally (*Nguyen and Australian Securities and Investments Commission* [2011] AATA 398, [19] ; *Australian Securities Commission v Kippe* (1996) 67 FCR 499, 508). The public protective purpose has been described as "*paramount*" (*Adler* , [59] ; *B undy* , [15] ; *Howarth and Australian Securities and Investments Commission* [2008] AATA 278). Banning orders also have a deterrent purpose (*Australian Securities and Investments Commission v Forge* [2007] NSWSC 1489 (***Forge***), [103]).

(d) Deterrence has two parts: (i) specific, or personal deterrence, of the person against whom the banning order is made; and (ii) general deterrence, of others in a like position, and the public generally (*Forge,* [103] . See also *Australia n Securities and Investments Commission v Beekink* [2007] FCAFC 7; *Jeffers and Australian Securities and Investments Commission* [2015] AATA 537 , [33] ; *Dimitropou los,* [70]).

(e) These matters are critical aspects of the public interest, which must be considered by the Tribunal when deciding whether to exercise its power to stay a banning order (*Bundy* , [15] ; *Technical Education Australia Pty Ltd and Australian Skills Quality Authority* [2018] AATA 3047 (***Technical Education Australia***), [61], [113]).

(f) Also relevant to the Tribunal's power to stay a banning order is the public interest in maintaining the efficacy of a subsisting decision of the Respondent, made after the provision of procedural fairness (*Scott* at [10]). The public interest in the transparency of the Respondent's investigation and decision-making processes is also important (*Poidevin,* [82]).

(g) In deciding whether to order a stay of a banning order the Tribunal should give little weight to the fact that the Respondent did not identify harm, or immediate risk to clients and members of the public (*Poidevin* , [78]).

(h) The Respondent says that the Applicant's argument that there is no need for personal deterrence because he poses no risk to the public is not to the point. So long as the delegate's decision stands, there is a need to specifically deter the Applicant. That need for specific deterrence will not fall away unless and until the delegate's decision is overturned on the determination of the review application. The Respondent also point to the authorities cited above to the effect that the isolated nature of the conduct and otherwise clean record of the person banned, are not a proper basis for a stay.

(i) So far as general deterrence is concerned, this purpose will plainly be impeded by a stay. The Banning Order is already in the public domain. Those who are aware of it will see that the person the subject of that order can continue to provide financial services without restriction. The perception may be that those who engage in conduct sufficient for the imposition of a banning order can get away with it.

(j) The Respondent disputes the Applicant's assertion that the conduct which gave rise to the Banning Order occurred in 2016 and 2017 which is some time ago, and says that the relevant conduct was in the period from late 2016 to

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early 2018 which is relatively recent and that the age of the conduct should not be a ground for a stay any more than its isolated nature or the banned person's otherwise clean record.

(k) The Respondent says that if a stay is granted the result will be that the Applicant can continue to provide financial services which would prohibit the Respondent from fulfilling its statutory functions because:

(i) it will be unable to maintain public interest and confidence in the financial services industry;

(ii) it will experience difficulty protecting the public because the person, who a delegate determined should be banned, is free to provide financial services; and

(iii) it will be compelled to dedicate resources to monitoring the Applicant.

(l) Public interest concerns are enlivened because the breaches related to the preparation of independent reports. Regulatory Guide 112: provides that "An expert report that is biased frustrates rather than assists informed decision-making. Security holders will assume that an expert report is an independent decision and will be misled if the opinion is not". The Respondent also notes Brooking J's observations in *Phosphate Co-operative of Australia Ltd v Shears (No 3)* (1988) 14 ACLR 323, 339 on the criticality of the integrity of supposed independent expert reports to the financial system.

Callychurn and Australian Securities and Investments Commission [2019] AATA 4600 (25 October 2019) (Deputy President J Redfern)

Horwarth v Australian Securities and Investments Commission [2008] AATA 278
Jebb v Repatriation Commission

Callychurn and Australian Securities and Investments Commission [2019] AATA 4600 (25 October 2019) (Deputy President J Redfern)

214. The applicants rely on the decision of Deputy President Forgie in *Horwarth v Australian Securities and Investments Commission* [2008] AATA 278 at [135] , where DP Forgie opined about the seriousness of the consequences of a banning order in describing the context of assessing what amounts to reasonable grounds, noting that a banning order "is a power that is exercised on the basis of the protection of the public and not for the punishment of the person banned or to penalise that person." The part of the passage extracted by the applicants focusses on issues relating to the exercise of discretion rather than whether the question of whether the ground for the exercise of the discretion exists. However, what DP Forgie is highlighting, which is undoubtedly correct and consistent with the decision of the Full Federal Court in *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93, is that in considering whether the Tribunal is satisfied there is reason to believe a person is likely to contravene, when findings of fact may have serious consequences "it may be accepted the Tribunal would exercise greater caution in evaluating the factual foundation for the decision to be reached." [120] In other words, the Tribunal should not rely on inexact proofs and speculative evidence but should be comfortably satisfied about a finding based on objective probative evidence.

Whittle and Australian Securities and Investments Commission [2018] AATA 1861 (18 June 2018) (Mrs J C Kelly, Senior Member)

Howarth and Australian Securities and Investments Commission [2008] AATA 278

Whittle and Australian Securities and Investments Commission [2018] AATA 1861 (18 June 2018) (Mrs J C Kelly, Senior Member)

70. The Tribunal accepts the submission made by counsel for Ms Whittle that the predominant purpose of s 130F of the SIS Act is to protect the public, not to punish the auditor, although the latter may be the practical outcome. [3] That is consistent with the numerous authorities he cited.

via

[3] *Howarth and Australian Securities and Investments Commission* [2008] AATA 278 at [180] .

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278; (2008) 101 ALD 602; (2008) 48 AAR 10
Re Phillips and Inspector-General in Bankruptcy

Re Bolton and Australian Securities and Investments Commission [2018] AATA 976 (24 April 2018) (Deputy President S A Forgie)

5. On behalf of ASIC, Dr Bender submitted that the text of s 206F must first be analysed [8] and that analysis must be conducted in the context of the Corporations Act . The structure of the Corporations Act generally separates regulatory provisions relating to the imposition of disqualification or banning orders from those provisions creating criminal and civil penalty provisions. [9] Regard must be had to the purpose for which the power conferred by s 206F may be exercised and to the matters to which regard must be had under s 1(2) of the *Australian Securities and Investments Commission Act 2001* (ASIC Act) when exercising that power. The purpose for which the power is given to ASIC is protective even though it may serve other purposes such as those of deterrence. Whatever those other purposes are, they do not include the imposition of a penalty or punishment. He relied on cases such as *Rich* [10] citing the propositions put forward by Santow J in *Re HIH Insurance Ltd (in prov liq); Australian Securities and Investments Commission v Adler* [11] (*Adler*), *Kamha v Australian Prudential Regulation Authority* [12] (*Kamha*), *Murdaca* [13] and *Australian Securities and Investments Commission v McCormack* [14] (*McCormack*).

via

[9] *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 101 ALD 602; (2008) 48 AAR 10 (*Howarth*)

McLean And Australian Securities And Investments Commission [2017] AATA 2566 (07 December 2017) (Deputy President B W Rayment)

47. The respondent submits that ASIC must strive to promote the confident and informed participation of investors in the financial system under s. 1(2) of the *Australian Securities and Investments Commission Act 2001* (Cth) . It submits that the power to make a banning order is for the purpose of protecting the public, [1] deterring like conduct [2] and maintaining investor confidence in financial markets. [3]

via

[2] *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 ; *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments*

Commission v Adler (2002) 42 ACSR 80 at [56] ; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [41] and [43] ; *Re Dollas-Ford and Australian Securities and Investments Commission* [2006] AATA 704 at [13] to [15] ; and *Re Musumeci and Australian Securities and Investments Commission* (2009) 109 ALD 677.

Davidof and Australian Securities and Investments Commission [2017] AATA 2594 (07 December 2017) (Deputy President B W Rayment)

20. The objects of a banning order are to protect the public, deter like conduct both by others and the person who is to be made the subject of the banning order and to maintain investor confidence in financial markets: see *Australian Securities Commission v Kippe* (1996) 20 ACSR 679; R*e Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 ; *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd; Australian Securities and Investments Commission v Adler* (2002) 42 ACSR 80 at [56] ; *Rich v Australian Securities and Investments Commission* (2004) 220 CLR 129 at [41] and [43] ; *Re Dollas-Ford and Australian Securities and Investments Commission* [2006] AATA 704 at [13] to [15] ; *Re Musumeci and Australian Securities and Investments Commission* (2009) 109 ALD 677; and *Re Felden v Australian Securities and Investments Commission* (2003) 73 ALD 149 .

Downey and Australian Securities and Investments Commission [2017] AATA 958 (26 June 2017) (Deputy President DR C Kendall)

100. ASIC also submitted that a banning order would act as a form of general deterrence and promote consumer confidence:

General Deterrence & Consumer Confidence

14. The Applicant's conduct, albeit short in duration, was serious in nature in that it involved misleading or deceptive statements about investments in a financial product, which were necessary to obtain a Significant Investor Visa. Those statements were made to the Australian Government in support of a decision about granting certain rights to an overseas national within Australia.

15. The consequences of such conduct ought to be a banning order for an appropriate length of time, for reasons of specific and general deterrence and consumer confidence.

16. General deterrence will be achieved by demonstrating that engaging in conduct that misleads the Government in relation to an overseas national's investment status will result in a person being banned from providing any financial services.

Without imposing a banning order in this case, others will not be dissuaded from engaging in such conduct.

17. As Deputy President Forgie held in Howarth v ASIC (2008) 101 ALD 602 at [180] , 'the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.' *Such deterrence is ultimately for the public protection.*

18. A banning order also has an educative effect on an individual and the industry at large. It informs other participants in the industry that certain conduct is neither acceptable nor tolerated.

19. A banning order promotes and maintains consumer confidence in the market. As stated in section 760A of the Act , the object of the law in

> *relation to financial services and markets is to promote* 'confident and informed decision making by consumers of financial products and services' *and* 'fairness, honesty and professionalism by those who provide professional services.'
>
> *20. For these laws to achieve those objectives in this particular case, the conduct of the Applicant needs to be condemned and a banning order is appropriate to ensure such objectives.*
>
> *21. The Respondent notes that a banning order will also act as a personal deterrent to the Applicant in relation to how he conducts himself in the future with respect to financial services laws once the banning order period ends.*

Australian Securities and Investments Commission v McCormack [2017] FCA 672 (15 June 2017) (O'Callaghan J)

> 42. The Tribunal was bound to take into account, as a factor among others, maintaining public interest or confidence in the financial services industry. That much is apparent from the decision of the Tribunal in *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; 101 ALD 602 at [201] . The Tribunal in this case cited that decision and quoted from it as follows:
>
> > So much in our professional and business lives depends on trusting that what is stated is in fact so. So much depends on not taking advantage of others. The confidence of those in the financial services industry depends on it and the public is entitled to expect a financial services industry that operates on an ethical basis.
>
> (*Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; 101 ALD 602 at [201] . The difficulty is that the Tribunal, having quoted that passage, paid no apparent regard to it in its reasons.)

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> (*Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; 101 ALD 602 at [201] . The difficulty is that the Tribunal, having quoted that passage, paid no apparent regard to it in its reasons.)

JSKN and Australian Securities and Investments Commission [2017] AATA 818 (01 June 2017) (Senior Member T. Tavoularis)

> 19. The regime to be followed by this Tribunal involves an assessment of whether ASIC's order to permanently ban the Applicant is the proper order in all of the circumstances, having

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regard to the protection of the public, specific and general deterrence, and the desire to maintain public confidence in the profession. [13] Regard must be had to the factors appearing in established authority, [14] and ancillary guides to applicable legislation.[15]

via

[13] *Horwarth v ASIC* [2008] AATA 278 at [180] .

Batros and Australian Securities and Investments Commission [2017] AATA 399 (28 March 2017) (Professor R Deutsch, Deputy President)

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278; (2008) 101 ALD 602

Re Sullivan and Australian Securities and Investments Commission

Batros and Australian Securities and Investments Commission [2017] AATA 399 (28 March 2017) (Professor R Deutsch, Deputy President)

114. Deterrence is relevant to the protection of the public: *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 101 ALD 602 . A banning order does not only provide deterrence to the person the subject of the order, but also to others who are involved or might potentially become involved in the industry. A banning order may also have an educative effect on the person concerned and the industry at large. It informs other participants in the industry, including advisers and consumers, that certain conduct is neither acceptable nor tolerated.

Batros and Australian Securities and Investments Commission [2017] AATA 399 (28 March 2017) (Professor R Deutsch, Deputy President)

111. The purpose of a banning order is to protect members of the public: *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 101 ALD 602, Forgie DP at [152]-[180] .

Chapple and Australian Securities and Investments Commission [2016] AATA 1032 (16 December 2016)

Howarth and ASIC 101 ALD 602

Chapple and Australian Securities and Investments Commission [2016] AATA 1032 (16 December 2016)

15. Another purpose of a banning order is deterrence. In *Howarth and ASIC* 101 ALD 602 Deputy President Forgie discussed the effect of earlier decisions with respect to disqualification orders for unprofessional conduct, and came to this conclusion (at [180]):

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance [industry]. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. As was said in Re Donald and Australian Securities and Investments Commission, the Tribunal said:*

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> *116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.*
>
> *117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand, a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed.*

Chapple and Australian Securities and Investments Commission [2016] AATA 1032 (16 December 2016)

21. The jurisdiction to impose a banning order arises by virtue of the eight fraud convictions against Mr Chapple. Standing in the shoes of ASIC to consider the exercise of the discretion in s 920A , the first question is whether a banning order should issue at all: *Howarth and ASIC* 101 ALD 602 at [151] . The answer to that question must be yes, in that the behaviour in question is serious and fully satisfies the criteria referred to in Regulatory Guide 98.

McCormack v Australian Securities and Investments Commission [2016] AATA 1021 (14 December 2016)

50. Much has been written about the purpose to be achieved by making a banning order or a disqualification order. Deputy President S A Forgie in *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 101 ALD 602; 48 AAR 10 (Howarth) canvassed many of the authorities dealing with such decisions, noting that they were not necessarily consistent. She concluded, at [180] :

> *The weight of authority in the Federal and Supreme Courts to whose judgements we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of the penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the offence. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. ...*

Parker and Australian Securities and Investments Commission [2016] AATA 983 (01 December 2016)

180. In *Musumeci v ASIC* [2009] AATA 524 the Tribunal also made it clear that a banning order serves a protective purpose:

> *65. A fundamental and often repeated concept is that the banning power is a protective power. Its principal purpose is to contribute to the public interest by limiting the conduct of financial services business to people with the requisite capacity and integrity to provide the services in a lawful and competent manner: Santow J's propositions (i) to (iv) reflect this stated purpose and are supported by numerous cited authorities: see*

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Australian Securities and Investments Commission v Adler (2002) 42 ACSR 80 page 97 at [56] .

66. A corollary of this often repeated concept is the proposition that the exercise of the banning power is not concerned with punishment and may be regarded as entirely protective: Re Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602; [2008] AATA 278 especially at [170] , [176] and [180] .

Sahay v Australian Securities and Investments Commission [2016] AATA 583 (09 August 2016)

Howarth and Australian Securities and Investment Commission (2008) 101 ALD 602

Sahay v Australian Securities and Investments Commission [2016] AATA 583 (09 August 2016)

36. In *Howarth and Australian Securities and Investment Commission [7]* the Tribunal emphasised the importance of the protection of the public and the reinforcement of the integrity of the financial services industry by the imposition of banning orders. These principles are equally applicable to the credit industry.

via

[7] (2008) 101 ALD 602 at [152]- [180] .

Chong and Australian Securities and Investments Commission [2016] AATA 338 (26 May 2016)
Howarth and Australian Securities and Investments Commission (ASIC), Re (2008) 101 ALD 602
JTMJ and Australian Securities Investment Commission, Re

Chong and Australian Securities and Investments Commission [2016] AATA 338 (26 May 2016)

154. Based on the misconduct of Mr Chong in providing financial services, as set out above (noting, in particular, his contravention of s 1041H(1) of the Corporations Act), the Tribunal finds that the imposition of a banning order for a three to ten year period is appropriate in Mr Chong's case. More specifically, the Tribunal finds that the imposition of a five year banning period is appropriate in the circumstances of Mr Chong's case. In reaching this is finding, the Tribunal notes, in particular, the following:

· the seriousness and duration of Mr Chong's misconduct which cannot be characterised as simply "careless" or "inadvertent" (i.e. which would warrant a lesser banning period). Mr Chong's conduct involved repeated/systemic compliance failures. Imposing a substantial banning order in such circumstances is likely to help participants in financial markets to better understand their obligations;

· the absence of any obvious remorse or insight shown by Mr Chong and the lack of insight displayed by Mr Chong to the consequences of his misconduct. Mr Chong has repeatedly tried to shift the blame for his own failure to comply with the Corporations Law (and, in particular, "financial services laws") onto Meritum (refer to paragraphs 139 and 140 above) rather than taking responsibility for his own conduct as a financial services provider;

· the importance of maintaining standards on the profession - a banning order protects the public from people like Mr Chong being involved in the financial services industry for the period of the order. A banning order may also have the effect of maintaining investor confidence in the financial industry: *Felden and Australian Securities and Investments Commission* (2003) 45 ACSR 111 at [398] . Members of the public are entitled to expect that those who fall short of minimum standards are removed from their profession for a period of time: *Story v National Companies and Securities Commission* (1988) 6 ACLC 560 at 581 .

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· there is a strong protective effect for the public and reinforcement of the integrity and reputation of the financial services industry - It is well established that the purpose of a banning order is to protect members of the public from those who do not meet the standards of conduct expected of a person engaged in the provision of financial services: *Howarth and Australian Securities and Investments Commission (ASIC), Re* (2008) 101 ALD 602 at [152]-[180] per DP F orgie. A banning order is not made to punish a person even though punishment or the imposition of a penalty may be the practical outcome of such an order; and

· the errant behaviour of Mr Chong, and others committing like contraventions of the Corpor ations Act , is more likely to change for the better if Mr Chong is banned for a significant period of time. Deterrence is also relevant to the protection of the public: *Howarth and Australian Securities and Investments Commission, Re* (2008) 101 ALD 602 at [180] per DP Forgie. A banning order does not only provide deterrence to the person the subject of the order but also to others who are involved or might potentially become involved in the industry. A banning order may also have an educative effect on the person concerned and the industry at large. That is, it may inform other participants in the industry, including advisers and clients, that certain conduct is neither acceptable nor tolerated.

Chong and Australian Securities and Investments Commission [2016] AATA 338 (26 May 2016)

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· there is a strong protective effect for the public and reinforcement of the integrity and reputation of the financial services industry - It is well established that the purpose of a banning order is to protect members of the public from those who do not meet the standards of conduct expected of a person engaged in the provision of financial services: *Howarth and Australian Securities and Investments Commission (ASIC), Re* (2008) 101 ALD 602 at [152]-[180] per DP Forgie. A banning order is not made to punish a person even though punishment or the imposition of a penalty may be the practical outcome of such an order; and

· the errant behaviour of Mr Chong, and others committing like contraventions of the Corporations Act , is more likely to change for the better if Mr Chong is banned for a significant period of time. Deterrence is also relevant to the protection of the public: *Howarth and Australian Securities and Investments Commission, Re* (2008) 101 ALD 602 at [180] per DP F orgie. A banning order does not only provide deterrence to the person the subject of the order but also to others who are involved or might potentially become involved in the industry. A banning order may also have an educative effect on the person concerned and the industry at large. That is, it may inform other participants in the industry, including advisers and clients, that certain conduct is neither acceptable nor tolerated.

Frugtniet v Secretary, Department of Family and Community Services [2015] AATA 128 (06 March 2015) (G. D. Friedman, Senior Member)

Howarth and Australian Securities and Investments Commission [2008] AATA 278

Frugtniet v Secretary, Department of Family and Community Services [2015] AATA 128 (06 March 2015) (G. D. Friedman, Senior Member)

The purpose of a banning order is to protect the public and is not a form of punishment, and deterrence is relevant not only to the person who is subject to the order but to others in the industry or might become involved (*Howarth and Australian Securities and Investments Commission* [2008] AATA 278).

Frugtniet v Australian Securities and Investments Commission [2015] AATA 128 (06 March 2015) (G. D. Friedman, Senior Member)

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Allan Vissenjoux and Australian Securities and Investments Commission [2015] AATA 98 (24 February 2015) (John Handley, Senior Member)

Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602

Allan Vissenjoux and Australian Securities and Investments Commission [2015] AATA 98 (24 February 2015) (John Handley, Senior Member)

51. If those objectives are not met, a licensee is at risk of a banning order. In *Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 at [152] the Tribunal decided *the purpose of a banning order is to ensure that members of the public are protected from those who do not meet the standards of behaviour or otherwise expected of a person engaged in the provision of financial services. There is nothing on the face of Pt 7.6 generally or of ss 920A and 920B in particular that suggests that the purpose of imposing a banning order is intended to be punitive*.

Tarrant v Australian Securities and Investments Commission [2015] FCAFC 8 (06 February 2015) (Rares, Yates and Griffiths JJ)

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278; (2008) 48 AAR 10

Re Refugee Tribunal; Ex parte H

Tarrant v Australian Securities and Investments Commission [2015] FCAFC 8 (06 February 2015) (Rares, Yates and Griffiths JJ)

45. In determining whether a banning order was appropriate and, if so, for how long, the AAT considered some of the factors set out by Santow J (as his Honour then was) in *Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 (**ASIC v Adler**) at [50] . The AAT observed that that case related to factors to be considered in the disqualification of a director, but it added that the factors had also been considered in several disqualification cases, including *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 48 AAR 10 .

Liu v Australian Securities and Investments Commission [2014] AATA 817 (31 October 2014) (Ms J L Redfern, Senior Member)

Re Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602; [2008] AATA 278

Shi v Migration Agents Registration Authority

Liu v Australian Securities and Investments Commission [2014] AATA 817 (31 October 2014) (Ms J L Redfern, Senior Member)

119. *Adler* concerned a breach of civil penalty provisions and, in particular, breach of director's duties. Santow J helpfully set out the guiding principles to be taken into account when the disqualification of a director is being considered. These principles have subsequently been adopted in a number of disqualification cases and in my view the principles are equally relevant to the exercise of the discretion under s 920A(1) of the Corporations Act . As observed by the Tribunal in *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602; [2008] AATA 278 at [180] :

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.*

Re Coshott v Australian Securities and Investments Commission [2014] AATA 677 (17 September 2014) (Ms J L Redfern, Senior Member)

Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602; [2008] AATA 278

ASIC V PFS Business Development Group Pty Ltd

Re Coshott v Australian Securities and Investments Commission [2014] AATA 677 (17 September 2014) (Ms J L Redfern, Senior Member)

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> *person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.*

Jackie Chang and Migration Agents Registration Authority [2014] AATA 235 (22 April 2014) (Deputy President RP Handley)

Howarth and ASIC [2008] AATA 278

Hughes & Vale Pty Ltd v New South Wales (No 2)

Jackie Chang and Migration Agents Registration Authority [2014] AATA 235 (22 April 2014) (Deputy President RP Handley)

52. I note that administrative sanctions of this sort are not intended to punish those who have committed misconduct. Rather, they are intended to be protective of the public and with a view to maintaining proper standards in the conduct of that activity. The aims of the Code set out in clause 1.10 reflect this. When considering how best to protect the public and set proper standards, deterrence is a relevant matter, both in terms of the individual concerned and others who are engaged, or may engage, in such activity: see, for example, the discussion in *Howarth and ASIC* [2008] AATA 278 at [167] to [180] .

Re George and Australian Securities and Investments Commission. [2014] AATA 167 (27 March 2014) (Deputy President RP Handley)

Howarth and Australian Securities and Investment Commission [2008] AATA 278

Hughes & Vale Pty Ltd v New South Wales (No 2)

Re George and Australian Securities and Investments Commission. [2014] AATA 167 (27 March 2014) (Deputy President RP Handley)

64. In its 'Statements of Facts, Issues and Contentions', ASIC referred the Tribunal to s 1(2) of the *Australian Securities and Investment Commission Act 2001* (the ASIC Act) which provides that in performing its functions and exercising its powers, ASIC must strive to "promote the confident and informed participation of investors and consumers in the financial system". The Tribunal must, therefore, decide whether a banning order is appropriate having regard to (a) the protection of the public, (b) specific and general deterrence, and (c) maintaining public confidence in the profession. In *Howarth and Australian Securities and Investment Commission* [2008] AATA 278 , at [180] , the Tribunal noted:

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. ...*

Re George and Australian Securities and Investments Commission. [2014] AATA 167 (27 March 2014) (Deputy President RP Handley)

82. Banning orders are not intended to punish those who have committed misconduct. Rather, they are intended to be protective of the public and with a view to maintaining proper standards in the conduct of that activity. In doing so, deterrence is a relevant matter both in

terms of the individual concerned and others who are engaged, or may engage, in such activity; see, for example, the discussion in *Howarth and ASIC* [2008] AATA 278 at [167] to [180] .

Tarrant v Australian Securities and Investments Commission [2013] AATA 926 (20 December 2013) (President D Kerr, Ms J L Redfern, Senior Member)

384. *ASIC v Adler* was about breach of civil penalty provisions and, in particular, breach of directors duties. Santow J helpfully set out the guiding principles to be taken into account when the disqualification of a director is being considered. These principles have subsequently been adopted a number of disqualification cases and in the Tribunal's view the principles are relevant to the Tribunal's discretion. As observed by the Tribunal in *Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602; [2008] AATA 278 at [180] :

> *The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry.*

Seagrim v Australian Securities and Investments Commission [2012] AATA 583 (31 August 2012) (Deputy President D G Jarvis)

Re Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602
Re Lavery and Registrar, Supreme Court (Qld) [No. 2]

Seagrim v Australian Securities and Investments Commission [2012] AATA 583 (31 August 2012) (Deputy President D G Jarvis)

88. I consider that the discretion to impose banning orders should be exercised in such a way as to achieve the objectives set out in this section. It is accordingly appropriate to take into account that a principal consideration is that the power to make a banning order should be to protect the public from persons who do not comply with the requirements of the Act when providing financial products and services, and also to deter the persons whose conduct is in question and other persons in the industry from contravening the Act. The imposition of banning orders will have a punitive effect on the persons banned, but the discretion should not be exercised by reference to that consequence, but rather by reference to the need to protect the public, and the deterrent effect of banning orders, which are the overriding considerations [65] . Nevertheless, personal hardship if a banning order is made is a mitigating factor which may be taken into account [66].

via

[65] I consider that this approach is consistent with the weight of authority very helpfully reviewed by Deputy President Forgie in *Re Howarth and ASIC* (2008) 101 ALD 602 at [149]-[180] .

Re One Re Services Limited and Australian Securities and Investments Commission [2012] AATA 294 (15 May 2012) (Senior Member J L Redfern)

Re Howarth and Australian Securities and Investments Commission (2008) 101 ALD 602

Re One Re Services Limited and Australian Securities and Investments Commission [2012] AATA 294 (15 May 2012) (Senior Member J L Redfern)

59. In *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 , Deputy President Forgie observed that "what amounts to reasonable grounds will depend on the context" but made a distinction between the level of satisfaction that should be reached in having a reason to believe that a person 'will' do something as opposed to whether the person 'may' do something. In *Re De Souza and Australian Securities and Investment Commission* [2009] AATA 725 Senior Member Frost adopted a more flexible approach as follows:

> *With respect, I have not found it helpful to consider the distinction in that way. The safer course, in my view, is to concentrate on the language of s 920A(1)(f) itself, and to be guided simply by the requirement that is expressed there. The requirement placed on me is to determine whether I have reason to believe that Mr De Souza will not comply with a financial services law. It is not a question, in my view, of the material being "more convincing" or "less convincing"; the material will either give me reason to believe, or it will not. It may be, as Callinan J said in Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission [2002] HCA 49; (2002) 213 CLR 543 at [130] , that the expression "reason to believe" poses a "relatively low threshold", but the threshold still needs to be met.*

Nguyen And Australian Securities And Investments Commission [2012] AATA 156 (14 March 2012) (Ms G Ettinger, Senior Member)

> *Re Howarth and Australian Securities and Investments Commission [2008] AATA 278 ; (2008) 101 ALD 602*

Nguyen And Australian Securities And Investments Commission [2012] AATA 156 (14 March 2012) (Ms G Ettinger, Senior Member)

> 141. Accordingly, in deciding on the appropriate penalty, I must have regard to the protection of the public, specific and general deterrence, and maintaining public confidence in the profession, and have regard to the range of factors identified by Santow J in *Re HIH Insurance Limited (in prov liq) and HIH Casualty and General Insurance Limited (in prov liq); Australian Securities and Investments Commission v Adler* [2002] NSWSC 483; (2002) 42 ACSR 80 and *Re Howarth and Australian Securities and Investments Commission* [2008] AATA 278; (2008) 101 ALD 602 , and as reflected in Regulatory Guide 98 published by ASIC.

Ngyuen And Australian Securities And Investments Commission [2011] AATA 398 (09 June 2011)

> 15. The public interest in this case, Mr Lo Surdo submitted, includes protecting the integrity of the financial services market, maintaining confidence in the financial services industry and providing a potential deterrent upon others in the relevant industry (*Re Howath v ASIC* [2008] AATA 278 at [147]). These matters related variously to the public generally, other market participants, and current and prospective clients of the Applicant.

Ngyuen And Australian Securities And Investments Commission [2011] AATA 398 (09 June 2011)

> 26. Moving then to the public interest; ASIC by making a banning order against Mr Nguyen, ensures the protection of the integrity of the financial services market, adds to maintaining of confidence in the financial services industry, and provides a potential deterrent upon others in the relevant industry (*Re Howath v ASIC* [2008] AATA 278 at [147]).

Klusman v Australian Securities And Investments Commission [2011] AATA 150 (08 March 2011) (Ms G Ettinger, Senior Member)

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278 ; (2008) 101 ALD 602

Re Rosenberg And Australian Securities And Investments Commission [2010] AATA 654 (31 August 2010)

111. The Tribunal notes that even if we had found Mr Rosenberg to have contravened either or both of ss 1041B(1) and 1041H , we consider the banning order imposed by the delegate was disproportionate to the alleged contraventions of the Act. The power to impose a banning order in s 920A(1) is a discretionary rather than a mandatory one. In our view, it is unnecessary to revisit the discussion of this issue undertaken by the Tribunal in *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 (*Howarth*), at [139] to [148], which concluded that the power is a discretionary one. We agree with that discussion.

Australian Securities and Investments Commission v Administrative Appeals Tribunal [2010] FCA 807 (30 July 2010) (Dowsett J)

21. The Tribunal then referred to the following passage from an earlier Tribunal decision, *Re Howarth and Australian Securities and Investments Commission* (2008) 101 ALD 602 :

> "Although perhaps trite to say so, what amounts to reasonable grounds will depend on the context. In this case, the immediate context is that of s 920A(1)(f) but the broader context is that of founding a power on which to make a banning order. As we will conclude later in these reasons, that is a power that is exercised on the basis of the protection of the public and not for the punishment of the person banned or to penalise that person. There is no doubt, though, that a consequence of a banning order is to prevent the person banned from undertaking work that person has chosen to do in the past. That may well be work that has provided the person's income and means of supporting him or her self and a family. That is a serious consequence for the person just as protecting the public is a weighty endeavour. These sorts of matters will be borne in mind in deciding whether there exist facts sufficient to induce in the mind of a reasonable person a reason to believe that the particular state of affairs exists.
>
> In the case of s 920A(1)(f) that state of affairs is that the person 'will not comply with a financial services law'. The state of affairs is not the person 'may not comply with a financial services law'. To our minds, the distinction between what a person will do and what that person may do is very important. A state of mind in which a person has a reason to believe that another person may do something may well be reached before and on less convincing material than is required for a state of mind that the person will do something."

JTMJ v Australian Securities and Investments Commission [2010] AATA 350 (11 May 2010)

Re Howarth and Australian Securities and Investments Commission [2008] AATA 278 ; (2008) 101 ALD 602

Re Mann and Capital Territory Health Commission (No. 2) (1983) 5 ALN N261

JTMJ v Australian Securities and Investments Commission [2010] AATA 350 (11 May 2010)

220. In the case of s 920A(1)(f) that state of affairs is that the person "*will not comply with a financial services law*". The state of affairs is not that the person "*may not comply with a financial services law*". To my mind, the distinction between what a person will do and what that person may do is very important. A state of mind in which a person has a reason to believe that another person may do something may well be reached before and on less convincing material than is required for a state of mind that the person will do something. This is the conclusion to which Dr Hughes, Member, and I came to in in *Re Howarth and Australian Securities and Investments Commission* [207] (*Howarth*) and I continue to hold it.

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[207] [2008] AATA 278 ; (2008) 101 ALD 602 at [130]-[136] ; 636-640

JTMJ v Australian Securities and Investments Commission [2010] AATA 350 (11 May 2010)

252. The matters to which we must have regard in considering whether or not to make a banning order have been the subject of some judicial consideration.
Dr Hughes, a Member of the Tribunal, and I considered these in *Re Howarth and Australian Securities and Investments Commission.* [234] Although a lengthy passage,
I include it to explain why I continue to hold the view that the authorities establish that a banning order should only be imposed for protective, and not punitive, purposes:

"*152. If we were to have regard to the licensing framework established by Part 7.6 of the Corporations Act without reference to judicial authorities, it would seem to us that the purpose of a banning order is to ensure that members of the public are protected from those who do not meet the standards of behaviour or otherwise expected of a person engaged in the provision of financial services. There is nothing on the face of Part 7.6 generally or of*
ss 920A and 920B in particular that suggests that the purpose of imposing a banning order is intended to be punitive. There are separate provisions in the Corporations Act creating criminal offences and yet others providing for civil consequences, such as pecuniary penalties, for the breach of certain provisions of the financial services law.[235] There seems to be a clear separation in the Corporations Act of the regulatory provisions relating to suspension or cancellation of AFSLs, those relating to the imposition of banning orders and those relating to the creation of offences and the criminal and civil consequences of breaching them.

153. It might be thought that this proposition would be contrary to the High Court's conclusion in Rich v Australian Securities and Investments Commission [236] when it overruled the judgment of the Full Court of the Federal Court in Australian Securities Commission v Kippe. *[237] The issue that faced the Full Court and its conclusion were summarised by Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ in Rich :*

> '... *In Kippe*, the question was whether statements made in an examination under s 19 of the Australian Securities Commission Act 1989 (Cth) were admissible in evidence in proceedings before the Administrative Appeals Tribunal in which banning orders were sought under ss 829 and 830 of the Corporations Law . Secti on 68(3) of the Australian Securities Commission Act provided that the statements were not admissible in "a proceeding for the imposition of a penalty". The Full Court of the Federal Court held ... that a proceeding which might result in a banning order was to be characterised as "protective" in purpose and not as one for the imposition of a penalty. ..." *[238]*

154. The case of Rich itself involved an application by ASIC to the Supreme Court of New South Wales for orders of discovery against Mr Rich and another. Mr Rich claimed that he should not be required to give discovery because the proceedings exposed him to a penalty in the form of declarations of contravention, compensation orders and disqualification orders so that the privilege against penalties and forfeiture applied. Referring to a disqualification order, the majority, Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ, with whom McHugh J agreed on these aspects, said:

> ' If a disqualification order is made, the person against whom the order is made ceases to be a director, or a secretary of a company, ... unless given permission under ss 206F or 206G of the 2001 Act to manage the corporation concerned. The order for disqualification thus causes the person against whom

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> it is made to forfeit any office then held in a corporation and forbids that person from holding office in a corporation for the duration of the disqualification order. Those consequences, whether taken separately or in combination, when inflicted on account of a defendant's wrongdoing, are penalties. That the penalty is not exacted in the form of a money payment does not deny that conclusion. As the authorities referred to earlier in these reasons reveal, equity's concern with penalties was never confined to *pecuniary* penalties. If exposure to loss of office or exposure to dismissal from a police force ...is exposure to penalty, exposure to a disqualification order is exposure to a penalty.' *[239]*

155. The majority did not go on to consider the basis on which the discretion to make a disqualification order should be made. They referred to authorities in which it had been said that its purpose was to protect the public rather than to punish but immediately distinguished that line of authorities from the issue that they had to decide. The issue they had to decide was:

> '... how should the general principles of the privileges against exposure to penalties and forfeiture find application in the particular circumstances of these proceedings. That inquiry is not assisted by examining why the orders sought in the proceedings might be made or what purposes might be achieved by their making. Rather, attention must be focused upon the nature of the orders that are sought.' [240]

156. On our understanding, the majority gave no consideration at all to the factors that are to be taken into account when making disqualification orders. It appears from their judgment that they had no need to do so. Kirby J, who was in dissent, did not need to do so and expressly said so:

> '... Those decisions are not themselves under review in this appeal. Accordingly, their correctness (and in particular the correctness of the 'fifteen point guide' to disqualification orders considered in one of them) ... [*Re HIH Insurance Ltd (in prov liq)* (2002) 42 ACSR 80 at 97-9 [56] per Santow J] was not argued or considered in this appeal. Principle and fair procedures require that this court reserve its position upon them.' [241]

157. McHugh J, however, did go on to consider them even though he agreed with the majority on the issues they had addressed. He said:

> '... I think that the factors that the courts take into account when ordering disqualification under the corporations legislation make it impossible to hold that the "civil penalty" provisions and, in particular, the disqualification provisions, are purely protective in nature. Despite frequent statements by the judges who administer the legislation that the purpose of the disqualification provisions is protective, what the judges actually do in practice is little different from what judges do in determining what orders or penalties should be made for offences against the criminal law. Elements of retribution, deterrence, reformation and mitigation as well as the objective of the protection of the public inhere in the orders and periods of disqualification made under the legislation.' *[242]*

158. Later in his reasons, McHugh J went on to analyse 15 propositions that Santow J derived from previous authorities regarding a court's powers under ss 260C and 260E to disqualify a person from managing corporations. Santow J had done that in Re HIH Insurance Ltd (in prov liq) [243] *and McHugh J described his judgment as the leading authority on the reasons for a court's exercising its powers under ss 206C and 206E of the Corporations Act to order the disqualification of a person from managing corporations. His Honour categorised some of Santow J's propositions as relating to the protection of the public, others as relating to deterrence and yet others as relating to mitigating factors.*

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159. McHugh J also analysed principles stated in other cases concerned with disqualification orders in the same way. In particular, he referred with approval to the judgment of the Victorian Court of Appeal in Elliott v Australian Securities and Investments Commission [244] *when it said:*

> 'Many of the propositions and factors listed by Santow J bear a similarity to sentencing principles. Matters going to aggravation and mitigation in relation to contraventions of s 588G [of the Corporations Law] need to be considered and accorded proper weight. But above all else protection of the public and deterrence, specific and general, must also be given appropriate consideration.' *[245]*

160. His Honour concluded:

> 'Both Santow J's list of propositions and the comments of the Victorian Court of Appeal indicate that the factors taken into account in the criminal jurisdiction — retribution, deterrence, reformation, contrition and protection of the public — are also central to determining whether an order of disqualification should be made under the Corporations Act and, if so, the appropriate period of disqualification. Those factors also support the conclusion that the jurisdiction exercised under this part of the Corporations Act cannot properly be characterised as purely protective.' [246]

161. Having analysed the judgments of both the majority and of McHugh J, we find, regrettably, that our understanding of the majority judgment in Rich *does not accord with the analysis of it by Senior Member Penglis in* Re Dollas-Ford and Australian Securities and Investments Commission [247] *when he said:*

> ' The proper basis for the exercise of a discretion to impose a banning order was considered by the High Court of Australia in *Rich v Australian Securities and Investments Commission* .... The High Court rejected the proposition stated in *Aus tralian Securities and Investments [sic] Commission v Kippe* ... the purpose of banning orders is solely to protect the public rather than to punish.' *[248]*

162. We note that Finkelstein J reached the same conclusion as Senior Member Penglis in Australia n Securities and Investments Commission v Vizard [249] *when he considered the pecuniary penalty that should be imposed as well as whether a disqualification order should be made. His Honour said:*

> ' It could hardly be denied that, as a rule, directors of publicly listed companies are sensitive to risk. The few that may be tempted to gain prestige, wealth and security by illegal means can be dissuaded from that course if the risk of detection and serious punishment is too great. Although the civil penalties are not substantial when compared with the possible gains from corporate crime, other penalties may act as a better deterrent.
>
> > This is where the possibility of disqualification from office can play an important function. It may be accepted that the principal object to be achieved by a disqualification order is protective: protection of the company and its shareholders against the likelihood of repetition of the offending conduct. The mistake is to treat this as the sole purpose of a disqualification order. That error has now been exposed. In *Rich v Australian Securities and Investments Commission (2004) 209 ALR 271; 50 ACSR 242 ; [2004] HCA 42 the High Court made it clear that a disqualification order can be imposed not only to protect the company's shareholders against further abuse, but also by way of punishment and, importantly, for general deterrence. I am confident the fear of losing both their position from business life, as well as*

> *their good reputation, will be an effective deterrent in the case of many a director who is contemplating a dishonest course for gain. Few corporate crimes are spontaneous. There is always time to consider the consequences. The risk of a long period of disqualification, for example so long that it will keep the director forever out of public corporate life, may well tip the scales .' [250]*

163. Any disagreement we might have with a judgment of the Federal Court is, when all is said and done, irrelevant if what is said in that judgment is not obiter dicta *and if there is no relevant conflicting authority from a superior court. McHugh J's judgment accorded with the statements made in these two cases but not so the majority's. The majority were at pains to distinguish between an enquiry that was relevant to the resolution of the issue it had to decide – the nature of the orders sought – and an issue it did not have to decide – why an order might be made and the purposes it might achieve.*

164. The judgment of Finkelstein J places us in a very difficult position as we are bound by judgments of superior courts. In trying to resolve our dilemma, we note that what McHugh J said in Rich and Australian Securities and Investments Commission *is* obiter dicta*. What Finkelstein J said in* Australian Securities and Investments Commission v Vizard *is not necessarily so but it is not consistent with conclusions reached on the same or analogous issues in other superior courts. We will begin by referring to passages from judgments to which McHugh J referred in* Rich and Australian Securities and Investments Commission.

165. After analysing passages from the judgment of Bryson J in Re One.Tel Ltd (in liq); Australian Securities and Investment Commission v Rich [251] *when ordering that persons were disqualified from holding office as company officers, McHugh J concluded:*

> ' It is difficult to read these passages without concluding that there is little difference in the approach of his Honour and the approach of judges making orders or imposing sentences in the criminal jurisdiction. It is hard to escape the conclusion that, in determining the period of disqualification, the courts consider that the larger the loss the longer the period of disqualification that is justified. If that is so, and I think that it is, it indicates that *retribution* is as much a factor as protection of the public. There is no *a priori* reason why the protection of the public requires a person who is responsible for the loss of $100m to be disqualified for a longer period than a person who is responsible for the loss of $100,000. The person responsible for the smaller loss may be a far greater danger to the public than the person responsible for the larger loss. Yet, given the approach of the courts, if other things are equal, the person responsible for the major loss will almost certainly receive a far longer period of disqualification.
>
> > Another matter which suggests that retribution is a factor behind the making of a disqualification order, including the appropriate length of disqualification, is the relevance of the defendant's having obtained some personal benefit from the conduct that gives rise to the application for disqualification. Thus, in *Australian Securities Commission v Donovan*, Cooper J said... that in determining whether a disqualification order is appropriate and, if so, the length of such disqualification, the extent to which the person benefited from the conduct personally or tried to conceal it are relevant matters.
> >
> > Further, the fact that courts take into account mitigating factors suggests that the jurisdiction is not purely protective. For example, both the Victorian Supreme Court and the Court of Appeal in *Austra lian Securities and Investments Commission v Plymin (No 2)*...[(2003) 21 ACLC 1237] and *Elliott*...[(2004) 205 ALR 594 ; 48 ACSR 621] and Gzell J in the New South Wales Supreme Court i*n Australian*

> *Securities and Investments Commission v Whitlam (No 2)*...[(2002) 42 ACSR 515] took into account mitigating factors when determining whether to order disqualification and when assessing the appropriate period of disqualification of the defendant company directors. In *Plymin* and *Elliott* such factors included the defendants' previous unblemished corporate record, remorse and their cooperation with relevant authorities, including the Australian Securities and Investments Commission and external administrators... In *Whitlam (No 2)*, Gzell J also took into account the loss to the community of the defendant's services if he were disqualified and the irreparable effect of the proceedings upon the defendant's reputation, income, career and family.' [252]

166. *The case of* Australian Securities Commission v Donovan ,[253] *to which McHugh referred in this passage required Cooper J to consider s 1317EA(3)(a) of the* Corporations Law *giving the Court power to make an order prohibiting persons whom it has declared to have contravened certain provisions in certain ways, from managing a corporation. Cooper J described s 1317EA(3)(a) as* "... a protective provision designed to protect the public and to prevent a corporate structure being used by individuals in a manner which is contrary to proper commercial standards." [254] *He cited* Re Tasmanian Spastics Association; ASC v Nandan ,[255] *which had considered the same section as well as* Nicholas v Corporate Affairs Commission ,[256] *which had considered s 562A(3) of the* Companies (Victoria) Code. *Cooper J concluded:*

> 'Because the power under s 1317EA(3)(a) is predominantly protective, it is relevant to have regard to the officer's prior corporate conduct, to the present activities of the officer, to the likelihood that the officer will repeat or engage in conduct of the type which constituted the contravention of s232(4) which gives rise to the application, including whether or not the officer shows contrition or accepts responsibility for his or her conduct, and the extent to which the officer benefited from the conduct personally or tried to conceal it.' [257]

167. *Contrary to the earlier passage to which we have referred, Cooper J described the power in this passage as '* **predominantly** protective' *(emphasis added). That modification followed his reference to the cases of* Re Civica Investments Ltd [258] *and* Cullen v Corporate Affairs Commission. [259] In each, consideration was given to whether the relevant power to disqualify should be exercised for the maximum period or for something less. In Re Civica Investments Ltd, *Nourse J considered a power to disqualify that was limited to a five year period. He said that the court should:*

> '... what the court has to do is to impose such a period of disqualification, if any, as it thinks appropriate, bearing in mind the upper limit of the power and disregarding its further power to give leave to act in the future notwithstanding the disqualification. Speaking for myself, I certainly would not think it right to impose the maximum period of disqualification irrespective of the degree of blame and then leave it to the person concerned to come back and seek leave to act in the future.
>
> Secondly, the fact that the five year period is a maximum must, on general principles, mean that the longer periods of disqualification are to be reserved for cases where the defaults and conduct of the person in question have been of a serious nature, for example, where defaults have been made for some dishonest purpose, or wilfully and deliberately, or where they have been many in number and have not been substantially alleviated by remedial action and convincing assurances that they will not recur in the future.' [260]

168. *Cooper J also referred to this passage from the judgment of Young J in* Cullen v Corporate Affairs Commission (NSW). *Young J was considering an appeal from a notice that the Corporation*

Affairs Commission (NSW)(CAC) had given Mr Cullen prohibiting him from being in any way concerned in or taking part in the management of a corporation. The CAC had issued the notice under s 562A(3) of the Companies (NSW) Code *which, at the relevant time, permitted it to impose a prohibition for a period not exceeding five years. It was in that context that Young J said:*

> ' The next question is for what period should that disqualification be. There is not much authority on this point. In *Re Civica Investments Ltd* (1983) BCLC 456, Nourse J held that the maximum period of disqualification should be reserved for defaults of a serious nature such as dishonesty or a large number of defaults not substantially alleviated by appropriate remedial action and/or convincing assurances that they would not recur. As far as I know that case has never been departed from although I must confess I do not know of any other cases in the reports that deal with this point.
>
> > The present case was not the worst case. The delegate did not find, nor did the liquidator find, any fraud or dishonesty. The case was one of, there *[sic]*, inefficiency, or as the learned delegate put it, bungling. The director did not take appropriate action quickly enough to minimise loss. That he intermingled the affairs of different corporate entities, that he did not fully understand the obligations of a director and, most importantly, did not pay over group tax.
> >
> > The learned delegate said that unless there were strongly persuasive circumstances which would warrant a reduction of five years he should not reduce it. He said this notwithstanding the submission of counsel for the Corporate Affairs Commission that on the facts before him it was not the worst case. Learned counsel says that he does not adhere to that submission before me because further facts have come out which make the case more serious than the evidence before the delegate suggested.
> >
> > It seems to me, with respect, the learned delegate overlooked the words of Nourse J and took the view that five years' disqualification was the norm. I am of the view that I should follow the view of Nourse J. This is not the worst case, but on the other hand it is not a trivial case and I think in all the circumstances, especially as this is one of the first cases where this sort of conduct has come under consideration for disqualification, that disqualification for two years from today would be appropriate. I have taken into account the fact in fixing this period that de facto the director has not been involved in being a director of a company since last May.' *[261]*

169. It is important to note that both Re Civica Investments Ltd *and* Cullen v Corporate Affairs Commission (NSW) *concerned provisions that permitted the disqualification periods to be no more than five years. That was a feature recognised by Cooper J in* Australian Securities Commission v Donovan *when he surmised that a maximum of that length must mean that the longer periods of default must, on general principles, be reserved for the cases where the person's defaults and conduct has been more serious. That can be read as introducing an element of punishment but, when read in the context of a maximum period, need not necessarily be read in that way at all.*

170. Any notion that punishment is relevant in the imposition of a period of disqualification was dispelled by the Full Court of the Federal Court in Kamha v Australian Prudential Regulation Authority, [262] which was decided after Rich. *It said:*

> '73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise

of judicial power: *Police Service Board v Morris & Martin* [1985] HCA 9; (1985) 156 CLR 397 at 403 and 407 . Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct.' [263]

171. More recently, in 2007, in Australian Securities and Investments Commission v Forge , [264] *White J of the Supreme Court of New South Wales considered whether to make a disqualification order against Mr Forge for a greater or lesser period or to accept an enforceable undertaking. Earlier in his reasons, his Honour had quoted the passage from McHugh J's judgment that the factors of retribution, deterrence, reformation, contrition and protection of the public are also central to determining whether an order for disqualification should be made under the Corporations Act and, if so, the appropriate period of disqualification.* [265] *White J also referred to the fact that McHugh J had cited with approval the observations of Bryson J in* Re One.Tel Limited (in liq); Australian Securities and Investments Commission v Rich *that only limited guidance can be obtained from other decisions with respect to disqualification orders and the period for disqualification. That is so because each decision is related to its own facts and the circumstances of each defendant are special and vary greatly.* [266]

172. Somewhat in contrast to these passages, when White J came to consider whether an enforceable undertaking should be accepted in lieu of a disqualification order, White J said:

> ' The proffered undertaking is in narrower terms than a banning order. A banning order would prohibit Mr Forge from managing a corporation. That expression is defined by s 91A of the Corporations Law . It extends to the person being in any way (whether directly or indirectly) concerned in or taking part in the management of a corporation. However, I understood that the proffered undertakings were intended to extend to managing a corporation in this sense, as well as being a director of a corporation. It was submitted for Mr Forge that the proffered undertaking would fully protect the public. Indeed, unless a disqualification order were made for life, it was said that the public would have greater protection by the acceptance of such an undertaking than it would if a disqualification order were made. That is because the undertaking is proffered as a perpetual undertaking.
>
> > I do not accept this submission. A disqualification order is protective of the public for the period of disqualification against misconduct by the person disqualified. However, that is not its only purpose. The object of general deterrence is also of great importance. That object is served by the public disapproval of the impugned conduct being marked not only by a declaration that the conduct has contravened the Act, but by an order for disqualification of the contravener from managing a corporation either for a fixed period or for life. The shame or embarrassment which accompanies such an order is not designed as punishment, although it might have that effect, but serves as a general deterrent to others who might be tempted to breach their duties as directors or officers of a company. In my view, the objective of general deterrence would not be sufficiently served by the acceptance of the proffered undertaking.' [267]

173. This passage clearly excludes punishment as a factor in the imposition of a banning order even though it notes that punishment may be an effect of its imposition. White J had referred to McHugh J' judgment but appears not to have read it in the way that led him to reach the conclusion reached by Finkelstein J in Australian Securities and Investments Commission v Vizard.

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174. The conclusion reached by White J is also consistent with earlier authorities. We refer, for example, to Story v National Companies and Securities Commission *,[268] in which Young J (in Eq) considered s 60 of the* Securities Industry (New South Wales) Code*. That section provided that the then National Corporations and Securities Commission (NCSC) could revoke the licence held by a dealer in certain circumstances. One of those circumstances arose where the NCSC had reason to believe that the dealer had not performed the duties of the holder of such a licence. One of the grounds on which the NCSC could revoke a licence was that the person was not performing his or her duties efficiently, honestly and fairly.*

175. Among other matters, Young J considered whether the dealer's licence should have been revoked. In doing so, he said that a finding that a dealer had been inefficient was not necessarily sufficient to justify a conclusion that his or her licence should be revoked. He considered what matters should be taken into account when he said:

> 'On the matter as to whether revocation should follow an opinion of inefficiency, various matters have to be weighed. One of these is the public interest that people should be permitted to follow a trade or profession which they are qualified to follow. Another is that the public expect those who fall short of minimum standards to be removed from the profession, at least until such time as the regulatory body can be assured that they are able to perform their functions efficiently. A third consideration is that the step of revocation is purely for the public benefit and is not punitive.' *[269]*

176. Although not part of the ratio decidendi *of the case, the Full Court of the Federal Court maintained that theme in* Australian Securities Commission v Kippe and Another*. [270] They said in relation to a banning order made under s 829 of the* Corporations Law *as in force at the time against a dealer's representative:*

> 'The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventive in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing that person from participation therein.' *[271]*

A similar theme is found in the judgment of *Emmett, Allsop and Graham JJ in Kamha v Australian Prudential Regulation Authority [272] when they said:*

> '73 While punishment of a criminal offence is the exercise of judicial power, the imposition of disciplinary penalties does not necessarily entail the exercise of judicial power (*Police Service Board v Morris & Martin* [1985] HCA 9; (1985) 156 CLR 397 at 403 and 407). Disciplinary jurisdiction is significantly protective and does not involve a punitive element in the nature of the punishment of a criminal offence. Jurisdiction in disciplinary matters is exercised to protect the public, not to punish the person disciplined. The object of protection of the public also includes deterring others who might be tempted to fall short of the relevant standards of conduct." *[273]*

177. This approach is consistent with the approach taken by superior courts in relation to statutory powers to regulate other professional, business and other activities that affect members of the public. The judgement of the New South Wales Court of Appeal in New South Wales Bar Association v Hamman [274] *provides an example. The court considered disciplinary proceedings against a legal practitioner and said*:

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> "... Disciplinary proceedings against a legal practitioner are concerned with the protection of the public (*Wentworth v New South Wales Bar Association* (1992) 176 CLR 239 at 250-251). The object is not to punish the practitioner but to protect the public and to maintain proper standards in the legal profession. ..." [275]

178. Authorities such as New South Wales Bar Association v Evatt [276] *and* Hardcastle v Commissioner of Police [277] *acknowledge that, in achieving the objects of public protection and the maintenance of proper professional standards, an order made in disciplinary proceedings may involve great deprivation for the person who is the subject of that order. Despite that, the object of the order is not to punish or to extract retribution.*

179. Intentionally committing a wrong-doing is not the only reason to cancel or suspend a person's right to engage in his or her chosen profession. As Kirby P said in Pillai v Messiter [No.2]: [278]

> "... The public needs to be protected from delinquents and wrong-doers within professions. It also needs to be protected from seriously incompetent professional people who are ignorant of basic rules or indifferent as to rudimentary professional requirements. Such people should be removed from the register or from the relevant roll of practitioners, at least until they can demonstrate that their disqualifying imperfections have been removed. ...". [279]

180. The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. As was said in Re Donald and Australian Securities and Investments Commission *,[280] the Tribunal said:*

> "116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.
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> 117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand, a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed." [281]

via

[234] [2008] AATA 278

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Moore And Australian Securities And Investments Commission [2008] AATA 1164 (23 December 2008)

24. In *Howarth v Australian Securities and Investments Commission* (2008) 101 ALD 602 Deputy President Forgie and Dr Hughes, Member, offered some views as to the use of the words "fraud", "dishonesty" and "serious fraud" in the Corporations Act (at [121] to [122]). However, these observations were made in a different context to that before us. For the purposes we are considering we prefer the simple analysis which has led us to our conclusion. To the extent to which DP Forgie and Dr Hughes expressed the view, however, that dishonesty alone will not suffice and both elements of fraud must be present in an offence before the definition of "serious fraud" can operate to deem a conviction of an offence to be a "conviction of fraud" for the purposes of s 920A, we do not agree (see *Howarth* at [111] to [129]). We note that in *Howarth* (at [123]) the Tribunal appears to refer to s 912A(1)(c) in error for s 920A(1)(c) .

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Tweed v Australian Securities and Investments Commission [2008] AATA 514 (19 June 2008)
Re Howarth and Australian Securities and Investments Commission [2008] AATA 278
Re Ngu and Minister for Immigration and Citizenship

Tweed v Australian Securities and Investments Commission [2008] AATA 514 (19 June 2008)

149. In *Re Howarth and Australian Securities and Investments Commission* , [172] Dr Hughes and I considered the meaning of the expression " *reason to believe*" as it appears in s 920A(1)(f). I adopt our analysis of the previous authorities, which have considered the meaning of that expression in contexts other than s 920A(1)(f) and to which we referred: *Boucaut Bay Co Ltd v The Commonwealth* ,[173] *WA Pines Pty Ltd v Bannerman* ,[174] and *Power v Hamond*. [175] In *Re Howarth*, we applied the principles developed in those cases to what is meant by having "*reaso n to believe*" as required by s 920A(1)(f). I adopt our conclusion:

"*135. Although perhaps trite to say so, what amounts to reasonable grounds will depend on the context. In this case, the immediate context is that of s 920A(1)(f) but the broader context is that of founding a power on which to make a banning order. As we will conclude later in these reasons,*

that is a power that is exercised on the basis of the protection of the public and not for the punishment of the person banned or to penalise that person. There is no doubt, though, that a consequence of a banning order is to prevent the person banned from undertaking work that person has chosen to do in the past. That may well be work that has provided the person's income and means of supporting him or her self and a family. That is a serious consequence for the person just as protecting the public is a weighty endeavour. These sorts of matters will be borne in mind in deciding whether there exist facts sufficient to induce in the mind of a reasonable person a reason to believe that the particular state of affairs exists.

136. In the case of s 920A(1)(f) that state of affairs is that the person 'will not comply with a financial services law'. *The state of affairs is not the person* 'may not comply with a financial services law'. *To our minds, the distinction between what a person will do and what that person may do is very important. A state of mind in which a person has a reason to believe that another person may do something may well be reached before and on less convincing material than is required for a state of mind that the person will do something.*"

via

[172] [2008] AATA 278

Tweed v Australian Securities and Investments Commission [2008] AATA 514 (19 June 2008)

159. For the reasons Dr Hughes and I gave in *Howarth*, [176] I have concluded that a finding that one of the gateway provisions in s 920A(1) has been met does not mean that a banning order must be made against a person. In providing that s 920A(1) provides that "*ASIC may make a banning order ...*" in the specified circumstances, there is an indication that the power is a discretionary power. When the purpose of a banning order and the statutory context in which the power is given are considered, I find that the discretionary nature of the power is confirmed.

via

[176] See [2008] AATA 278 at [139] –[149]

Tweed v Australian Securities and Investments Commission [2008] AATA 514 (19 June 2008)

167. In *Howarth*, Dr Hughes and I spent some time exploring the purposes for which the power under s 920A(1) could be properly exercised. There has been some suggestion that it can be used as a punitive measure against a person whose behaviour brings him or her within one of the paragraphs of s 920A(1). We rejected

that suggestion and I adopt our reasons for doing so. [181] I repeat our conclusion that:

"*180. The weight of authority in the Federal and Supreme Courts to whose judgments we have referred seems to be to the effect that a disqualification order, and so a banning order, is made on the basis of what will protect the public. It is not made on the basis of what will punish the person concerned even though punishment or the imposition of a penalty may be the practical outcome of the making of an order. Deterrence is also a relevant concern. Deterrence may relate both to the person concerned and to others engaged or*

potentially engaged in the finance. If imposed, it is relevant in the case of the individual in that it protects the public from that person's being involved in the industry. Whether imposed or not, the possibility that an order might be made is itself a deterrent both to an individual and to all of those engaged in that industry. As was said in Re Donald and Australian Securities and Investments Commission, [182] *the Tribunal said*:

> '116. The imposition of a banning order against a dealers representative certainly achieves, in respect of at least one member of that profession, the second aspect of public protection for the period in respect of which it is imposed. That is, it ensures that the public can be certain that a particular person, who has been found to have breached a statutory standard applicable to him or her, is no longer entrusted with dealing in shares. At the same time, it informs both other dealers representatives and members of the general public that the behaviour is neither acceptable nor tolerated.
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> 117. Whether it achieves the first aspect of public protection is more debateable. A period of prohibition may, rather like a retreat or a period of contemplation, lead a person to reflect upon his or her behaviour and to come to an understanding of why that behaviour has been regarded as inappropriate by others and, if it is necessary to do so, to take steps to improve his or her knowledge of what is an appropriate manner of behaviour. On the other hand, a period of prohibition may not result in such reflection or lead to a person's coming to any greater understanding than he or she had when it was imposed.' [183] " [184]

via

[181] [2008] AATA 278 at [152]-[181]

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