Australian Law Reform Commission

Financial Services Legislation Interim Report A (2021)

Submission to Retain the Conjunctive Standard of "Efficient, Honest and Fair" in the Corporations Act

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I write to express my concern with Proposal A20(a) in the ALRC's *Financial Services Legislation Interim Report A* (2021) to separate the three conjunctive standards in the statutory obligation of the holder of an Australian Financial Services Licence (AFSL) under s 912A(1)(a) of the Corporations Act 2001 (Cth) to act "efficiently, honestly and fairly" into three separate paragraphs. The Report contains no evidence beyond two recent dicta in the Full Federal Court and a line in an academic article for the need for this proposal. There is no evidence of the mischief if any which it seeks to address and no research is presented to support it.

I write as a legal academic who has researched, published and taught in this area for 40 years at Monash Business School and its predecessors, and now at Swinburne Law School, with links going back to the commencement of the then National Companies and Securities Commission and the efficient, honest and fair standard in 1980. The ALRC has cited my two articles "Providing Financial Services 'Efficiently, Honestly and Fairly'" at (2006) 24 *Company and Securities Law Journal* 362 and "Providing Financial Services "Efficiently, Honestly and Fairly: Part 2" at (2020) 37(6) *Company and Securities Law Journal* 382. My first published research in the financial services area was "Good Faith in Insurance Contracts" in (1980) 8(1) *Australian Business Law Review* 37.

In my view, the ALRC has proposed a solution for a legal problem which does not exist. It asserts "conflicting case law" on the basis of two dicta in Australian Securities and Investment Commission v Westpac Securities Administration Limited (ASIC v Westpac) in the Full Federal Court from Allsop CJ and O'Bryan J and from one academic commentator. The dicta are not case law and give no reason to change established case law going back 40 years.

I submit that there is no problem to be corrected by legislation and that Proposal A20(a) be shelved as a false start.

This submission is set out as follows:

(1) *Submission – Shelve Proposal A20(a)*
(2) *Some History of the Statutory General Obligation to do All Things "Efficiently, Honestly and Fairly"*
(3) *The ALRC has been Distracted by Two Dicta Which Question the Conjunctive Reading of Efficient, Honest and Fair*
(4) *The Disjunctive Interpretation Would Destroy the Hendiadys of the Three Part Standard of Efficient, Honest and Fair*
(5) *The Conjunctive Interpretation is Confirmed in Almost 40 Years of Case Law*
(6) *Submission – Repeat, Shelve Proposal A20(a)*
(7) Further Research

(1) *Submission – Shelve Proposal A20(a)*

Proposal A20(a) of the ALRC's *Financial Services Legislation Interim Report A* (2021) (Report) recommends separating the three conjunctive standards in the statutory obligation of the holder of an Australian Financial Services Licence (AFSL) under s 912A(1)(a) of the *Corporations Act 2001* (Cth) to act "efficiently, honestly and fairly" into three "individual paragraphs". The Report contains little evidence beyond two recent dicta in the Full Federal Court in ASIC v Westpac[1] and a line in an academic article that a "cloud of uncertainty now hangs over the future treatment of s 912A(1)(a)"[2] for the need for this proposal. There is no evidence of the mischief if any which it seeks to address, and no research is cited to substantiate any uncertainty in support of the proposal.

The Proposal would amend s 912A(1)(a) and its extensive caselaw which goes back to the enactment of its predecessor in 1980. The benefit of such a proposal would not be what the ALRC called "not free from doubt (Report, [13.65]).

The efficient, honest and fair standard is at the heart of the regulation of the conduct of holders of an AFSL and their representatives. Its importance can only grow after it has been "weaponised" with amendments in 2019.[3]

I submit that the ALRC has proposed a solution for a legal problem which does not exist. It asserts "conflicting case law" (Report, [13.43]) on the basis of two dicta in *Australian*

[1] *Australian Securities and Investment Commission v Westpac Securities Administration Limited* [2019] FCAFC 187; (2019) 373 ALR 455, [171] (Allsop CJ); [424] (O'Bryan J); (ASIC v Westpac).

[2] Joshua Anderson, "Duties of Efficiency, Honesty and Fairness Post-Westpac: A New Beginning for Financial Services Licensees and the Courts?" (2020) 37 C&SLJ 450, 453, cited by ALRC, [13.63].

[3] Following commencement of the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties Act 2019* (Cth) s 2: ALRC, n 1, [13.50], citing Anderson, n 2, 466.

Securities and Investment Commission v Westpac Securities Administration Limited[4] in the Full Federal Court from Allsop CJ and O'Bryan J and from one legal author in an academic article.[5] The dicta are not case law and give no reason to change established case law going back 40 years unless and until there is an authoritative determination of an appellate court following full argument (Report, [13.54).

(2) *Some History of the Statutory General Obligation to do All Things "Efficiently, Honestly and Fairly"*

The evidence of financial market misconduct presented in the Rae Report (1974)[6] and its recommendations were fresh in mind in the early years of Australia's first national financial services regulation. The collapse of the Poseidon mining boom in 1970 and the failures of self-regulation motivated action by the Commonwealth government, and a Senate Committee known by the name of its first chair was appointed to investigate the collapse and the failures of the self-regulation of the financial services sector. The evidence revealed widespread evidence of misconduct, conflict of interest and the failure of self-regulation. Stock exchanges had failed to ensure that their stock exchange members provided an "honest, skilled, unbiased and efficient service".[7]

The origin of the general obligation to do all things "efficiently, honestly and fairly" was in the first State-based financial services legislation such as the *Securities Industry Act 1970* (Vic) s 19(1)(a) and the equivalents in the other three then non-Labor states of NSW, Queensland and Western Australia administered by the-then Interstate Corporate Affairs Commission. This was going to be replaced by *Corporations and Securities Industry Bill 1974* (Cth) (the *"Murphy Bill"*) which was never passed as it lapsed with the dismissal of the Whitlam government in 1975. Instead it was replaced with the Fraser government's Commonwealth-State Scheme for Co-operative Companies and Securities Regulation signed in 1978 and in force in 1980 (Co-operative Scheme) which involved Commonwealth and state legislation administered by the new National Companies and Securities Commission (NCSC) and the State and Territory Corporate Affairs Commissions. Section 48(a)(v) of the *Securities Industry Act 1980* (Cth) and the matching State Codes included the duty of the holder of an AFSL to do all things "efficiently, honestly and fairly" as one of the prerequisites for the grant of an AFSL. This standard was added to the Securities Industry Act and Codes by an amendment in 1981 as grounds for revocation or suspension of an AFSL (s 60(1)(b)(ii)).

There was never any doubt that the efficient, honest and fair standard imposed a "single, composite and omnibus obligation rather than three individual obligations" (ALRC, [13.55]),[8] that each "conditioned" the other and that the three obligations were never intended

[4] Above, n 1.

[5] Above, n 2

[6] Senate Select Committee on Securities and Exchange, Parliament of Australia, *Australian Securities Markets and their Regulation* (1974) (Rae Report).

[7] Rae Report, n 6, [15.6].

[8] Paul Latimer, "Providing Financial Services 'Efficiently, Honestly and Fairly'" (2006) 24 C&SLJ 362; Paul Latimer, "Providing Financial Services "Efficiently, Honestly and Fairly: Part 2" (2020) 37 C&SLJ 382.

to stand alone as individual standards (ALRC, [13.55]). The standard was to be conjunctive and compendious. Compendious at that time had the same meaning as expressed by Allsop CJ, namely a "single, composite concept, rather than containing three discrete behavioural norms".[9] The standard of "efficiently, honestly and fairly" is a compendious phrase which has always been given a conjunctive interpretation.[10]

I write with personal knowledge of the origin of the efficient, honest and fair standard, and in so doing, I write to commemorate the memory of one of the architects of the section, the late Leigh Masel, the foundation chair of the predecessor of ASIC, the NCSC (1982-1991).

I had personal interaction with Leigh Masel in the 1980s and heard him explain his vision for the then-new efficient, honest and fair standard many times.[11] Masel hosted me as a visiting lawyer and researcher in the very early days of the NCSC during a university sabbatical in 1982. In return, as a staff member at the predecessor of what is now the Monash Business School, I hosted Masel when he was appointed a Visiting Fellow in 1985.[12]

I can answer your question that there was never any doubt that the efficient, honest and fair standard imposed a "single, composite and omnibus obligation rather than three separate obligations" (ALRC, [13.55]), that each "conditioned" the other and that the three obligations were never intended to stand alone (ALRC, [13.55]). Masel intended the standard to be conjunctive and compendious and was proud of its scope. Compendious at that time had the same meaning as used by Allsop CJ, namely a "single, composite concept, rather than containing three discrete behavioural norms".[13] I remember Masel saying that the standard would replace the traditional standard of "fit and proper person" in legislation like the Securities Industry Act 1970 (Vic) s 19(1)(a) which was static in point of time and did not test the performance of the licensee.

Masel was an influential spokesperson for the-then new Co-operative Scheme of financial regulation, and presented endless speeches to promote the new NCSC and its role. His words would have been heard by and known to the legal profession and the financial services industry, and his views would be on record in the many addresses he gave as foundation chair of the then NCSC. They would have been deposited in the then NCSC library, and sadly, as they were largely before IT, they cannot be searched online.

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[9] ASIC v Westpac, [170].

[10] This commenced with Young J in *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, 672; cited by ALRC, n 1 [13.56]; upheld in *ASIC v Westpac Securities Administration Limited* [2018] FCA 2078, with authorities cited at [416]-[420] (Gleeson J).

[11] See, eg, David Knott, *ASIC Friend or Foe of Business*, Speech, 9 July 2002. Knott reflects on the role and vision of Leigh Masel in the first two pages.

https://download.asic.gov.au/media/1310473/AICD_speech_090703.pdf.

[12] Masel's educative tone is evident in "Microeconomics Suffers From Neglect", *Monash Reporter*, 19 August 1985.
https://www.monash.edu/__data/assets/pdf_file/0010/2569681/1985-08-19.pdf

[13] ASIC v Westpac (n) [170].

(3) *The ALRC has been Distracted by Two Dicta Which Question the Conjunctive Reading of Efficient, Honest and Fair*

I submit that the ALRC has been distracted by two dicta in the Full Federal Court which question whether efficient, honest and fair is conjunctive or disjunctive.[14] The ALRC should remember that dicta are incidental comments made by a judge in passing which are not essential to the judgment. They are not authorities and should not be cited as grounds to repeal 34 years of case law.

In ASIC v Westpac, Allsop CJ made the surprising statement that "if a body of deliberate and carefully planned conduct can be characterised as unfair, even if it cannot be described as dishonest, such may suffice for the proper characterisation to be made."[15] Unfair conduct does not fulfil the three prerequisites of the section, and no authority is cited to amend the section by rewriting it to replace the conjunctive "and" with the disjunctive "or". There appears to be no appreciation that this is flagging an attempt to change the legislation by judicial activism.[16] Further, this interpretation is inconsistent with his Honour's later comments on the conjunctive standard of efficient, honest and fair which were offered to support the comments of Gleeson J as the primary judge on the operation of the efficient, honest and fair standard,[17] but he did question its scope:[18]

> .. I would reserve for an occasion where the matter was fully argued the question whether the phrase is compendious and, if it is, its meaning and application. In particular, I would reserve my views as to the consequences of demonstrating unfairness in the provision of financial services and any need for additional ethical failing.

Similarly, O'Bryan J, after citing the compendious approach to "efficiently, honestly and fairly" in Story,[19] Camelot,[20] Avestra Asset Management[21] and Gleeson J as the primary judge in the Westpac case,[22] then expressed "considerable reservations about the view that the words 'efficiently, honestly and fairly' should be read compendiously in the manner suggested by Young J in *Story*".[23] Further, O'Bryan J, like Allsop CJ, strayed from the principles of statutory interpretation which govern the conjunctive use of "and" applied the

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[14] Above, n 1.

[15] ASIC v Westpac, [170].

[16] Described as a "political slogan" with perjorative overtones by Ronald Sackville, "Do Judges Make Law? Some Aspects of Judicial Law Making" (2001) 5(1) *University of Western Sydney Law Review* 59.

[17] ASIC v Westpac, [170] – [171].

[18] ASIC v Westpac, [171], cited by ALRC, n 1, [13.59].

[19] Above, n 10.

[20] *ASIC v Camelot Derivatives Pty Ltd (In Liq)* [2012] FCA 414.

[21] *ASIC v Avestra Asset Management Ltd (In Liq)* [2017] FCA 497.

[22] *ASIC v Westpac Securities Administration Limited, in the matter of Westpac Securities Administration Limited* [2018] FCA 2078, [416]-[428], cited in summary in ASIC v Westpac, [422] - [423].

[23] ASIC v Westpac, [424].

disjunctive "or" in the phrase "efficiently, honestly and fairly" to state that the three obligations are concurrent,[24] and went on to state that the defendant did not comply with what he styled as the "significant aspect" of the section, namely to act fairly, with no mention of the other two standards.[25] There is no authority in the policy behind the efficient, honest and fair standard and its caselaw to separate and to rank the three standards in this manner.

These dicta of the Full Federal Court in 2019 may be worth considering if they come within the words of the section and their implementation would lead to an improvement in the law. At this stage, they do not warrant action by the ALRC on the basis that as dicta they may or may not be confirmed by future courts. If they were followed by future courts, they would have the effect of repealing effect of the section which has stood the test of time for 42 years and may attract the attention of not only the ALRC for law reform but also the parliament for amendment. Dicta may just fade away if and when the relevant issues are fully argued in an appellate court with an authoritative determination. To put this in context, it is trite to say that the role of the court is to apply the law. Parliament which represents the people enacts the law and the courts interpret and declare the law. Judicial law making is limited to interpreting and not rewriting the words in the legislation. In the words of Allsop CJ *extra curia*:[26]

> (i)f a person is required by a statute to act …efficiently, honestly and fairly … the task of the court is to ascribe a generality of meaning to such words that conform to the generality of the expression, and develop through articulated application of them over time, case by case, the human reality of that meaning … (this) will be achieved by interpreting the words of generality by reference to the values that the statute requires and articulating, on a case by case basis, why the general words are engaged, or not.

These dicta were acknowledged but not followed by Beach J in AGM Markets who said that "I am bound to apply the single judge decisions unless I consider them to be plainly wrong, which I do not".[27] Moshinsky J in RI Advice stated that "(t)o the extent that different views have been expressed as to whether 'efficiently, honestly and fairly' is a compendious expression, it is unnecessary to resolve that issue for present purposes. Insofar as RI submits that s 912A(1)(a) comprehends conduct of the licensee that is morally wrong in the commercial sense, I do not consider the provision to be limited to such conduct."[28] Similarly, Jackson J in MobiSuper upheld the compendious approach to "efficiently, honestly and fairly". This was sufficient for the judgment before his Honour added, just in case, '(at least) not honestly and not fairly, considered as separate concepts' and then a third version of 'lack of honesty, fairness and sound ethical dealing'.[29] The dicta underlying this submission have destabilised four decades of policy and precedent.

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[24] ASIC v Westpac, [426].

[25] ASIC v Westpac, [421], [427].

[26] James Allsop, "Statutes and Equity" (Kenneth Sutton Lecture, Sydney, 12 November 2019).

[27] *ASIC v AGM Markets Pty Ltd (In Liq) [No 3]* [2020] FCA 208, [516]; cited by ALRC, n 1, [516]; Leif Gamertsfelder, "Efficiently, Honestly and Fairly: A Norm that Applies in an Infinite Variety of Circumstances" (2021) 50(2) *Australian Bar Review* 345, 357.

[28] *ASIC v RI Advice Group Pty Ltd (No 2)* [2021] FCA 877, [377] (Moshinsky J).

[29] *ASIC v MobiSuper Pty Ltd* [2021] FCA 855, [49].

Any future court will be guided by a purposive rather than a literal construction - a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object:[30]

> Another general consideration relevant to statutory construction … concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object.

There is no reason s 912A(1)(a) cannot be given a purposive reading as its objects are clear and unambiguous.[31] The courts are not legislatures or law reform agencies, and they must remember that "(t)he primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute".[32] In the words of Chief Justice John Doyle:[33]

> judicial law making is the same as legislation in the sense that the extent that it is the exercise of a power to determine for the first time that a legal rule exists. But the judicial exercise of the power is confined in a significant manner by a common law rule that legislation prevails over the common law

In the words of McHugh J, "(t)he common law is the product of eight hundred years of judicial law-making,"[34] now made clearer by the *Acts Interpretation Act 1901* (Cth) when it says in s 15AA that "(i)n interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act (whether or not that purpose or object is expressly stated in the Act) is to be preferred to each other interpretation".

(4) *The Disjunctive Interpretation Would Destroy the Hendiadys of the Three Part Standard of Efficient, Honest and Fair*

Section 912A(1)(a) is clear when it states that the holder of an AFSL must do all things "efficiently, honestly and fairly". The ALRC has overlooked the record of over 40 years of policy and case law on the section when it alleges that the compendious reading requiring evidence of conduct which is not efficient, honest and fair is "inherently more complex" than conduct which breaches only one of the standards . (ALRC, [13.63]).The only evidence for this assertion are the two dicta and one academic article discussed above. This assertion misses the point of the section that the offending conduct must fail the three standards of

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[30] *Carr v Western Australia* [2007] 232 CLR 138, [5]-[6] (Gleeson CJ), cited by J J Spigelman, "The Intolerable Wrestle: Developments in Statutory Interpretation" (2021) 84(12) *Australian Law Journal* 822, 827.

[31] Compare Stephen Bottomley, "A Framework for Understanding the Interpretation of Corporate Law in Australia", Ch 9 of Suzanne Corcoran and Stephen Bottomley, *Interpreting Statutes* (Federation Press, 2005), 156-157.

[32] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 35, [69], cited by J J Spigelman, "The Intolerable Wrestle: Developments in Statutory Interpretation" (2021) 84(12) *Australian Law Journal* 822, 824.

[33] J J Doyle, "Judicial Lawmaking - Is Honesty the Best Policy" (1995) 17(1) *Adelaide Law Review* 161, 181.

[34] M H McHugh, "The Law-making Function of the Judicial Process – Part I" (1988) 62(1) *Australian Law Journal* 15, 15.

efficient, honest and fair. Conduct which is, for example, unfair would not fulfil the three conjunctive tests and would not be in breach of the section.

The ALRC offers no evidence – and recognises that it may not be "not be entirely free from doubt" (ALRC, [13.65]) - to support its assertion that the separate articulation of the individual standards would provide greater expressive power, remove the existing uncertainty, and permit a simpler assessment of whether conduct had contravened the provision or not (ALRC, [13.64]). This would indeed involve a major change in the underlying policy intent of the existing law (ALRC, [13.65]). Further, there is wishful thinking by the ALRC when it asserts with no evidence that breaking the hendiadys "would be a meaningful improvement that could facilitate greater compliance with, and understanding of, the law. The marginal costs involved in such a change are likely to be outweighed by these benefits, which would include limiting the need for future litigation on this issue". (ALRC, [13.67]). This assumes that there is currently non-compliance with and poor understanding of the current standards, which is not evident in the policy and case law on efficient, honest and fair.

I do not support the ALRC's proposal to replace the current conjunctive "and" with the disjunctive "or" in line with the dicta of Allsop CJ and O'Bryan J.[35] AAT Senior Member Peter Taylor QC in Re Hres correctly identified efficient, honest and fair as a hendiadys, from the Greek, where an idea is expressed by two independent words like "nice and warm"[36] or "law and order".[37] The component parts of hendiadys may differ in meaning but they come together with impact. For example, Heydon J in the High Court, with whom the other judges agreed, in a victims compensation claim for "symptoms and disability" recognised the expression as a single idea expressed in two words connected by a conjunction, a "composite or portmanteau phrase" or a hendiadys which avoided a conflict between a conjunctive and a disjunctive interpretation.[38] To break up the hendiadys, or to replace the conjunctive reading with a disjunctive reading, would mean that the statutory obligation would be breached for one only of the three standards. This would introduce an either/or standard, and would weaken the operation of the hendiadys. Jackson J in MobiSuper was correct when he cited Allsop CJ for his warning against "elevating phrases used by judges in individual cases to explain their approach to (efficient, honest and fair) into rules of general application".[39] In the words of Herbert Smith Freehills, this would make the standard of fairness "more equal than others" in the words of George Orwell's *Animal Farm* satire on communism (1945).[40]

I do not accept the ALRC's assertion that "the separate articulation of the individual norms of 'efficiently, honestly and fairly' would provide greater expressive power, remove the existing uncertainty, and permit a simpler assessment of whether conduct had contravened the provision or not" (ALRC, [13.64]). Overruling over 40 years of policy and caselaw on the

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[35] Above, n 1.

[36] *Hres and Australian Securities and Investments Commission* [2008] AATA 707, [24].

[37] Michelle Sanson, *Statutory Interpretation* (2016) 151, where the law is one thing and order is another.

[38] *Victims Compensation Fund Corporation v Brown* [2003] HCA 54, [34] (Heydon J).

[39] *ASIC v MobiSuper Pty Ltd* [2021] FCA 855, [49], after citing Allsop CJ in ASIC v Westpac, [174].

[40] Herbert Smith Freehills, "EHF in Focus: Dissecting the Efficiently, Honestly and Fairly Obligation with a Governance Lens", 27 September 2021. Fairness being the one upheld by Allsop CJ and O'Bryan J in ASIC v Westpac, [170], [427].

basis of two dicta and one academic article with no or little analysis of the case law would be based on an assertion by the ALRC without authority that there is "existing uncertainty" in the statutory conjunctive definition (ALRC, [13.64]). This is further magnified by the ALRC citing the Explanatory Memorandum's explanation of the same words used in a different context in the National Consumer Credit Protection Bill 2009 (Cth) s 47 (ALRC, [13.65]-[13.66]) to advance the proposition that the "efficiently, honestly and fairly" obligation in s 47 means that conduct which is efficient may "in all likelihood" (ALRC, [13.65]) not meet the required standard of honesty or fairness and hence the three standards are to stand alone.[41] Interpretation of the same words or phrase must always be done in context and with reference to their purpose.

I do not accept the ALRC's assertion that "the separate articulation of the individual norms of 'efficiently, honestly and fairly' would provide greater expressive power, remove the existing uncertainty, and permit a simpler assessment of whether conduct had contravened the provision or not." (ALRC, [13.64]). Overruling 34 years of caselaw on the basis of two dicta with no or little analysis of the case law would be based on an assertion by the ALRC without authority that there is "existing uncertainty" in the conjunctive (ALRC, [13.64]).

I do accept the assertion of the ALRC that an amendment to articulate each of the norms separately not be "entirely free from doubt" (ALRC, [13.65]) and I do not accept the assertion that it would not involve a change in the underlying policy intent of the existing law (ALRC, [13.65]).

(5) *The Conjunctive Interpretation is Confirmed in Almost 40 Years of Case Law*

In practical terms, the question raised in my submission is whether any one of the three standards of efficient, honest and fair is "conditioned" (ALRC, [13.55]) by the others or whether each stands alone as an individual standard. The conjunctive test which requires proof of each of the three standards was the intention when the section was drafted, and it has been applied in case law many times. It has never been overruled and has stood the test of time for 42 years. An early report in 1985 by the then NCSC on efficient, honest and fair stated that the three tests set out what is required of a licence holder, recognised the conjunction "and" and made no suggestion that the three standards of conduct could be cherrypicked.[42]

From the start Young J said that the phrase was compendious:[43]

> To illustrate, a police officer may very well be most efficient in control of crime if he just shot every suspected criminal on site. It would save a lot of time in arresting, preparing for trial, trying and convicting the offender. However, that would hardly be fair. Likewise, a judge could get through his list most efficiently by finding for the plaintiff or the defendant as a matter of course, or declining to listen to counsel, but

[41] Explanatory Memorandum, National Consumer Credit Protection Bill 2009 (Cth) [2.113], cited by ALRC, n 1, [13.65].

[42] National Companies and Securities Commission, *A Review of the Licensing Provisions of the Securities Industry Act and Codes* (1985) [7.31] – [7.35].

[43] *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, 672.

> again that would hardly be the most fair way to proceed.[44] Considerations of this nature incline my mind to think that the group of words "efficiently, honestly and fairly" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty.

Allsop CJ recognised the standard as a "composite or compendious phrase or expression … (which does) ... not admit of a comprehensive definition".[45] The words are joined with "and" and on first principles of statutory interpretation, they are to be read together as a whole. As they are not disjunctive – joined with "or" – they cannot be read as standalone individual standards. This basic rule is explained in any book on statutory interpretation,[46] and is subject to the power of the court to read "and" as "or" and vice versa if there is considered to be what has been described as a printing error, which is certainly not relevant in this context.

There is nothing uncertain about the meaning of efficient, honest and fair, as confirmed by Gleeson J as the primary judge in ASIC v Westpac[47] who cited the first instance cases of Story,[48] Elrington Nominees,[49] Camelot,[50] Cassimatis (No 8),[51] Avestra Asset Management[52] and Re Hres[53] all of which upheld the conjunctive reading. To these can now be added AGM Markets,[54] MobiSuper[55] and RI Advice Group.[56]

The ALRC proposal for separate paragraphs for efficient, honest and fair would render obsolete the following concise and elegant submission by ASIC, which Leigh Masel as one

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[44] *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, 672. The first three sentences were cited by O'Bryan J in ASIC v Westpac [2019] FCAFC 18, [424].

[45] *ASIC v Westpac Securities Administration Limited* [2019] FCAFC 18, [172].

[46] See, eg, Scott Guy, *Statutory Interpretation* (Lawbook Co 2014) [2.145]; Perry Herzfeld and Thomas Price, *Statutory Interpretation Principles* (Lawbook 2014) [3.120].

[47] *ASIC v Westpac Securities Administration Ltd, in the matter of Westpac Securities Administration Ltd* [2018] FCA 2078, [413] – [429] (Gleeson J), cited in *ASIC v Westpac* [2019] FCAFC 18, [171] per Allsop CJ.

[48] Above, n 10.

[49] *R I Elrington Nominees Pty Ltd v Corporate Affairs Commission (SA)* [1989] SASC 1941.

[50] *ASIC v Camelot Derivatives Pty Ltd (In Liq)* [2012] FCA 414.

[51] *ASIC v Cassimatis (No 8)* [2016] FCA 1023.

[52] *ASIC v Avestra Asset Management Ltd (In Liq*) [2017] FCA 497.

[53] *Hres and ASIC* [2008] AATA 707.

[54] *ASIC v AGM Markets Pty Ltd (In Liq) [No 3]* [2020] FCA 208; cited by ALRC, n 1, chapter 13; Gamertsfelder, n 27, 357.

[55] *ASIC v MobiSuper Pty Ltd* [2021] FCA 855.

[56] *ASIC v RI Advice Group Pty Ltd (No 2)* [2021] FCA 877, [377] (Moshinsky J).

of its original architects would have been chuffed to read. Foster J held the following to be correct:[57]

> (a) The words "efficiently, honestly and fairly" must be read as a compendious indication meaning a person who goes about their duties efficiently having regard to the dictates of honesty and fairness, honestly having regard to the dictates of efficiency and fairness, and fairly having regard to the dictates of efficiency and honesty: *Story v National Companies and Securities Commission*
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> (b) The words "efficiently, honestly and fairly" connote a requirement of competence in providing advice and in complying with relevant statutory obligations: *Re Hres and ASIC.* They also connote an element not just of even handedness in dealing with clients but a less readily defined concept of sound ethical values and judgment in matters relevant to a client's affairs: *Re Hres and Australian Securities and Investments Commission*
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> (c) The word "efficient" refers to a person who performs his duties efficiently, meaning the person is adequate in performance, produces the desired effect, is capable, competent and adequate: *Story v National Companies and Securities Commission*. Inefficiency may be established by demonstrating that the performance of a licensee's functions falls short of the reasonable standard of performance by a dealer that the public is entitled to expect: *Story v National Companies and Securities Commission.*
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> (d) It is not necessary to establish dishonesty in the criminal sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission* (SA). The word "honestly" may comprehend conduct which is not criminal but which is morally wrong in the commercial sense: *R J Elrington Nominees Pty Ltd v Corporate Affairs Commission* (SA)
>
> (e) The word "honestly" when used in conjunction with the word "fairly" tends to give the flavour of a person who not only is not dishonest, but also a person who is ethically sound: *Story v National Companies and Securities Commission***.**

The first consideration of the efficient, honest and fair standard by an appellate court was in the Full Federal Court decision in *ASIC v Westpac*[58] in 2019 which the ALRC has asserted has given rise to "conflicting case law" on the standard of efficient, honest and fair, (ALRC, [13.43]) magnified by citation of an academic article by Anderson which asserts that "a cloud of uncertainty now hangs over the future treatment"[59] of the efficient, honest and fair standard (ALRC, [13.63]).

I submit that there is no "uncertainty" in the judgment and that there is nothing to be clarified (ALRC, [13.54]). The three judges correctly applied the standard as a compendious single, composite concept rather than as three discrete behavioural norms - Allsop CJ,[60] Jagot J[61] and

[57] *ASIC v Camelot Derivatives Pty Ltd (In Liq)* [2012] FCA 414, [69] (citations deleted), cited by Zarkovic, below n 69, 277 to show "what (the) meaning is" of "efficiently, honestly and fairly".

[58] The conjunctive reading of the efficient, honest and fair standard was upheld by the High Court without comment in *Westpac Securities Administration Ltd v Australian Securities and Investments Commission* [2021] HCA 3, [36].

[59] Above, n 2.

[60] ASIC v Westpac, [170].

[61] ASIC v Westpac, [289].

O'Bryan J.[62] Allsop CJ upheld the previously defined "composite or compendious phrase or expression"[63] efficient, honest and fair as "part of the statute's legislative policy to require social and commercial norms or standards of behaviour[64] … expressed as an abstraction … to be directed to the conduct case by case".[65] He acknowledged that instances or examples of conduct caught by the phrase would be "helpful and provide guidance, as well as an articulation or description of the norms involved",[66] but he did not cite the academic literature to this effect.[67] He then appeared to question precedent when he said that "(c)are needs to be taken that phrases used by judges in individual cases … do not become rules to apply as defaults for the proper process of characterisation by reference to the words used by Parliament as to whether a body of conduct satisfied or failed to satisfy the norm."[68]

Jagot J upheld the judgment of Gleeson J as the primary judge[69] that Westpac's "systemic sharp practice"[70] was "sufficiently egregious" to amount to a breach of the conjunctive standard of efficient, honest and fair.[71]

The ALRC has made another assertion when it claims that an amendment to separately articulate each of the norms into individual standards would not involve a change in the "underlying policy intent of the existing law" (ALRC, [13.65]). Conduct which is efficient will fail the standard if it is not honest or fair.

The comment by the ALRC that "resolution does not matter much" (ALRC, [13.61]) would not apply if the "and" in "efficiently, honestly and fairly" were replaced with "or", as the words Young J in Story cited by ALRC would no longer apply if the three standards were individual: [72]

> in the long run it does not seem to me to much matter whether one reads the words cumulatively or disjunctively, because unless a licence holder possesses the three

[62] ASIC v Westpac, [426].

[63] ASIC v Westpac, [172].

[64] ASIC v Westpac, [173].

[65] ASIC v Westpac, [173], citing WMC Gummow, "The Common Law and Statute" in *Change and Continuity: Statute, Equity and Federalism* (Oxford University Press, 1999) at 18–19.

[66] ASIC v Westpac, [172].

[67] Latimer, n 8; Anderson, n 2; Jessica Zarkovic, "Are the "Efficiently, Honestly and Fairly" and Unconscionable Conduct Civil Penalty Provisions Equally Effective in Combating Unfair Practices by Licensees" (2020) 48(3) *Australian Business Law Review* 272; Gamertsfelder, n 27.

[68] ASIC v Westpac, [173].

[69] ASIC v Westpac,[286].

[70] ASIC v Westpac, [290].

[71] ASIC v Westpac,[289].

[72] *Story v National Companies and Securities Commission* (1988) 13 NSWLR 661, 672, quoted by ALRC, n 1, [13.61]; Gamertsfelder, n 27, 358.

> attributes whether as one package or as three separate parcels (it will contravene the provision).

The fact that this quotation would no longer apply again shows that the ALRC proposal would have negative consequences and that if implemented, it would destroy the three part standard of efficient, honest and fair and would render obsolete its caselaw. This leads to the conclusion of my submission that "efficiently, honestly and fairly" is a composite phrase made up of three standards joined with "and". Beach J said correctly in AGM Markets that:[73]

> It is not in doubt that a contravention of the "efficiently, honestly and fairly" standard of s 912A(1) of the Act does not require a contravention or breach of a separately existing legal duty or obligation, whether statutory, fiduciary, common law or otherwise. The statutory standard itself the source of the obligation:

I conclude this submission to support the quotation from Beach J who stated correctly that "it is not justifiable to take one word from a composite phrase, artificially elevate its significance and read it in a manner asymmetrically".[74]

(6) ***Submission - Repeat, Shelve Proposal A20(a)***

The standard of efficient, honest and fair was well planned over 40 years ago, and like "misleading or deceptive" in s 18 of the Australian Consumer Law, the scope of doing all things "efficiently, honestly and fairly" keeps giving as case law continues to expand into new fact situations and areas, as discussed in the author's two previous articles in this journal.

I submit that the two dicta in the Full Federal Court and one academic article which question the conjunctive reading of efficient, honest and fair have distracted the ALRC. Two dicta and one article should not be the ground for new legislation unless and until there is evidence of failure of the current law and an authoritative determination by an appellate court following full argument.

The three words make a single idea or hendiadys joined by "and". To separate these into three proposed individual and disjunctive standards would result in one of the standards being, in the words of author George Orwell in 1945, more equal than others. I submit that there is nothing calling for correction by the ALRC proposal with possible future legislation. The conjunctive interpretation of efficient, honest and fair has been confirmed in 40 years of policy and case law and has stood the test of time.

(7) Further Research

Locating hard copy documents on the efficient, honest and fair standard from the early 1980s would help to remind current generations of the purpose of the conjunctive standard.

I suggest that the ALRC check whether the ASIC library holds any of the old hard copy speeches by Leigh Masel where he set out his vision for the new standard of efficient, honest

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[73] *ASIC v AGM Markets Pty Ltd (in liq) [No 3]* [2020] FCA 208, [512].

[74] *ASIC v AGM Markets Pty Ltd (in liq) [No 3]* [2020] FCA 208, [528], cited by, eg, Gamertsfelder, n 27, 358.

and fair. These would have been deposited in its predecessor NCSC library as a matter of course.

Could the ALRC check with some of the “older” consultants listed who may have old hard copy speeches stored in the garage?

In addition, could the ASLR check with Leigh Masel’s family? Masel was an experienced lawyer and no double kept copies of everything. I would be happy to contact the Masel family on your behalf to help search the old boxes.

I suggest the ALRC invite submission from Justice Young and his views post-Story.