Financial Robots as Instruments of Fiduciary Loyalty

Simone Degeling[*] and Jessica Hudson[†]

Abstract

Retail financial consumers increasingly interact with financial services providers via a financial robot that is driven by an algorithm or other mathematical model ('robo financial advice'). In this sector, the focus of industry and legal participants is on statutory regulation under the *Corporations Act 2001* (Cth) and associated class orders and guidance issued by the Australian Securities and Investment Commission. We argue that despite compliance with this regime, significant legal risk remains. Equity continues to operate in a domain where fiduciary obligations, and attendant poorly managed fiduciary conflicts, arise systemically. This article considers the application of the fiduciary norm to robo financial advice. In doing so, it explores the interaction of equitable principle and statute, and pursues a deeper understanding of the application of equitable fiduciary principle to robo financial advice.

I Introduction

Robo financial advice is that given by an advice provider where the method of transmission of the advice is via a digital platform.[1] The regulatory posture in Australia is one of facilitating technological advances in the provision of financial services.[2] In view are various competing policy imperatives including the need for automated processing of transactions, streamlined communication and the possibility of increased consumer access to financial services. While the Australian Securities and Investments Commission ('ASIC') has issued regulatory guidance on robo financial advice,[3] this guidance does not address the application of equitable

[*] Professor, UNSW Law, Sydney, Australia.

[†] Senior Lecturer, UNSW Law, Sydney, Australia.

We are grateful to Whittens & McKeough for their generous financial support of private law research at UNSW Law, which permitted our attendance at the North American Fiduciary Law Workshop (UCLA School of Law School, Los Angeles, USA, June 2017) at which we presented an earlier draft of this article. We thank the organisers for inviting us and participants for their feedback. Keith Mason also provided invaluable comments on an earlier draft. All errors remain our own.

1 For example, an online website, smartphone app or software program.

2 Australian Securities and Investments Commission ('ASIC'), *Regulatory Guide 255: Providing Digital Financial Product Advice to Retail Clients*, August 2016, [255.1]–[255.17] ('*ASIC RG 255*'). Contrast the apparently cautious approach taken by regulators in the United States: Megan Ji, 'Are Robots Good Fiduciaries? Regulating Robo-Advisors under the *Investment Advisers Act of 1940*' (2017) 117(6) *Columbia Law Review* 1543.

3 *ASIC RG 255*, above n 2. Note, however, that ASIC *Regulatory Guide 175*, which applies to providers of financial product advice, expressly identifies fiduciary duties that may apply to the provision of advice: ASIC, *Regulatory Guide 175 Licensing: Financial Product Advisers — Conduct and Disclosure*, November 2017, [175.90]–[175.91] ('*ASIC RG 175*').

© 2018 Sydney Law Review and authors.

fiduciary principles. There is thus a risk that non-statutory regulation of robo financial advisers, including equitable fiduciary obligations, are not systemically prominent. A concomitant compliance risk arises for advice providers in adopting a mindset focused solely on statute. This article demonstrates that robo financial advice creates the risk of breach of equitable fiduciary obligations despite an adviser's compliance with statutory obligations relating to conflicts of interest, including duties to disclose such conflict(s).[4] The robo financial adviser is, thus, exposed to the possibility of equitable remedies. Further, a breach of fiduciary obligations may adversely impact the adviser's or licence holder's Australian Financial Services License ('AFSL').[5]

Some ground clearing is necessary in order to proceed. First, the 'robot' is not the financial adviser. Rather, the financial robot is the digital means by which the advice is manifested and/or communicated. As explored below, somewhere in the matrix of facts exists a legal entity which is the adviser. ASIC describes robo advice as being 'without the direct involvement of a human adviser',[6] and it might therefore erroneously be argued that a financial robot cannot be an adviser for the purposes of legal regulation. However, this article takes the contrary position that robo advice *is* the product of the acts of a legal entity, capable of bearing equitable responsibility. As discussed below, we argue that while robo financial advice is communicated through a digital medium, the advice is itself embodied by, and contained within, a decision tree. The decision tree contains predetermined pathways navigated by the client. The list of possible destinations is also predetermined, such that the available advice outcomes are members of a closed set. The adviser determines the pathways, and the outcomes, and thus provides advice. A client receives advice provided by a financial adviser whether the client receives verbal advice from an adviser in a face-to-face meeting in which the adviser uses expertise, experience and an algorithm, or robo financial advice, which is a product of the same or similar expertise, experience and an algorithm.[7]

---

4 *Corporations Act 2001* (Cth) ch 7 ('*Corporations Act*'). See generally Tables 2 and 3 in this article.

5 The obligation in *Corporations Act* s 912A(1)(a) to 'do all things necessary to ensure that the financial services … are provided efficiently, honestly and fairly' is interpreted in *ASIC RG 175* to include compliance with common law obligations: *ASIC RG 175*, above n 3, [175.90]–[175.91]. We take common law here to include equity, which as ASIC recognises, includes fiduciary duties. See also *Corporations Act* s 960B. The loss of an AFSL or more restrictive conditions may arise from s 914A(1) (conditions on the licence) taken together with s 915C(1) (ASIC may suspend or cancel licence for failure to comply with obligations under s 912A). See also *ASIC v Camelot Derivatives Pty Limited (in liq)* (2012) 88 ACSR 206, 225 [69] (Foster J), quoted in *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, 337–8 [674] (Edelman J).

6 *ASIC RG 255*, above n 2, [255.1].

7 Section 961(6) of the *Corporations Act* states that '[a] person who offers personal advice through a computer program is taken to be the person who is to provide the advice and is the provider for the purposes of this division.' Section 52 of the Act states that '[a] reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done.' That robo advice is advice is also the foundation of *ASIC RG 255*, above n 2, [255.1]. See also *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, 221 [21], 232–3 [81]–[85] (Edelman J). The predicate of Edelman J's decision is that the interaction between human adviser and client, and subsequent advice that follows predetermined standardised pathways, may constitute financial advice. In that case, the defendants 'create[ed] and advance[ed] a model, and a system for application of the model, to be applied in almost every circumstance': at 368–9 [824] (Edelman J).

Second, our analysis observes particular courses of dealing in the pattern of interaction between a robo financial adviser and client, which we label 'substantive advice' and 'advice about advice'.[8] Substantive advice is advice capable of implementation by the client concerning actual investments or investment strategies. Thus, for example, substantive advice includes financial product advice.[9] Advice about advice is a conceptually preliminary recommendation by the adviser. Advice about advice may encompass, for example, the threshold question of whether or not the client should receive substantive financial advice. Alternatively, advice about advice may relate to the selection of the topic areas of advice on which the client will receive substantive advice. Advice about advice is conceptually preliminary, but depending on the course of dealing, may or may not occur prior in time to the substantive advice. Robo financial advice collapses these categories and may encompass both advice about advice and also substantive advice. We return to these particular courses of dealing in Part II below.

It is important to delineate between these courses of dealing, and thus scopes of advice, because pts 7.7–7.7A and 7.9 of the *Corporations Act 2001* (Cth) ('*Corporations Act*') only apply to financial product advice.[10] Depending on the facts, the statutory definition of financial product advice may not capture *all* courses of dealing in which robo financial advice is given. Specifically, although substantive advice will, as a factual matter, usually fall within the statutory definition of financial product advice,[11] advice about advice may not. However, equity scrutinises all courses of dealing, including advice about advice, substantive advice and financial product advice.[12] This article demonstrates that the robo financial adviser who complies with pts 7.7–7.7A and 7.9 of the *Corporations Act* nonetheless may be exposed to the risk of fiduciary breach. Moreover, equity's gold standard of conduct, which is full fiduciary disclosure and client consent, may be difficult to implement. Regulators and financial advisers, therefore, need to consider the role of the fiduciary norm in supervising and modelling the conduct of market participants.

---

8 This article applies and develops the framework identified and developed by the present authors: Simone Degeling and Jessica Hudson, 'Equitable Money Remedies against Financial Advisers Who Give "Advice about Advice"' (2015) 33(3) *Company and Securities Law Journal* 166; Simone Degeling and Jessica Hudson, 'Fiduciary Obligations, Financial Advisers and FOFA' (2014) 32(8) *Company and Securities Law Journal* 527. These articles demonstrate that the courses of dealing labelled 'advice about advice' and 'substantive advice' are not particular to robo financial advice.

9 *Corporations Act* s 766B(1).

10 Ibid.

11 Such as where the topic of substantive advice relates to a financial product as defined in pt 7.1 div 3 of the *Corporations Act* and includes, for example, a derivative, a security (which includes a share or debenture: s 761A), a policy of life insurance, and a carbon credit unit: s 764A(1).

12 Note that the operation of equity is not ousted by ch 7 of the *Corporations Act* and is, thus, capable of application to the conduct falling within the statutory definition of financial product advice. See generally Part IID below.

II Robo Advice and Courses of Dealing

A *What is Robo Advice?*

As has been said, robo advice is advice concerning a client's financial decisions provided through a digital platform. Robo advice encompasses completion of standardised questions by the client via the adviser's platform, which reveal information about the client and their objectives, and the automatic generation of recommendations for that client using algorithms and technology. The client navigates a decision tree of questions designed to elicit information according to which the adviser allocates possible recommendations for that client from a menu of predetermined possible outcomes. The provision of robo advice to suitable clients is one of these outcomes. There may also be other services provided by the platform consequent on the implementation of this advice, such as custodial, execution and portfolio management services.

> A paradigm example of robo advice is the ASIC Digital X example:[13]
>
> **Scenario**
>
> Digital X is a start-up fintech company that provides digital advice. The advice is limited to portfolio construction investment advice on exchange-traded funds (ETFs).
>
> Digital X determines the client's investment profile by asking the client a number of questions about their financial situation and goals. Clients who are not filtered out of the model are aligned with one of a limited number of ETF portfolios based on their investment profile.
>
> Digital X's algorithm then automatically recommends to the client an investment strategy based on their personal profile, and a Statement of Advice (SOA) is generated and provided.
>
> **Commentary**
>
> Digital X is providing personal advice. Through its algorithm, Digital X has considered one or more of the client's relevant circumstances (e.g. their objectives, financial situation and needs) when recommending a financial product.

In the above example, the adviser gathers information about the client and, in parallel, assesses the suitability of the client as a candidate for robo financial advice. This triaging process may result in the client being assessed as suitable for the services offered and allowed to proceed to the next stage or 'filtered out'. Table 1 below sets out some examples of filtering as part of the robo advice triage process. Assuming the client is not filtered out of the platform, and depending on the range of services and topics of advice offered by the platform, there may be some further triaging process by which the client is aligned with one or more suitable services. This triaging process is contemplated in the above example: 'Digital X determines the client's investment profile by asking the client a number of questions about their financial situation and goals. *Clients who are not filtered out of the model are aligned with one of a limited number of ETF portfolios based on their investment profile*.'[14] Digital X

---

13 *ASIC RG 255*, above n 2, [255.28].

14 Ibid (emphasis added).

thus gives financial advice on ETFs to meet the client's self-selected financial situation and goals. The client will have chosen the information about their financial situation and goals from a menu of options presented on the platform.

A second version of this example arises by extrapolating from Digital X, and concerns platforms that may commence the information-gathering and triaging phase with a different set of questions designed to reveal information about the client's life aspirations.[15] For example, as described in the Explanatory Memorandum to the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth),[16] the filtering questions presented by the adviser may ask about the client's financial objectives, circumstances and needs. Thus, 'superannuation, debt consolidation and life insurance' may be identified as relevant financial objectives ('Financial Objectives Filter').[17] The client will follow a path through the decision tree depending on their answers to the questions posed by the financial adviser. At an even higher level of generality, according to life objectives, a third hypothetical version of this platform might similarly triage clients according to aspirations such as 'security in retirement', 'pay for children's education', 'own my own home' or 'nest egg' ('Life Objectives Filter'). Such platforms will similarly make recommendations to the client about the suitability of the adviser's services.

As foreshadowed above, it should be observed that despite commentary describing robo financial advice as being 'without the direct involvement of a human adviser',[18] the significance of the digital delivery of this advice should not be overstated. In building the decision tree and questionnaire with which the client interacts, and the algorithm underpinning the operation of the digital platform, a legal entity has made decisions and predetermined the pathways of decision and potential liability that will apply to this interaction. The fiduciary norm applies to the robo financial adviser indistinguishably to any other adviser within its purview. ASIC states in Regulatory Guide 255 that 'the law is technology neutral'.[19] We contend that equity adopts a similar posture in being indifferent to the medium through which advice is given. However, despite ASIC's assertion that there is no human involvement, equity's focus on the entire course of dealing between the

---

15 Similar examples of online advice platforms that filter according to financial objectives or the client's life goals are given in ASIC, *Regulatory Guide 244: Giving Information, General Advice and Scaled Advice*, 13 December 2012, [244.79] examples D7–D8 and related commentary.

16 Explanatory Memorandum [1.29]–[1.30]. The Bill has not been enacted, and the regulations implemented to insert a specific example of scaled advice, reg 7.7A.2(4) of the *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (Cth), were disallowed on 19 November 2014.

17 Another example of similar filtering (albeit face-to-face advice) is given in *ASIC RG 175*, above n 3, [175.298] example 14 (emphasis added):

> A client in their early 40s asks an advice provider to review every aspect of their financial situation to determine how the advice provider can maximise the client's savings over the medium and long term. The advice provider gives the client an estimate of the cost to prepare the requested advice. This amount is more than the client is willing to pay for the advice.
>
> The advice provider then identifies the key areas *that they think the client should receive advice on*, based on the objectives, financial situation and needs that the client disclosed to the advice provider in their instructions.

18 *ASIC RG 255*, above n 2, [255.1].

19 Ibid [255.6].

parties allows a conclusion not only that there are other human and legal entities involved, but that such entities potentially owe fiduciary obligations to the client.

Table 1: Filter examples

Filter example	**Triage process**	**Robo example – Advice about advice**	**Robo example – substantive advice**
Digital X filter	Adviser assesses client's suitability to receive advice on topic area offered according to personal information provided by client.	Adviser filters client out of platform because client's personal debt is too high relative to assets, and/or income levels are below threshold minimum. Advice about advice: that client should not receive substantive advice.	Adviser filters client out of platform because client's personal debt is too high relative to assets, and/or income levels are below threshold minimum. Substantive advice: that client should not invest in investments advised on (here, ETF).
Financial objectives filter	As above. Adviser prioritises one or a limited set of topic areas for advice according to client's self-identified financial objectives.	Adviser identifies topic area of 'superannuation and life insurance' as the topic area of advice having regard to the client's self-selected financial objectives and personal circumstances. Advice about advice: that client should get substantive advice on prioritised topic area over other areas of advice in order to achieve financial objective.	Depends on topic areas and whether adviser offers advice on more than one financial product or class of financial product. Example of substantive advice: that client should make higher superannuation contributions.
Life objectives filter	As above. However, the adviser identifies the client's financial objectives by translating life objectives into financial objectives.	Adviser identifies topic area of 'superannuation and life insurance' having regard to client's general life aspirations. Advice about advice: (i) the particular identified financial objective will achieve client's life objective; and (ii) that client should get substantive advice on prioritised topic area over other areas of advice in order to achieve particular financial objective.	Depends on topic areas and whether adviser offers advice on more than one financial product or class of financial product. Example of substantive advice: that client should make higher superannuation contributions.

B *Applicable Statutory Regime*

The *Corporations Act* applies to the provision of 'financial product advice', which is

> a recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person in making a decision in relation to a particular financial product … or could reasonably be regarded as being intended to have such an influence.[20]

The nature and content of the statutory obligations attendant upon the provision of financial product advice depend upon the type of advice given,[21] and whether the client is a 'retail client' or 'wholesale client'.[22] A provider of robo financial advice will need to hold the relevant licence or be an authorised representative of a licensee[23] to provide financial product advice. There are certain obligations that will apply irrespective of the client or the nature of the investment.[24] The legislative focus is upon the provision of financial product advice to retail clients, in which case certain disclosures and notices must be given to the client.[25] Further obligations regulate the standards of conduct of the financial adviser and quality of advice provided, the contents of which turn on whether the financial product advice is 'personal advice'[26] or 'general advice'.[27] These statutory requirements apply to the provision of robo financial advice.[28]

The discussion below demonstrates that the robo financial adviser who complies with the disclosures and obligations mandated by pts 7.7, 7.7A and 7.9 of the *Corporations Act*, will not also systematically evidence conduct capable of discharging applicable equitable fiduciary obligations. Further, we take the view that

---

20 *Corporations Act* s 766B(1).

21 There are two types of financial product advice: 'general advice' (s 766B(4)) and 'personal advice' (s 766B(3)).

22 All clients will be a 'retail client' unless an exception applies — in which case they will be a 'wholesale client', which includes where a client is: a professional investor; receiving the advice in the context of a large business; paying a price where either the value of the financial product or financial service exceeds $500,000; a sophisticated investor; or a high net worth individual (eg, with assets over $2.5 million): *Corporations Act* ss 761G, 761GA. See also *Corporations Regulations 2001* (Cth) regs 7.1.11–7.1.28.

23 'Financial product advice' is a 'financial service' (s 766A(1)(a)), and providers of 'financial services' are required to hold an Australian financial services licence ('AFSL') (s 911A(1)) or be an authorised representative of an AFSL holder (s 911A(2)).

24 See, eg, *Corporations Act* pt 7.10.

25 See Table 2 below.

26 'Personal advice' (s 766B(3)) is financial product advice that is given or directed to a person (including by electronic meaning) in circumstances where:

(a) the provider of the advice has considered one or more of the person's objectives, financial situation and needs …; or

(b) a reasonable person might expect the provider to have considered one or more of those matters … .

27 'General advice' is financial product advice that is not personal advice (s 766B(4)).

28 *ASIC v Online Investors Advantage Inc* (2005) 194 FLR 449 (Moynihan J), where financial product advice was provided through a website with automated advice functions; *ASIC v Oxford Investments (Tasmania) Pty Ltd* (2008) 169 FCR 522 (Heerey J), where financial product advice was provided through software, including an excel spreadsheet with automated advice functions; *ASIC v Stone Assets Management Pty Ltd* (2012) 205 FCR 120 (Besanko J), where financial product advice was provided through a link on the 'company's website' to an online trading platform with automated advice functions. See also *Re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282 (Carnwarth J).

meeting the statutory requirements may itself create a course of dealing attracting equity's scrutiny. Thus, robo financial advisers with compliance systems directed only to statute may remain exposed to unmet fiduciary risk. Tables 2 and 3 below outline these statutory requirements as a basis for our analysis of the course of dealing thereby created.

Table 2: Required statutory disclosures

Disclosure Type	Financial services guide ('FSG')	Statement of advice ('SOA')	Product disclosure statement ('PDS')
When	'[A]s soon as practicable after it becomes apparent to the providing entity [financial adviser] that the financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided': s 941D(1), where the client is a retail client: s 941A.	Provision of personal advice to retail client: s 946A(1). Personal advice is financial product advice given in circumstances where the adviser has taken account the client's objectives, financial situation and needs, or a reasonable person might expect the adviser to have taken regard of the client's objectives: s 766B(3).	PDS is disclosed by the issuer, but the adviser must provide a copy of the PDS to the retail client when the adviser makes a recommendation to the client to acquire a financial product: s 1012A.
Content requirements	Remuneration, including commissions or other benefits to be received by a financial adviser in relation to the services offered: ss 942B–942C.	Matters such as any associations, relationships or remuneration and commissions that may influence the adviser in providing the advice: ss 947B–947C.	Cost of the product and information about commissions or other payments that may impact on returns to the retail client: ss 1012A–1012C.
Purpose	Information required by a retail client to decide whether to engage or acquire the financial service offered: ss 942B(3), 942C(3).	Information required by a retail client to decide whether to act on the advice provided: ss 947B(3), 947C(3).	Information required by a retail investor to decide whether or not to acquire the financial product offered: ss 1013D(1), 1013E.

In addition to statutory disclosures, there are statutory obligations applying to robo financial advice. These obligations apply to the provision of financial product advice to retail clients,[29] and are contained in pt 7.7A of the *Corporations Act*. We summarise these in Table 3 below ('FOFA Obligations').

[29] There are, of course, other statutory and general law regimes that apply to the making of statements including those under pt 7.9 div 7 and pt 7.10 of the *Corporations Act*, the *Australian Consumer Law*

Table 3: FOFA Obligations

Best interests duty	The adviser must act in the best interests of their clients in relation to the advice ('best interests duty').[30] The best interests duty can be satisfied if the adviser has taken all of the following steps in connection with the provision of the advice:[31] a) identify the objectives, financial situation and needs of the client as disclosed by the client; b) identify the subject matter of the advice sought and the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter ('client's relevant circumstances'); c) make reasonable inquiries to obtain complete and accurate information; d) ensure the adviser has the necessary expertise on the subject matter; e) conduct reasonable investigations into the financial products that meet the client's circumstances; f) base all judgements in advising the client on their circumstances; and g) take any other step that would be reasonably regarded as being in the best interests of the client given the client's relevant circumstances.
Prioritise client's interests	The adviser must place the interests of their clients ahead of their own.[32]
Provide appropriate advice	The adviser must provide advice that is appropriate.[33]
Give warnings	The adviser must warn the client if the financial product advice is based on incomplete or inaccurate information.[34]
Not accept conflicted remuneration	The adviser must not accept conflicted remuneration.[35]
Not charge certain fees	The adviser must not charge asset-based fees on borrowed amounts, where the fee charged by the adviser is calculated by reference to the amount borrowed or used to acquire a financial product.[36]

(*Competition and Consumer Act 2010* (Cth) sch 2) and *Australian Securities and Investments Commission Act 2001* (Cth), together with general law actions such as the tort of deceit. These further regimes are not covered in this article.

30 *Corporations Act* pt 7.7A div 2 subdiv B (only applies to personal advice: s 961(1)).

31 Ibid pt 7.7A div 2 subdiv B (only applies to personal advice: s 961B(2)).

32 Ibid pt 7.7A div 2 subdiv E (only applies to personal advice: s 961(1)).

33 Ibid pt 7.7A div 2 subdiv C (only applies to personal advice: s 961(1)).

34 Ibid pt 7.7A div 2 subdiv D (only applies to personal advice: s 961(1)).

35 Ibid pt 7.7A div 4 applies in relation to the provision of financial product advice (general advice and personal advice) to retail clients to prohibit a financial services licensee, an authorised representative, or other representative from receiving conflicted remuneration, as defined in s 963A, and prohibits an employer, product issuer or seller from giving conflicted remuneration.

36 Ibid pt 7.7A div 5, subdiv B applies where a financial services licensee, or a representative of a financial services licensee, provides financial product advice to a retail client.

Give fee disclosure statements and enhanced fee disclosure	The adviser must give the client a fee disclosure statement and renewal notice at the specified times during the life of an ongoing fee arrangement.[37] If, after receiving the renewal notice, the client decides not to renew or fails to respond to the fee recipient's renewal notice, the ongoing fee arrangement terminates.[38] This means that the fee recipient is not obligated to provide ongoing financial advice to the client, and the client is not obligated to continue paying the ongoing fee.[39] The adviser must provide enhanced disclosure of the fees charged and services provided in the disclosure statement.[40]

C *Assumed Statutory Course of Dealing and Different Types of Advice*

The *Corporations Act* assumes a pattern of interaction between the adviser and retail client. The statute assumes a state of affairs such that via statutory disclosures (such as, SOA and FSG), the client is informed of the terms on which the advice is given, and the content of that advice. In the above examples, the client would likely acknowledge by clicking 'I agree' (or, for example, 'try it now', 'get started', or 'commence') indicating that they have read and understood the robo website terms and conditions and FSG on first accessing the website. After giving this apparent consent, the client commences navigating the inbuilt decision tree.

Thus, from the first interaction with the robo financial adviser, we assume that the client has been given a FSG. The client then works through the various questions designed to allocate the client to one of the menu of predetermined possible advice outcomes. In the Digital X example, the client is directed to a financial product (ETF) that meets the client's self-selected financial goal. The end point of the robo financial advice is a SOA. The client may then be given an opportunity to purchase securities or otherwise implement the advice contained in the SOA. In the alternative courses of dealing above, in which the Financial Objectives Filter and the Life Objectives Filter are applied, a FSG similarly is acknowledged to have been received by the client on first accessing the robo advice platform. Assuming that financial product advice is similarly given by the robo financial adviser, the platform will also provide a SOA.

As is assumed by the *Corporations Act*, robo financial advice is financial advice since it is a statement of opinion or recommendation that influences or is intended to influence the client's decision in relation to a financial product.[41] In a face-to-face human interaction between adviser and client, the parties may have

---

37 Ibid pt 7.7A div 3 applies to fee recipients, being either the financial services licensee or representative (s 962C) in relation to an arrangement to provide personal advice to a retail client (ss 962–962A).

38 Ibid ss 962M–962N, 962Q.

39 Ibid s 962Q.

40 Ibid pt 7.7A div 3, applies to fee recipients, being either the financial services licensee or representative (s 962C) in relation to an arrangement to provide personal advice to a retail client (ss 962–962A).

41 Ibid s 766B.

commenced their course of dealing prior to the stage when substantive advice is provided. For example, the financial adviser may give 'advice about advice' as to the topic area on which the client will receive substantive advice. As explained below, in robo financial advice, we observe the same pattern, albeit that the advice about advice occurs in parallel with substantive advice. The decision tree embedded within the robo financial adviser asks questions and allocates the client towards one of the menu of advice outcomes. Thus, advice about advice is provided.

The following section identifies advice about advice and substantive advice in relation to: (1) the Digital X Filter; (2) the Financial Objectives Filter; and (3) the Life Objectives Filter. The purpose of doing so is carefully to articulate the course of dealing between the parties and to identify the relevant financial advice in respect of which any equitable fiduciary obligation may arise.

1 *The Digital X Filter*

In the Digital X example, after the client clicks 'I agree' and commences interacting with the robo financial adviser, the gateway questions allocate the client to a decision tree according to the client's self-selected financial goal. Irrespective of the gateway questions, which will likely elicit information about the client's personal and financial circumstances, the outcome will be either that the client does or does not receive substantive robo advice. Implicit in either possible outcome is a prior unarticulated decision of the robo financial adviser, which is whether or not to provide robo advice to that client at all. The mechanics of the prior decision are not transparent to the client. However, the decision will be revealed if — following answers to gateway questions such as 'What is your weekly income?' and 'What are your weekly expenses?' — the robo financial adviser responds with a decision outcome that the client is filtered out of the platform with a message such as: 'We advise clients to reduce debts before pursuing financial investments. Please come back when you are debt free.' Alternatively, the client will be offered substantive advice. After the gateway questions, the client will follow the decision tree and be allocated to a decision outcome, triggering provision of a SOA. The SOA may or may not be capable of implementation on the same platform. Digital X clients 'are aligned with one of a limited number of ETF portfolios based on their investment profile[s]'.[42]

The crucial observation is that the robo financial adviser is, thereby, making a conceptually distinct decision about whether or not to offer substantive advice to the client. In the case where substantive advice is offered, there is an additional decision, which is that substantive advice is only offered on the topic area of the robo advice platform, and not on other topic areas. These preliminary decisions constitute advice about advice. Of course, as described above in the Financial Objectives Filter and the Life Objectives Filter, it is possible that a robo financial adviser may ask other gateway questions. In such cases, the possibility of the robo financial adviser offering advice about advice is more clearly in view.

---

[42] *ASIC RG 255*, above n 2, [255.28] example 3. See also above n 15 and accompanying text.

The robo financial adviser in Digital X therefore gives advice about advice. It is important to observe that advice about advice is a separate concept to financial product advice.[43] Advice about advice may concern the options available to the client in relation to any number of alternative topic areas of financial inquiry. However, advice about advice and financial product advice may overlap where the adviser provides advice on topic areas such that the topic area(s) are themselves confined to a 'particular financial product or class of products'. For example, in Digital X, the financial product advice is that the client should invest in 'one of a limited number ETF portfolios.' On these particular facts, this is financial product advice because the robo financial adviser is providing 'a recommendation or statement of opinion intended to influence the client' in making a decision in relation to ETF portfolios, which are a particular financial product or class of financial products.[44] Thus, Digital X provides advice about advice and also financial product advice.

Digital X's algorithm also automatically filters the client in or out of the platform. In doing so, Digital X provides advice on a different matter: whether or not the client should receive investment advice at all. This also constitutes advice about advice. In providing this advice about advice, Digital X allocates the client to an appropriate decision tree or filters them out of the platform. This advice about advice may or may not be financial product advice. Since Digital X provides advice on only one topic area of advice, which is itself confined to a single financial product, the robo financial adviser thereby also may be providing financial product advice.[45] However, the point to note is that in deciding whether to permit the client to proceed through the decision tree or in filtering the client out of the platform, the robo financial adviser is advising the client on their suitability to receive financial advice at all.

There is also substantive advice. In filtering out the client or allocating the client to an appropriate decision tree, Digital X implicitly makes a recommendation as to whether or not the client should invest in ETF portfolios. This is structurally inevitable since ETF portfolios are the only class of financial product on which Digital X provides advice. It is for this reason that the substantive advice will similarly constitute financial product advice. The advice about advice and substantive advice are, thus, provided in parallel. As a result, the robo financial adviser's allocation of the client to receive a SOA, or not, means it is difficult to distinguish between these forms of advice.

2 *The Financial Objectives Filter*

In relation to the Financial Objectives Filter, the client selects between receiving advice on 'superannuation', 'debt consolidation' and 'life insurance'. Depending on the client's answers to the subsequent gateway questions, the robo financial adviser allocates the client to an appropriate decision tree or filters them off the platform. Thus, the robo financial adviser proves advice about advice as to the client's suitability to receive substantive advice on the selected topic area. In addition, as

---

43 To constitute financial product advice, the advice must relate to a particular financial product or class of products: *Corporations Act* s 766B(1).

44 *ASIC v Online Investors Advantage Inc* (2005) 194 FLR 449, 465 [123]–[125] (Moynihan J).

45 See above n 43.

with Digital X, it may be argued there is substantive advice and financial product advice being given about certain investments. This will, in part, depend on the topic areas and whether the robo financial adviser offers financial advice on more than one financial product or class of financial products.

3 *The Life Objectives Filter*

The Life Objectives Filter more explicitly differentiates between advice about advice and substantive advice. In this example, the client selects between 'security in retirement', 'paying for children's education', 'owning own home' or 'having a nest egg'. The robo financial adviser translates the client's life objective(s) into a pre-programmed financial objective(s) on which to receive substantive robo financial advice. For example, 'security in retirement' as a life objective might translate to 'superannuation strategy' as a financial objective. Having a 'nest egg' might similarly translate to 'portfolio strategy'. This translation and alignment constitutes advice about advice. The robo financial adviser is counselling the client on a suitable topic area of financial advice.

Throughout this process, the client will also answer the gateway questions, such as their age, income, liabilities and assets, risk tolerance and desired rate of return. Based on the client's responses the robo financial adviser allocates the client to the appropriate decision tree, or filters them out of the platform. This allocation implicitly confirms the client's suitability to receive substantive advice on a particular topic(s), now expressed as financial objectives. At this point in the analysis, the Life Objectives Filter follows a similar pattern to the Digital X Filter and Financial Objectives Filter examples discussed above. However, the Life Objectives Filter uniquely provides a distinct phase of advice about advice in translating life objectives into financial objectives. In translating life objectives, the robo financial adviser is not providing financial product advice. In consequence, the investor protections contingent upon the provision of financial product advice, such as FOFA Obligations[46] and the requirement to make statutory disclosures[47] are not engaged.

Careful construction of the course of dealing between the robo financial adviser and the client demonstrates that since financial product advice is not being given, statutory protection of retail clients under the *Corporations Act* is not consistently available. However, the robo financial adviser may owe equitable fiduciary obligations. As is demonstrated below, equity independently scrutinises the conduct of the robo financial adviser who may constitute itself a fiduciary and, thus, owe an obligation of loyalty to the client. Further, the robo financial adviser's conduct in compliance with the *Corporations Act* will not necessarily be that which also meets equity's stringent standards. It is to these equitable obligations that we now turn.

---

[46] See Table 3 above.
[47] See Table 2 above.

D *Equitable Fiduciary Obligations based on a Statutory Course of Dealing*

There is a debate as to the normative foundations and justifications for fiduciary obligations.[48] This discussion seeks to shed some light on why fiduciary law should be concerned with the conduct of robo financial advisers. It is impossible to canvas every theory of fiduciary obligations, and implicit in the calculation is some judgement about the role of fiduciary law in regulating *all* financial advisers. Part of the difficulty is that unlike other fiduciaries, such as agents and trustees, who may also have custody of assets or otherwise have the power to transform the legal status of the principal, the financial adviser does only and exactly just that: *advise*. Nonetheless, as pointed out by Smith, despite an absence of formal power to bind the principal, on particular facts, the robo financial adviser's influence over the client may be so powerful that it is *as if* the robo adviser had the power to affect the legal position of the client.[49]

Additionally, where the adviser is a stockbroker, it is also necessary to separate the financial adviser's function as an agent who buys and sells securities, and their advisory function. This distinction is forcefully illustrated by the facts of *Daly v Sydney Stock Exchange Ltd*.[50] As is discussed further below in Part IID, Dr Daly sought *advice* from Patrick Partners, a firm of stockbrokers. He had inherited a sum of money and, after reading a book entitled 'Investment for Everyone', decided to invest the money on the stock exchange.[51] Apart from a small

---

48 A non-exhaustive list of recent literatures includes: Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010); Matthew Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (2013) 7(2) *Journal of Equity* 105; James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 (Apr) *Law Quarterly Review* 302; James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7(2) *Journal of Equity* 128; James Edelman, 'The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21; P D Finn, *Fiduciary Obligations* (Lawbook, 1977); P D Finn, 'The Fiduciary Principle' in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1; Paul Finn, 'Fiduciary Reflections' (2014) 88(2) *Australian Law Journal* 127; Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 577; Joshua Getzler, '"As If" Accountability and the Counterfactual Trust' (2011) 91(3) *Boston University Law Review* 973; Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39; Matthew Harding, 'Trust and Fiduciary Law' (2013) 33(1) *Oxford Journal of Legal Studies* 81; Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58(4) *McGill LJ* 969; Paul B Miller, 'The Fiduciary Relationship' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63; Leonard I Rotman, 'Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence' (2011) 91(3) *Boston University Law Review* 921; Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7(2) *Journal of Equity* 87; Lionel Smith, 'The Motive, Not the Deed' in Joshua Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, 2003) 53; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on behalf of Another' (2014) 130 (Oct) *Law Quarterly Review* 608; Lionel Smith, 'Can We Be Obliged to Be Selfless?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 141.

49 Lionel Smith, 'Parenthood Is a Fiduciary Relationship', 24 July 2017 <https://ssrn.com/abstract=3007812> 13.

50 (1986) 160 CLR 371 ('*Daly*').

51 *Daly v Sydney Stock Exchange Ltd* [1981] 2 NSWLR 179, 183C (Powell J).

parcel of shares, Dr Daly had not previously invested in the share market. He approached Patrick Partners and met an employee, who was employed as a 'client adviser' or 'sales adviser', to inquire about shares in which he might invest his money.[52] The employee advised Dr Daly that the time was not propitious to purchase shares, but that Dr Daly should lend the money to Patrick Partners. Thus, the firm was not engaged to implement any transactions on his behalf. Despite being a 'stockbroker', on the facts, Patrick Partners provided advice alone.

Accounts of fiduciary law that rest on respect for the principal's autonomy, or are derived from the principal's authority, thus face a particular challenge in accommodating advisers, which is that a principal may engage an adviser and yet retain a degree of autonomy.[53] Similarly, a principal may engage an adviser who does not, in any meaningful sense, 'stand in substitution' for the principal.[54] However, as is discussed below, we speculate that the particular context of robo financial advisers tips the normative balance in both of these models in favour of the adviser owing an obligation of fiduciary loyalty.

Smith advances an 'interpretative theory of fiduciary relationships'.[55] According to Smith, an obligation of fiduciary loyalty arises when decision-making powers are held for and on behalf of another person, where those powers are held in a 'managerial capacity'.[56] Therefore, the powers must be exercised according to what the fiduciary believes is in the best interests of the principal and may not be exercised when the 'fiduciary is in a conflict'.[57] When a financial adviser is appointed, is the principal's autonomy sufficiently entrusted or transferred to the (fiduciary) adviser? Arguably this is the purpose of the doctrinal tests outlined below. Equity seeks to determine whether the substance of the relationship is such that an obligation of loyalty applies. Notwithstanding that formal authority to make and implement decisions rests with the principal, as a 'factual' matter 'factual power is held for and on behalf of the advisee'.[58] Application of this theory therefore depends on our ability to be satisfied that 'there has been a partial transfer of autonomy' to the adviser.[59] In relation to a robo financial adviser, we may question the extent to which the client perceives the digital platform to be neutral or impartial. On some facts, it may be demonstrated that the client's belief in the unbiased

---

52 Ibid 183D (Powell J).

53 Smith, 'Ensuring the Loyal Exercise of Judgment', above n 48, 618–19.

54 Paul B Miller, 'The Fiduciary Relationship' in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63, 71.

55 Lionel D Smith, 'Contract, Consent, and Fiduciary Relationships' in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 117, 134.

56 Ibid 134–5. See also Smith, 'Ensuring the Loyal Exercise of Judgment', above n 48, 614–16.

57 Smith, above n 55, 135. According to Smith's theory, the no-conflict rules 'tell a fiduciary when judgement cannot be safely exercised in relation to a fiduciary power' and breach renders the transaction, inter alia, voidable by the principal. The no-conflict rule is, thus, about the vitiation of the principal's consent. Smith views the no-profit rule as a rule of primary attribution by which profit obtained in breach of duty is attributed to the principal from the moment of acquisition. It is a rule about the principal's primary entitlement to the profit. See Smith, 'Ensuring the Loyal Exercise of Judgment', above n 48, 625, 628. See also J E Penner, 'Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014), 159, 171.

58 Smith, 'Ensuring the Loyal Exercise of Judgment', above n 48, 619.

59 Ibid.

competence of the robot allows the client to cede more decision-making power to the digital platform. In this sense, the 'factual power' held by the robo financial adviser may, on the facts, be greater as compared to a human adviser.

The same point is possible in relation to Miller's work. Miller argues that fiduciary power is 'a form of *authority* ordinarily derived from the *legal personality* of another (natural or artificial) person'.[60] The fiduciary is invested with the fiduciary power/authority of the principal and, therefore, stands in substitution for the principal 'in exercising a legal capacity that is ordinarily derived from … [the principal's] legal capacity'.[61] In relation to advisers, Miller also points out the important distinction we draw above, which is that it is relatively straightforward to characterise a stockbroker as fiduciary, where that person has some discretionary decision-making power in relation to investments, and where that power also includes the authority to implement transactions.[62] However, of interest is a different scenario, in which it is the client who implements any advice.[63] To the extent that Miller's model contemplates a principal who is 'incapable of exercising independent judgment'[64] — such that the financial adviser enjoys 'effective discretionary power' despite no formal relinquishment by the client — the robo financial adviser may similarly give financial advice.[65] As identified above, the systemic pattern may show that consumers are *more* willing to trust the digital platform than a face-to-face adviser.[66]

Our concern with the willingness of the client to trust the robo adviser comes close to Finn's 'fiduciary expectation' thesis.[67] Informed by considerations of public policy 'aimed at preserving the integrity and utility of such relationships given the expectation that the community is considered to have of behaviour in them, and given the purposes they serve in society',[68] fiduciary obligations are recognised where the actual circumstances of a relationship demonstrate that 'one party is entitled to expect that the other will act in his or her interests in and for the purposes

---

60 Miller, 'The Fiduciary Relationship', above n 54, 70 (emphasis in original).

61 Ibid 71.

62 Ibid 84. Albeit, as discussed in this article, some robo platforms also direct clients to portfolio and execution services.

63 Some robo platforms may, of course, be more comprehensive and offer advice as well as execution and portfolio management services, the latter being provided either by the robo entity or a separate but related entity. These services may obviously be conflicted.

64 Miller, 'The Fiduciary Relationship', above n 54, 84 n 76.

65 A question behind both Smith's and Miller's accounts, resolution of which lies beyond the scope of this article, is the question of *why* the principal has transferred autonomy or authority. Specifically, whether undue influence has been in view, given the shared historical roots of both doctrines. See generally Rick Bigwood, 'From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom' in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009), 369; Robyn Honey, 'Divergence in the Australian and English Law of Undue Influence: Vacillation or Variance?' in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016), 271.

66 We acknowledge this is an empirical question beyond the scope of this article. In addition, the mode of interaction and advice delivery may be a hybrid, utilising digital means to varying degrees — for example, via email or online chat platform. These hybrid modes are not specifically considered in this article.

67 Finn, 'Fiduciary Reflections', above n 48, 139. See also Finn, 'The Fiduciary Principle', above n 48, 46–7.

68 Finn, 'Fiduciary Reflections', above n 48, 139.

of the relationship'.[69] Finn particularly identifies 'lawyers and investment advisers' as being commonly subject to fiduciary loyalty on this basis.[70] As a matter of doctrine, the discussion below turns to the specific questions of whether the elements identified by Finn, such as ascendancy and vulnerability, are made out, which we argue do as a normative matter justify a relationship capable of the fiduciary protection suggested by Finn. However, we would go further and speculate that it is in the intrinsic nature of the digital platform through which robo financial advice is delivered that an expectation of loyalty may be generated. ASIC guidance itself contemplates that a client should expect to be in a better position if they follow the advice provided by the robo adviser,[71] and predicts that 'digital advice has the potential to be a convenient and low-cost option for retail clients who may not otherwise seek advice'.[72] We suggest that while a lower cost may indeed be one reason for increased uptake of robo financial advice, the question must also be asked: do consumers trust financial robots more than human advisers? To the extent that trust is relevant, so is the fiduciary norm.

Unlike the above explanations for fiduciary duties, which are identified in service of the law's ends or policies,[73] Edelman's undertakings thesis posits that the necessary, but not sufficient, condition is that the conduct of the fiduciary 'has manifested an undertaking such that the principal is entitled, "in an objective sense, to expect that the other will act in his or their interests in and for the purposes of the relationship"'.[74] Edelman argues that the status or office held by a person is also an important circumstance in determining the scope of duties that the officeholder may reasonably be held to have undertaken.[75] Thus, Edelman's account is based on the undertaking or consent of the putative fiduciary, as constructed by the reasonable person in the position of the putative principal. As the discussion below demonstrates, it might be argued that the robo financial adviser necessarily 'undertakes a particular financial advisory role for the client',[76] carrying with it the necessary fiduciary undertaking.

In addition, there are further justifications for the application of the fiduciary norm in relation to robo financial advice. As Rotman identifies,[77] the circumstances

---

69 Ibid.

70 Ibid.

71 See, eg, *ASIC RG 255*, above n 2, [255.95].

72 Ibid [255.3].

73 See generally Miller, 'Justifying Fiduciary Duties', above n 48, 994–1004. Conaglen also outlines the nature and function of fiduciary duties by reference to ends, arguing that fiduciary obligations serve a prophylactic and protective function in the service of the fiduciary's non-fiduciary duties. On this model, fiduciary duties increase the likelihood of the fiduciary's faithful adherence to (non-fiduciary) duty. See Conaglen, *Fiduciary Loyalty*, above n 48, 61.

74 Edelman, 'The Importance of the Fiduciary Undertaking', above n 48, 133, quoting *Red Hill Iron Pty Ltd v API Management Pty Ltd* [2012] WASC 323 (5 November 2012), [362] itself quoting *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 541.

75 Edelman, 'The Role of Status in the Law of Obligations', above n 48.

76 *Aequitas v Sparad No 100 Ltd (formerly Australian European Finance Corp Ltd)* [2001] NSWSC 14 (9 April 2001), [307] (Austin J) ('*Aequitas*') applying *Daly* (1986) 160 CLR 371, 377 (Gibbs CJ), 384–5 (Brennan J). See also *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 391 (The Court) ('*CBA v Smith*') in which the bank 'assumed a fiduciary responsibility towards the customer' in giving that customer 'advice upon financial affairs'.

77 Rotman, above n 48, 970–1.

must justify fiduciary protection. Where contract, tort or unjust enrichment can rectify injustice, then fiduciary law should have no role to play. The decision tree in which financial advice is embedded and through which it is delivered is opaque to the client. Further, the client cannot ask questions of the financial robot, or ask for clarification. Crucially, the client cannot ask for reasons beyond those automatically given by the platform and, therefore, cannot assess the basis for the financial advice and whether or not to act upon it. The information asymmetries in the relationship between the adviser and client are heavily weighted in favour of the robo financial adviser. As a formal matter, private ordering with the robo financial adviser is not possible. Additionally, the client entrusts the robo financial adviser with information that may be confidential in character, such as particular financial information and personal attributes and goals. Taken together, we argue that these features suggest the recognition of fiduciary loyalty in the giving of robo financial advice. There is a systemic risk of abuse of power by the robo financial adviser and holding the adviser to a particular standard of performance or degree of care will not meet this risk. The client is unable to monitor or evaluate the robo adviser's performance and, in any case, as Getzler explains: '[w]hat is being sought from the fiduciary is a decent process of decision making rather than a defined or prescribed result.'[78]

Assuming that we can be reassured as to *why* the fiduciary norm should apply to the robo financial adviser–client relationship, we now turn to establishing the presence of a fiduciary relationship in the statutory courses of dealing identified above in Part IIC.

Reference has already been made to *Daly*, in which the High Court held Patrick Partners owed fiduciary obligations to Dr Daly. Recall that an employee of Patrick Partners suggested to Dr Daly that instead of purchasing shares, he should lend the money to the firm for interest 'until the time was right to buy [shares]' adding that the 'firm was safe as a bank'.[79] Dr Daly pursued this course and lent the firm money on an unsecured basis. Patrick Partners was, in fact, in a parlous financial situation, which was not disclosed to Dr Daly. On the insolvency of the firm, the debt to him could not be repaid. Dr Daly commenced an action to recover from a statutory fidelity fund and his entitlement depended on whether the firm had received the funds as (constructive) trustee. Argument was directed to the question whether the firm stood in a fiduciary relationship to Dr Daly.

In determining that a fiduciary relationship had arisen, Gibbs CJ pointed to the need for an undertaking by the firm and reliance by the client:

> The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr Daly, and Dr Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make

---

78 Joshua Getzler, 'Financial Crisis and the Decline of Fiduciary Law' in Nicholas Morris and David Vines (eds) *Capital Failure: Rebuilding Trust in Financial Services* (Oxford University Press, 2014) 193, 199–200.

79 *Daly* (1986) 160 CLR 371, 375 (Gibbs CJ).

> to the client a full and accurate disclosure of the broker's own interest in the transaction.[80]

Justice Brennan identified:

> Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises.[81]

As has been said, it is also important to distinguish the activity of the firm in *Daly*. Prominent in the facts was *advice* and *advising*. Despite the firm being described as a 'stockbroker', the activity was not buying and selling securities. Had the employee been engaged to do so, a fiduciary relationship of agency would have arisen. It is for this reason that stockbrokers are often more easily cast as fiduciary in virtue of status. However, where the activity is advising, more careful construction is required. Following *Daly*, the relationship between a financial adviser and client is a distinct category of fiduciary relationship that arises whenever the criteria in *Daly* are met.[82] The existence of this obligation may prevent the fiduciary from subsequently attempting to contract out of any fiduciary obligations. We explore this issue below.

A fact-based fiduciary relationship may also arise from the course of dealing between the parties and the facts and circumstances of the case. Courts in Australia have articulated differing approaches to the identification of an ad hoc fiduciary relationship. Most prominent is the 'essence' account of Mason J in *Hospital Products Limited v United States Surgical Corporation*,[83] and the multi-factorial approach articulated by Gaudron and McHugh JJ in *Breen v Williams*.[84] Irrespective

---

80 Ibid 377 (Gibbs CJ) (references omitted).

81 Ibid 385 (Brennan J).

82 In the sense that a financial adviser–advisee relationship falling strictly within the criteria identified will be fiduciary: see *Daly* (1986) 160 CLR 371, 377 (Gibbs CJ), 385 (Brennan J). *Daly* was approved in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197–8 [72]–[74] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*'). See also *Aequitas* [2001] NSWSC 14 (9 November 2011), [307] (Austin J) and *ASIC v Citigroup (No 4)* (2007) 160 FCR 35, 77–8 [283]–[284] (Jacobson J), which hold fast to criteria identified in *Daly* — namely, the need to identify an undertaking to act in the client's interests in a particular financial advisory role and a holding out by the putative adviser of some expertise in financial matters. To the extent that the facts systematically disclose these elements in financial adviser relationships, *Daly* applies, unless displaced (as, for example, in *Pilmer*), where the necessary element of 'advising' was not present. Rather, the report of the auditor was a statement of opinion provided to satisfy the ASX listing rules.

83 (1984) 156 CLR 41 ('*Hospital Products*'). Justice Mason stated that the features of fiduciary relationships 'from the illustrations which the judicial decisions provide' suggest that '[t]he critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense': at 96–7.

84 (1996) 186 CLR 71, 106–7 (citations omitted) ('*Breen*'):

> Australian courts have consciously refrained from attempting to provide a general test … the term "fiduciary relationship" defies definition. … the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship. These … have included: the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.

of the description adopted, the discussion below demonstrates that the robo financial adviser likely constitutes itself fiduciary in providing advice, both advice about advice and substantive advice. All potential courses of dealing, therefore, pose risk for the robo financial adviser.

Justice Mason's obiter dicta in *Hospital Products* was applied in relation to a financial adviser in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)*.[85] In that case, a financial adviser recommended the purchase of financial products (notes) to various local councils. The face of the notes contained a purported disclosure such that the financial adviser (Grange) 'may also receive placement fees'.[86] Acting on the advice, the local councils purchased the notes from an entity related to the adviser and suffered financial losses. The local councils successfully obtained equitable compensation for these losses as a remedy for the adviser's breach of fiduciary duty. The Court, therefore, had to determine whether the financial adviser owed fiduciary obligations to the client.

In confirming the existence of a fiduciary duty, Rares J stated:

> Grange held itself out to Swan at all times from about mid-2003 (when Mr O'Dea began offering advice about rewriting Swan's investment policy and investing in the Forum AAA SCDO) as an adviser on matters of investment and undertook to advise Swan on those matters. Swan reposed trust and confidence in Grange acting as its adviser on investing the council's money in financial products. Grange undertook, from when it negotiated the Forum AAA transaction, to act in the interests of Swan in the exercise of the council's investment powers and discretions that affected Swan's interests in a legal or practical sense.[87]

As described above, the course of dealing between a robo adviser and client may be understood both as advice about advice and substantive advice. A fiduciary relationship arises on both types of advice. In addition, it should be noted that although the scope of the fiduciary relationships may be different, the existence of a fiduciary relationship may be demonstrated on all three courses of dealing described above: Digital X, Financial Objectives Filter and Life Objectives Filter.

Dealing first with advice about advice, in all three courses of dealing, the robo financial adviser determines the client's suitability to receive the substantive advice offered. Depending on the client's answers to the gateway questions, the robo financial adviser allocates the client to a decision tree, or filters them out of the advice platform. Ultimately, ascription of the fiduciary character will depend on the evidence in a given scenario.

Turning to the criteria identified in *Daly*, the most crucial observation is that the robo financial adviser holds itself out as an adviser on matters of investment.[88]

---

85 (2012) 301 ALR 1, 200 [743] (Rares J) ('*Wingecarribee*').

86 Ibid 76 [254] (Rares J).

87 Ibid 200 [743] (Rares J). See also *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 210–11 [1066]*; ASIC v Citigroup (No 4)* (2007) 160 FCR 35, 77–8 [282]–[286] (Jacobson J) — although on the facts the Court found a fiduciary duty had been contractually validly excluded.

88 *Aequitas* [2001] NSWSC 14 (9 April 2001), [307] (Austin J) applying *Daly* (1986) 160 CLR, 377 (Gibbs CJ), 384–5 (Brennan J). The important matter here is substance not form. We do not suggest

Importantly, the advice given implicitly covers the robot's decision as to the suitability of the client to receive substantive advice. The robot 'undertakes a particular financial advisory role for the client'.[89] Thus, the matters on which the adviser holds out expertise may be wider than is first apparent. The existence of an undertaking is further supported by the individuated nature of the interaction between robo financial adviser and client. The client relies on the expertise of the robo financial adviser first in confirming their suitability to receive substantive advice and then, where relevant, in the identification of the topic areas of advice. In answering the gateway questions, the client will have entrusted confidential personal information to the robo financial adviser. It is very difficult for the client to verify the advice given by the robo financial adviser in either filtering the client out or confirming their eligibility to proceed. The inner calculations of the robo financial adviser are fixed and predetermined and do not permit any questions and answers to be given. The client has no opportunity to challenge or question the robo financial adviser or the advice about advice during the process. Hence, the client is vulnerable in receiving advice about advice.

Similarly, the characteristics of an ad hoc fiduciary relationship are present. In addition to the elements of undertaking, vulnerability and reliance identified above, it might be argued that the robo adviser holds itself out via statements on the platform as acting in the interests of the client such that a legitimate expectation of loyalty is created.[90] Similarly, the paradigm elements of trust and confidence are present. Balanced against these factors, however, is the obvious point that the client may exit with a click of the mouse. But this possibility does not and should not derogate from the potential fiduciary analysis. In the more familiar example, in which the adviser and client interact face-to-face, the parallel argument may be made that the client can exit the meeting. Equity is suspicious of such arguments.

Turning to the provision of substantive advice, in all three examples, the robo adviser provides a recommendation to the client regarding financial investments. A fiduciary relationship may likewise arise. The structural characteristics of the *Daly* financial adviser–client relationship are present systemically when substantive advice is given. Similarly, there is an expectation of loyalty and an undertaking to act in the interests of the client coupled with vulnerability and power to affect the interests of the client.

---

that merely by renaming the activity as 'provision of general information' fiduciary law would turn a blind eye.

89 *Aequitas* [2001] NSWSC 14 (9 April 2001), [307] (Austin J) applying *Daly* (1986) 160 CLR, 377 (Gibbs CJ), 384–5 (Brennan J). See also *CBA v Smith* (1991) 42 FCR 390, 391 (The Court) in which the bank 'assumed a fiduciary responsibility towards the customer' in giving that customer 'advice upon financial affairs'.

90 Cf Finn, 'The Fiduciary Principle', above n 48, 46: '[what must be shown] is that the actual circumstances are such that one party is entitled to expect that the other will act in [their] interests in and for the purposes of the relationship'.

E *The Scope of the Fiduciary Duty*

Not all aspects of the relationship between robo financial adviser and client will be fiduciary in nature.[91] It is, therefore, necessary to construe the scope of the fiduciary relationship. In the robo financial adviser examples, this is bounded by the robo financial adviser's particular role in each course of dealing. For example, in the Life Objectives Filter, the robo financial adviser provides advice about advice in presenting topic areas for advice or filtering the client out of the platform. Recall, the life objectives are: 'security in retirement', 'pay for children's education', 'own my own home', or 'nest egg'. In translating a life objective into a financial objective, and then particularising a financial objective, the robo financial adviser assists the client in prioritising and selecting an appropriate topic area. Ultimately, this also potentially translates to substantive advice on that topic area. The scope of the robo financial adviser's fiduciary duty therefore initially embraces the process of filtering and selecting the client's topic preferences. There is potentially a second fiduciary duty that maps the robo financial adviser's role in providing substantive advice. Similarly, in the Financial Objectives Filter and the Digital X scenario, the scope of the robo financial adviser's fiduciary obligations are defined by reference to the roles in initially, identifying and prioritising the client's objectives, and also in providing substantive advice.

Three crucial points must be made. First, consistent with the observation that advice about advice and substantive advice are provided in parallel, the robo financial adviser may owe more than one fiduciary obligation to the client, arising from the same course of dealing. Second, a fiduciary relationship may arise very early, if not at the commencement, in the interaction between the robo financial adviser and client. This is significant because, as discussed below, the robo financial adviser's compliance with statutory obligations under the *Corporations Act*, will not systemically elicit conduct that also discharges or eliminates any fiduciary obligations. Third, depending on the course of dealing in question, the scope of any fiduciary obligation is potentially wider: for example, the Life Objectives Filter in relation to advice about advice may create a fiduciary obligation encompassing a broader range of conduct.

F *Fiduciary Duty Content and Breach*

The fiduciary obligation is loyalty.[92] Therefore, the robo financial adviser must not put itself in a position of conflict.[93] Breach occurs where the adviser puts itself in a

---

91 *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100 [34] (French CJ and Keane J).

92 *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ); *P&V Industries Pty Ltd v Porto* (2006) 14 VR 1, 6 [23] (Hollingworth J), after referring to *Breen* (1996) 186 CLR 71 and *Pilmer* (2001) 207 CLR 165: 'the no conflict and no profit rules encompass the whole content of fiduciary obligations and the duty of loyalty imposed on a fiduciary is promoted by prohibiting disloyalty rather than by prescribing some positive duty' (citing Richard Nolan, 'A Fiduciary Duty to Disclose?' (1997) 113 (Apr) *Law Quarterly Review* 220, 222).

93 *CBA v Smith* (1991) 42 FCR 390, 392 (The Court); an obligation 'not to enter upon conflicting engagements to several parties': *Breen* (1996) 186 CLR 71, 135 (Gummow J); *Pilmer* (2001) 207 CLR 165, 199 [78] (McHugh, Gummow, Hayne and Callinan JJ). See also *Beach Petroleum NL v*

position of a conflict, or real or substantial possibility of conflict, between duties or between the adviser's self-interest and duty to the client.[94] Crucially, breach occurs not simply on an actual conflict, but potential conflict. As discussed in Part IIG below, a robo financial adviser may avoid the consequences of breach by seeking the fully informed consent of their principal.

To the extent that the advice constitutes financial product advice,[95] the robo financial adviser must conform to various statutory obligations including the adviser's FOFA Obligations.[96] However, the robo financial adviser cannot rely on meeting its FOFA Obligations in seeking to perform any fiduciary obligations. Rather, the FOFA Obligations are predicated on the existence of conflict between the adviser and client, and propose a method by which this conflict should be managed. For example, although pt 7.7A div 4 prohibits conflicted adviser remuneration, there are exceptions.[97] Further, an advice provider is permitted to be in a position of conflict, provided the advice provider prioritises the client's interests.[98] Recall that advice about advice is not financial product advice since the advice does not relate to a particular financial product or class of products.[99] Therefore, the robo financial adviser is not required to comply with FOFA Obligations in the case of advice about advice. However, FOFA Obligations do apply to substantive advice. Thus, we argue that robo financial adviser conduct that meets FOFA Obligations may not evidence conduct capable of discharging that adviser's fiduciary obligations.

Abbott Tout Russell Kennedy (1999) 48 NSWLR 1, 47 (The Court); *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 107 [59] (Hayne and Crennan JJ).

94 *CBA v Smith* (1991) 42 FCR 390, 392 (The Court); *Breen* (1996) 186 CLR 71, 135 (Gummow J); *Birtchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408 (Dixon J); *Boardman v Phipps* [1967] 2 AC 46, 124 (Lord Upjohn); *Hospital Products* (1984) 156 CLR 41, 103 (Mason J); *Pilmer* (2001) 207 CLR 165, 199 [79] (McHugh, Gummow, Hayne and Callinan JJ); *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2016) 340 ALR 580, 581–2 [3]–[5] (Bathurst CJ); 605 [132] (Sackville AJA with whom Meagher JA agreed).

95 *Corporations Act* s 766B(1). See above nn 23–5, 28–9 and accompanying text.

96 See Table 3 above.

97 *Corporations Act* pt 7.7A div 4 prohibits a financial services licensee, authorised representative or other representative from receiving conflicted remuneration, as defined in s 963A and prohibits a product issuer or seller from giving conflicted remuneration. Note that exceptions to the prohibition on receiving conflicted remuneration are set out in pt 7.7A div 4 subdiv B. These include, a benefit given to the licensee or representative solely in relation to a life risk insurance product: s 963B, or non-monetary benefits less than the prescribed amount of $300 where the benefit is given in relation to some insurance products and has a genuine education or training purpose: *Corporations Act* s 963C; *Corporations Regulations 2001* (Cth) reg 7.7A.13.

98 *Corporations Act* s 961J(1):

> If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:
>
> (a) the provider, or
>
> (b) an associate of the provider; or
>
> …
>
> the provider must give priority to the client's interests when giving the advice.

99 Ibid s 766B(1). However, as acknowledged above, in Digital X the advice may constitute advice about advice, substantive advice and also financial product advice since the platform only advises on one financial product or class of financial product.

Specifically, as outlined in Table 3 above, the FOFA Obligations require the adviser to 'act in the best interests of the client in relation to the advice'.[100] In order to satisfy this obligation, the statute prescribes various steps that we suggest demonstrate that the adviser has exercised a degree of care and skill in advising the client. In addition, the adviser must take steps directed to the 'appropriateness' of the advice and must only provide the advice if it is appropriate.[101] Neither of these standards directs the adviser to meet the fiduciary obligation of loyalty.[102]

1 *Conflict of Duty and Self-interest*

The robo financial adviser must avoid a conflict between its duty to the client and its self-interest. In the Life Objectives Filter, the robo financial adviser translates life objectives to financial objectives. In the Financial Objectives Filter, the client is similarly guided to choose between a closed set of alternate financial objectives. In both scenarios, the robo financial adviser must only present topic areas within the scope of its licence[103] and on which it is qualified to advise.[104] Similarly, the robo financial adviser will likely present within the closed set of topic areas, those which for self-interested reasons, are beneficial to the adviser or a related entity. For example, the offered topic areas or financial products may correlate to providers offering execution, custodial and management services related to the robo financial adviser. To put the matter starkly, contrast the pattern of robo financial advice with a hypothetical situation in which a client approaches an adviser and *all* potential topic areas of advice are open for discussion, and in which the adviser has no interest in providing advice on one topic area over the other.

The analysis in relation to the Digital X scenario, is more nuanced. The client accesses the digital platform that only offers advice on one topic area: portfolio construction investment advice on ETF. However, as discussed above, all three scenarios contain an additional advice outcome. Specifically, the gateway questions and other filtering mechanisms determine whether or not the client should receive robo financial advice or be filtered out of the platform. Thus, even in Digital X, in which it appears that there has been no allocation of topic areas, nonetheless the robo financial adviser has determined whether or not the client should receive financial advice. This latter decision may be conflicted. Thus, it is not difficult to construct facts on which the robo adviser is in breach of its fiduciary obligation to avoid a conflict of duty and interest.

---

100 Ibid s 961B(1).

101 Ibid s 961G.

102 There is a debate beyond the scope of this article as to whether an obligation to act in the best interests of another is fiduciary or not. We observe that irrespective of the juridical basis of any best interest obligation binding the adviser, discharging this obligation will not, of itself, satisfy equity's obligations to avoid conflicts.

103 *Corporations Act* s 911A(1).

104 Section 912A of the *Corporations Act* requires a licensee to ensure their representatives comply with minimum standards for training of financial advisers and maintain organisational competence to provide the financial services authorised by the licence. See further ASIC, *Regulatory Guide 146 Licensing: Training of Financial Product Advisers*, July 2012; ASIC, *Regulatory Guide 105 Licensing: Organisational Competence*, 15 December 2016.

2 *Conflict of Duty and Duty*

The robo adviser must also avoid conflicts between duties. It is in the nature of robo financial advice that it is intended for mass consumption. Indeed, commentary has referred to robo financial advice having a 'democratising' effect.[105] In this environment, the risk of breach arises as individual clients are unlikely to have an identity of interest. As stated by the Court in *CBA v Smith*,

> The reason is that by reason of the multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting his obligation in the other. Thus, it has been said, after ample citation of authority that where an adviser in a sale is also the undisclosed adviser of the purchaser, an actual conflict of duties arises …[106]

Importantly, breach arises from the possibility of conflict, not merely on actual conflict. Two characteristics of robo financial advice immediately raise concerns. First, robo financial advice appears to proceed as a one-dimensional assessment of each client's interest. It is not clear the extent to which a landscape of differing clients and their interest is being taken account of in the provision of robo financial advice. In any event, the gateway questions are not likely to elicit information for the robo financial adviser sufficiently to appreciate the conflicts of interests that may arise between clients. The closed and predetermined nature of the decision tree prevents a sophisticated appreciation of the nature of the clients' interests. Second, as shown by Digital X, a robo platform may advise on acquisition of particular securities that may have limited market supply. In such circumstances, we may speculate as to the market impacts of this advice. This clearly engages the fiduciary obligation to avoid conflicts of duty.

G *Disclosure and Consent*

The robo financial adviser may obtain the informed consent of the client in order to avoid fiduciary liability.[107] *Maguire v Makaronis* states that '[w]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given'.[108] Relevant considerations include whether the fiduciary has disclosed all information relevant to the transaction or decision. The fiduciary will not meet the standard by giving information sufficient only to place the principal on inquiry.[109] Thus, the robo financial adviser must disclose the nature and extent of the conflict of duty and duty, or duty and interest.[110] In addition, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the Court noted that 'the sufficiency of disclosure can

---

105 Wealthfront Investment, 'Methodology White Paper', <https://research.wealthfront.com/whitepapers/investment-methodology>.

106 (1991) 42 FCR 390, 392 (The Court) (citation omitted).

107 There is a question beyond the scope of this article of the extent to which the course of dealing between the client and robo adviser supports other equitable defences such as equitable estoppels.

108 (1997) 188 CLR 449, 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

109 *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1127 (Lord Wilberforce) (PC).

110 *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 23 [110] (Besanko J, with whom Finkelstein and Jacobson JJ agreed).

depend on the sophistication and intelligence of the persons to whom disclosure must be made'.[111] Equitable consent is a function of the principal's ability to make a conscious and informed choice. At minimum, the principal must have turned their mind, or had the ability to turn their mind, to the question whether or not to consent to the breach of fiduciary duty.

Clients commence their interaction with the robo financial adviser by acknowledging their agreement to the platform terms and conditions and receipt of a FSG. Therefore, as a matter of chronology, the client's click or tap has the potential to found a good defence for the adviser. However, the difficulty is that the quality of the fiduciary disclosure at this point will not likely constitute sufficient disclosure for effective equitable consent. A FSG is not sufficient disclosure, since it fails to address the particular circumstances of each client and is not directed to any particular breach of duty. Rather, a FSG is uniform and contains a baseline level of information about remuneration, including commissions or other benefits to be received by the adviser in relation to the services offered.[112] Disclosure in the FSG need only be generic and need not be directed to the specific nature and extent of the conflicts of interest, or duty and duty, that may arise. Therefore, information provided to the client on clicking, including acknowledging not only a FSG, but also any terms and conditions, may be in the nature of blanket statements that fall short of equity's standard. For example, in *Wingecarribee*, a contractual term on the face of debt instruments that the adviser [Grange] 'may also receive placement fees from Issuers'[113] was insufficient disclosure to meet equity's standard.[114] Therefore, in relation to the advice about advice provided in all of three of the filter examples, the client may have insufficient information on which to found any consent, albeit that the timing of the disclosures coincides with the commencement of any course of dealing relevant for equitable fiduciary obligations.

In requiring the adviser to meet 'the sophistication and intelligence of the persons to whom disclosure must be made',[115] the robo financial adviser faces a particular risk. Face-to-face financial advisers may observe and communicate with the client through an iterative process in order to meet equity's standard of the fullest of disclosure.[116] There is, thus, the possibility of a 'feedback loop'. However, all interactions with the robo financial adviser occur according to predetermined pathways. It is systemically impossible, therefore, for the robo financial adviser's disclosure to be tailored to the particular circumstances of all individual clients, whether they be 'shrewd and astute' or '"babes in the woods"'.[117]

Client consent is signified by clicking or its equivalent. This discussion does not further interrogate the phenomenon of consent. We take the view that agreeing to the terms and conditions on a website or digital platform may be sufficient to signify good consent in equity. Nonetheless, we note that other substantive equitable

---

111 (2007) 230 CLR 89, 139 [107] (The Court) ('*Farah*').
112 *Corporations Act* ss 942B–942C.
113 *Wingecarribee* (2012) 301 ALR 1, 76 [254] (Rares J).
114 Ibid 201 [747]–[748].
115 *Farah* (2007) 230 CLR 89, 139 [107] (The Court).
116 *Boardman v Phipps* [1967] 2 AC 46, 93 (Viscount Dilhorne); *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1131–2 (Lord Wilberforce) (PC).
117 *Farah* (2007) 230 CLR 89, 139 [108] (The Court).

doctrine may scrutinise provision of consent in these transactions. Specifically, undue influence or unconscionability may be relevant. The fact that advice is provided via a digital platform may suggest to the client a quality of independence and authority in the robot that may be absent from a face-to-face interaction. These issues are not further explored here.

After the client progresses through the decision tree, in all filter examples the client either receives a SOA or exits the platform. Recall that in the Digital X example, the Financial Objectives Filter, and the Life Objectives Filter, the client receives advice about advice as to the topic area on which to receive substantive advice. As the discussion above demonstrates, the filters differ as to the specificity of the advice about advice. Any fiduciary relationship that exists is wrapped around the giving of the advice about advice, and is constituted by the prior course of dealing. The scope of the relevant fiduciary relationship similarly maps the specificity of the advice about advice. The SOA, likewise, need not contain the information required to meet equity's standard and comes too late in the course of dealing to provide fiduciary disclosure.

As outlined in Table 2 above, the SOA must reveal any associations, relationships or remuneration and commissions that may influence the adviser in providing the substantive advice.[118] While these matters may clearly be relevant to a client's decision whether or not to consent to a breach of fiduciary duty, as a substantive matter, they do not speak to any breach of the adviser's fiduciary duty in giving advice about advice. For example, disclosure in the SOA that the adviser will receive fees if the client purchases securities in Company Y may, on some facts, meet equity's standard in relation to a fiduciary relationship of an adviser in giving investment advice about whether or not to purchase securities (substantive advice). However, that same disclosure will not suffice for the adviser who is asked 'On what topic area should I receive advice?'. Disclosure about an entitlement to fees will only be meaningful if the client has the further realisation that the adviser may be influenced in steering the client to 'purchase of securities in Company Y' as the topic area of advice. In this latter example, equity may well require the adviser further to reveal the nature and extent of their conflict in counselling on the topic area of advice.

Thus, the SOA will not systematically meet the fiduciary disclosure for any fiduciary relationship in relation to the giving of advice about advice. In addition, the timing of the SOA is too late in the parties' course of dealing. By the time the SOA is provided, a fiduciary relationship may already exist and the adviser may already be in breach. On this view, the SOA might well provide the foundation for any subsequent ratification by the client. However, this will still be limited by the sufficiency of fiduciary disclosure contained in the SOA.

The client may also receive substantive advice, which is the subject of a fiduciary relationship distinct from that surrounding advice about advice. The SOA may similarly be harnessed to provide fiduciary disclosure of the nature and extent of conflict in relation to substantive advice. However, the difference is that in the case of substantive advice, the breach of duty revealed in any conflicted advice and

---

[118] *Corporations Act* ss 947B–947C. See also ASIC, *Regulatory Guide 246: Conflicted and Other Banned Remuneration*, December 2017.

the information contained in the SOA are communicated contemporaneously to the client. The potential therefore arises for a SOA to constitute fiduciary disclosure. A caveat to this is the particular facts of Digital X, since in that example, the distinction between advice about advice and substantive advice is difficult to draw. Digital X provides advice only on ETFs and, thus, there are no other potential topic areas on which to receive substantive advice. Therefore, implicit in advice about advice is substantive advice.

An additional difficulty, referred to above, is that like the FSG, and any other disclosure made by the robo financial adviser, it is not systematically possible to ensure disclosure meets the sophistication and intelligence of each individual client.[119]

The decision tree contemplates that some clients will exit the platform without receiving a SOA. In particular, a client may be filtered out according to their suitability to receive substantive advice. We have already made the point that this outcome in fact constitutes advice about advice and substantive advice, at least when provided in Digital X.[120] However, as these clients have not received a SOA, a SOA cannot provide the factual foundation for any defence in equity. For example, in relation to advice about advice, a highly geared client who identifies the topic areas 'superannuation and life insurance' or 'debt consolidation' may be filtered out of the platform. Bearing in mind that breach of fiduciary duty exists on the possibility of conflict between duty and self-interest or duties, it is not difficult to construct facts such that the robo adviser's advice implicit in filtering out the client is conflicted.

Finally, in relation to a conflict between duties, in addition to the matters discussed above, we observe that the robo financial adviser may have various clients with potentially diverse and conflicting interests. The decision tree is likely not structured to reveal any conflict or potential conflict between these interests. The difficulties of timing and content identified above apply equally to fiduciary disclosure designed to meet conflicts between fiduciary duties. Further, the robo financial adviser is inherently unable to appreciate the nature and extent of its conflicting obligations to multiple clients, which obviously goes to breach, but also informs the adequacy of disclosure.

As a matter of completeness, we return here to the adviser's FOFA Obligations. Despite the *Corporations Act* mandating provision of fee disclosure statements to clients,[121] this information is similarly given after any advice about advice or substantive advice. Further, it is limited in subject matter. Therefore, compliance with this FOFA Obligation similarly does not assist the fiduciary in obtaining informed client consent.

---

119 *Farah* (2007) 230 CLR 89, 139 [107] (The Court).

120 Since implicitly the client is thereby receiving 'a recommendation or statement of opinion … that is intended to influence [the client] in making a decision in relation to a particular financial product or class of financial products … or could reasonably be regarded as intended to have such an influence.': *Corporations Act* s 766B(1).

121 Ibid pt 7.7A div 3.

III Contracting Out of Any Fiduciary Obligation

Potential fiduciaries may seek to arrange their affairs to avoid assuming fiduciary obligations by entering a contract with their principal, which contains a term to the effect that the parties agree that no fiduciary obligations arise between them. In *ASIC v Citigroup (No 4)*,[122] the mandate letter between Citigroup (adviser) and Toll (the company) acknowledged that 'Citigroup [was] … an independent contractor and not … a fiduciary',[123] and ASIC 'specifically eschewed any suggestion that the fiduciary relationship arose prior to the execution of the mandate letter.'[124] But for this fact, the prior course of dealing between them may have satisfied the requirements establishing 'fiduciary obligations before the execution of the contract, as in *United Dominions v Brian*'.[125]

Robo financial advisers may similarly seek to employ this strategy of contracting out. Their ability to do so is inherently a function of contract law's ability to recognise the existence and enforceability of contracts formed through a digital medium, which is a matter beyond the scope of this discussion. Assuming, as a matter of formal validity, that a digital contract is possible, equitable fiduciary obligations may validly be excluded to the extent that to do so would not itself be a breach of any prior existing fiduciary obligations. Thus, for example, a fiduciary relationship recognised in virtue of status cannot easily be excluded by contract. Similarly, if on the facts, a fiduciary relationship is identified through a course of dealing, a subsequent attempt to contract out of the fiduciary obligations will be a breach of fiduciary duty. As has been noted, the category financial adviser and client is a contested status-based fiduciary relationship. In consequence, any attempt to contract out at the 'click' stage of client interaction may be unsuccessful to the extent that a relationship of adviser and client has already been constituted, and depending on whether the principal is able to give good consent to the breach. However, we also contend that an ad hoc fiduciary relationship may arise, depending on the decision tree, for any particular robo adviser. For this latter category, contracting out *may* be possible depending on the facts and course of dealing. Thus, we conclude that contracting out is not a reliable strategy for robo advisers who seek to avoid the creation of fiduciary obligations.

IV Conclusion

It is trite to observe that equity is concerned with the whole of the course of dealing between the parties. The decision tree embedded within the financial robot and robo financial advice creates the possibility of equitable fiduciary obligations arising. Industry participants concerned principally with regulatory and statutory compliance may not be aware of these equitable obligations and, thus, be exposed to the risk of breach of fiduciary duty. Equitable remedies such as rescission and account of

---

122 (2007) 160 FCR 35.
123 Ibid 59 [145] (Jacobson J).
124 Ibid 80 [306] (Jacobson J).
125 Ibid 80 [305] (Jacobson J) referring to *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

profits in relation to commissions and fees, and equitable compensation in relation to lost opportunity, may apply. Additionally, AFSL licence holders may be in breach of their licence conditions by virtue of any breach of fiduciary duty.[126]

A further risk is that a director of the company that is the advice provider or holder of the AFSL under which the advice is provided may face personal liability for breach of directors' duties. Justice Edelman in *ASIC v Cassimatis (No 8)*[127] found that directors had contravened s 180(1) of the *Corporations Act* by exercising their powers in a way that caused or permitted (by omission to prevent) inappropriate advice to be given to investors, which would have been 'catastrophic' for the entity to whom the directors owed their duties. In *ASIC v Cassimatis (No 8)*, the directors' breach turned upon the provision of advice that contravened s 945A of the *Corporations Act* (the predecessor of s 961B). Given the potential ramifications for the advice provider who fails to comply with their equitable fiduciary duties, a director who allows the corporate adviser to breach its equitable fiduciary duties might also be in breach of s 180(1) of the *Corporations Act*.

126 Above n 5.
127 (2016) 336 ALR 209, 370 [833].