IMAP Webinar Series

Understanding your Fiduciary Duty as an MDA Provider

Andrew Bradley
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Institute of Managed Account Professionals

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Presenters

AJ Gallagher — **Steven Hughes** – Principal
Akambo — **Jane Zhou** – Head of Governance
Consultant — **Mark Watmore**
Crowe — **Sean Pascoe** – Partner
JM GRC Consulting — **Jenny Mulders** - Founder
Hamilton Locke — **Simon Carrodus** – Partner; **Jaime Lumsden** – Partner
Holley Nethercote — **Michael Mavromatis** – Partner; **Jesse Vermiglio** – Partner
HSF Kramer — **Andrew Bradley** – Partner

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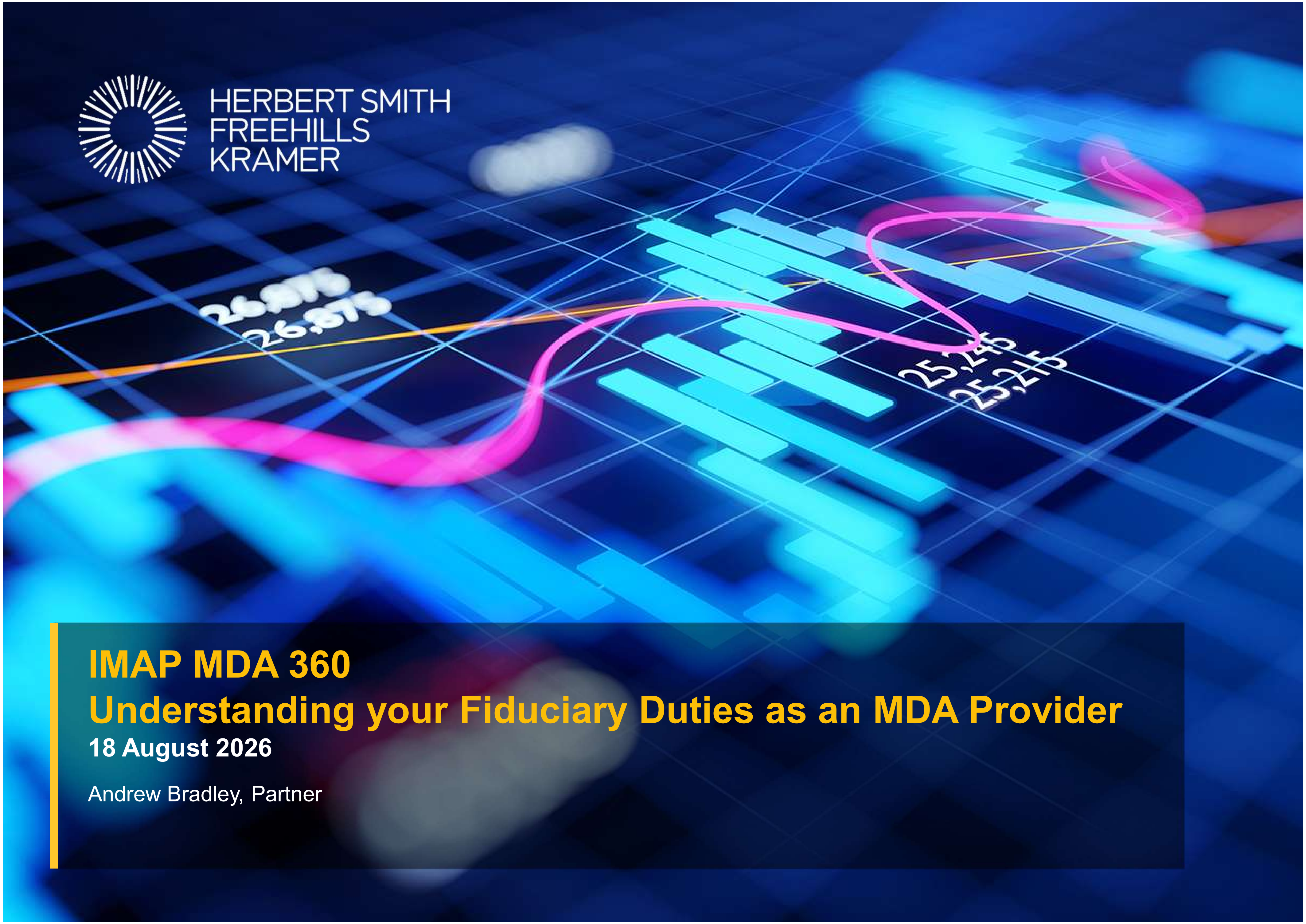
IMAP Alternatives and Discretionary Portfolio Management Conference

The Fullerton, Sydney

16th September



HERBERT SMITH FREEHILLS KRAMER

IMAP MDA 360
Understanding your Fiduciary Duties as an MDA Provider

18 August 2026

Andrew Bradley, Partner

Why are we talking about fiduciary duties?

1. In addition to their statutory duties, MDA Providers and MDA Advisers will typically owe **fiduciary duties** to their clients

2. Fiduciary duties are **not well understood** (and, therefore, the risk of a breach of fiduciary duties may not be well managed)

3. The ‘best interests’ duty and fiduciary duties are **complementary** but **distinct** regimes

4. Fiduciary duties offer clients **more powerful remedies** than are available under statute

5. Whilst ASIC can only pursue statutory causes of action, clients can pursue claims under both regimes **concurrently**

What is a fiduciary?

- A **fiduciary** is a person who:
  - has **undertaken to act in another person's interests** (or is deemed to have done so by virtue of their role); and
  - is **trusted** to exercise **judgement and discretion** on the other person's behalf.
- The duty arises from the **facts** of the relationship, not merely from the terms of a contract or a job title

The scope of fiduciary duties is informed by (and may be limited by) the terms of the contract – but substance will prevail over form

Elements of a fiduciary relationship

- Undertaking to act for the beneficiary
- Vulnerability
- Legitimate expectation of loyalty
- Inequality of bargaining power
- Fiduciary holds power or discretion affecting beneficiary's interests

What's the 'so what'?

- A **fiduciary** is subject to two core proscriptive duties (collectively referred to as **The Duty of Undivided Loyalty**)
  - **The no-conflict rule**: A fiduciary must not place themselves in a position where their personal interests (or duties to another) **conflict** with their duty to the beneficiary, without the beneficiary's informed consent.
  - **The no-profit rule**: A fiduciary must not make an **unauthorised profit** from their fiduciary position.

Fiduciary duties are ***proscriptive*** (i.e. they prohibit certain conduct) rather than ***prescriptive*** (they do not, of themselves, require the fiduciary to take positive steps)

Are financial advisers fiduciaries? Some case law

Daly v Sydney Stock Exchange (1986) 160 CLR 371

- Patrick Partners (stockbroking firm) broker advised Dr Daly against investing on the stock exchange and recommended that money should be lent to the broking firm. Daly accepted the advice and made the loan. The Firm became insolvent and Dr Daly lost his money.
- **Court held**: Fiduciary obligation existed because:
  - Patrick Partners held itself out as an adviser on matters of investment
  - Patrick Partners undertook to advise Dr Daly
  - Dr Daly relied on the advice given to him by Patrick Partners

CBA v Smith (1991) 102 ALR 453

- The Smiths were long-standing customers of the CBA. The branch manager, Mr Dungan, encouraged them to buy a hotel lease from another bank customer, aiming to secure repayment of a loan for the bank. The manager advised the buyers it was a "good buy", downplayed risks, and actively discouraged them from seeking independent accounting advice while hiding the true, lower valuation and poor performance track record.
- **Court held**: Fiduciary obligation existed because:
  - While the bank may be expected to act in its own interests in securing its position as a lender, the manager led the Smiths to believe that he would act in their interests in giving advice on the merits of the investment, and discouraged them from seeking independent advice
  - Branch manager became an 'investment adviser'
  - The Smiths understood that the bank would benefit from the transaction, so the 'no profit' rule was not violated – however, the bank breached the 'no conflict' rule by advising the Smiths

Are financial advisers fiduciaries? Some case law (cont.)

Aequitas Ltd v Sparad No 100 Ltd [2001] NSWSC 14

- Aequitas engaged Australian European Finance Corporation Limited (AEFC, later renamed Sparad No 100 Ltd) to provide financial advisory and corporate structuring services. AEFC structured transactions to derive benefits for itself and failed to properly disclose personal interests and profits.
- **Court held**: Fiduciary obligation existed because:
  - AEFC held itself out as an expert on investment or financial matters
  - It undertook to perform a dedicated financial advisory role, acting in the interests of Aequitas

Pilmer v Duke Group Ltd (in liq) (2001) 207 CLR 165

•Duke Group retained an accounting firm, Nelson Wheeler, to provide an expert valuation of a proposed takeover target, Western United. Nelson Wheeler was found to have overvalued the target, breaching the accountant's duty of care.

•**Court held**: No fiduciary obligation existed because Nelson Wheeler was hired as an *independent expert*, not as an adviser hired to act in the interests of Duke Group

Liability for breach of a fiduciary duty

- Remedy for breach of the statutory best interests duty is **compensatory** – it is directed at making good a client's loss
- However, the remedy for breach of a fiduciary duty goes beyond mere compensation to also **deprive the fiduciary of gains** they improperly earned:
  - Client may obtain an **account of profits** and/or a **constructive trust** over assets acquired by the fiduciary in breach of duty
  - Client may recover even if they suffered no damage at all

<u>Case study</u> - Crooked Tune Distillery

- The principal of a financial advice licensee, Andrew, is also the co-owner of a start-up whiskey distillery named Crooked Tune Distillery.
- Andrew genuinely believes that the distillery is a sure-fire investment and encourages his client, Jasper "Jack" Daniels, to invest in it. Andrew does not disclose his personal interest in the business.
- The distillery goes gangbusters and Jasper makes a 20% profit on his investment in a year. However, he is shocked to learn that Andrew co-owns the distillery and stands to make $100m from a proposed sale of Crooked Tune.
- Notwithstanding that Jasper has not suffered a loss, Jasper could seek to recover from Andrew **all of the profits Andrew made** as a result of procuring the investment by Jasper

Differences between statutory and fiduciary duties

Consequence	Fiduciary Duty	Statutory Best Interests Duty (s 961B)
Compensatory damages / equitable compensation	Yes	Yes (s 961M)
Account of profits	Yes	No
Constructive trust	Yes	No
Rescission	Yes	Limited circumstances (e.g. s1022B, 1041H, general court powers)
Injunction	Yes	Yes (court may grant under general jurisdiction)
Civil penalties	No	Yes (s 961K — up to ~$1.565M for individuals)
Regulatory banning / licence action	No (but may result in other breaches)	Yes (ASIC enforcement)
Licensee attributed liability	No direct equivalent, but licensees can be held liable	Yes (s 961L)
Safe harbour defence	No	Yes (s 961B(2))
Contributory fault reduction	Limited	Yes
Proof of loss required	Not for account/constructive trust	Yes (for s 961M compensation)
ASIC as enforcer	No	Yes
Applies to which clients?	Wholesale **and** retail clients	Retail clients only

Mythbusting!!

Fiduciary duties are the same thing as the best interest duty

Conflicts only need to be managed, not avoided

Fiduciary duties are only owed to retail clients

My duties to every retail client will always be the same

Client consent will eliminate fiduciary liability

Receiving a benefit is ok as long as it is not conflicted remuneration and is disclosed

Fiduciary duties end when the adviser relationship ends

A fiduciary duty can only be breached if the client suffers loss

Practical tips for managing dual roles

- Conduct a genuine and independent product assessment
- Full, frank and comprehensive disclosure
- Obtain genuinely informed consent
- Document the advice process thoroughly
- Implement robust conflict management protocols
- Ongoing review and monitoring

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