

# COMPANY AND SECURITIES LAW JOURNAL

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## ARTICLES

### **Fiduciary duty and the Ripoll Report – *The Hon Kevin Lindgren QC***

Some financial advisers are remunerated by the issuers of financial products according to the volume of their products the advisers sell. Yet the advisers profess to give independent advice to their clients. The conflict between interest and duty is obvious. In November 2009 the Parliamentary Joint Committee on Corporations and Financial Services chaired by Bernie Ripoll MP produced a report entitled *Inquiry into Financial Products and Services in Australia* which addressed the problem. It recommended introduction of a legislative “fiduciary duty” for financial advisers requiring them to place their clients’ interests ahead of their own. This article proposes that this recommendation is inadequate to address the problem and that the only satisfactory solution is to divide the present financial advice industry into two: truly independent advisers who are prohibited from being rewarded by the issuers of financial products on the one hand and the selling agents of such entities on the other. .... 435

### **Government to the rescue: ASIC takes the reins of the stock markets – *Janet Austin***

Over the last 20 years stock markets worldwide have changed dramatically and the Australian Securities Exchange (ASX) is no exception. First there was the wave of demutualisations when many stock markets, including the ASX, transformed themselves into public companies. Following these restructures many market operators hived off their surveillance and enforcement functions into organisations independent of the company operating the market. Existing market operators have started to move beyond their geographical boundaries and are becoming global conglomerates. New trading venues continue to appear. In Australia, while there is only one dominant market operator, the ASX, this is likely to change soon. However, despite these fundamental changes to the landscape, ultimately the job of protecting the integrity of the markets and the enforcement of serious market abuse offences still falls primarily on nationally based securities regulators, such as the Australian Securities and Investments Commission (ASIC). In fact, ASIC’s grip on the markets has recently increased. From 1 August 2010 ASIC assumed responsibility for the supervision of brokers well as the surveillance of trading on the ASX, existing smaller markets as well as any new trading venues which may emerge. This article considers the impact of these changes and the challenges that will face ASIC in maintaining the integrity of the markets as it attempts to bring them firmly under its control. .... 444

### **ASIC’s role as intervener: When should the regulator intervene in private litigation? – *Joanna Bird***

In recent years, the Australian Securities and Investments Commission (ASIC) has increasingly intervened in private litigation. It is interesting to consider why ASIC expends its resources intervening in this private litigation, given that – at least from its

point of view – one of the principal benefits of this private litigation is that it enables enforcement of the corporate, securities and financial services regulatory regime without expenditure of its resources. ASIC intervention in private litigation can be grouped into three categories: commencement of proceedings under s 50 of the *Australian Securities and Investments Commission Act 2001* (Cth); intervention under s 1330 of the *Corporations Act 2001* (Cth); and intervention with leave of the court. This article examines when ASIC has exercised its power to intervene in each of these three categories and when it should exercise its powers in each of these three categories. The article concludes with some general observations on the need to clarify and better articulate ASIC’s policy on intervention. .... 460

**For a limited time only? The use of s 1322(4)(d) of the Corporations Act to extend the limitation periods imposed on private rights of action relating to Pt 7.10 of the Act – Paul Walker**

In this article, the author considers the issue of whether certain rights of action conferred by Pt 7.10 of the *Corporations Act 2001* (Cth) are capable of extension by the general power to extend time conferred upon the courts by s 1322 of the same Act. The author argues that, on the proper construction of the relevant sections of the *Corporations Act*, in light of their historical context and current regulatory purpose, s 1322 was not intended to have any such effect. .... 475

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