

# COMPANY AND SECURITIES LAW JOURNAL

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## ARTICLES

### **On Process, Culture and “Systematic” Wrongdoing by Companies: Ruminations on Recent Financial Services Cases – *M Scott Donald***

Corporate conduct is the product of intersecting and invisible processes involving a variety of actors and timeframes – complicating attribution of accountability, especially in services industries where much of production is embodied in human interactions. Sometimes, the presence of a process internal to the corporation simplifies the challenge. This article considers two Australian cases in the financial services sector as illustration, identifying themes that recur in the Hayne Royal Commission and the ALRC’s 2020 report into Corporate Criminal Responsibility. The analysis suggests that although formal processes might reduce the corporation’s risk of unlawfulness from poor compliance on the part of its employees and agents, they can also facilitate attribution of accountability to the corporation and its senior officers in ways not to be underestimated, especially in light of the trend towards careful scripting of call centre interactions and the renaissance of robo-advising in the Australian marketplace. .... 148

### **Providing Financial Services “Efficiently, Honestly and Fairly”: Part 3 – *Paul Latimer***

One of the statutory general obligations of the holder of an Australian Financial Services Licence is to do all things “efficiently, honestly and fairly”. These three words make up a single idea or hendiadys joined by “and” which goes back over 40 years and has been enforced by extensive case law. Like “misleading or deceptive” in the *Australian Consumer Law*, the scope of doing all things “efficiently, honestly and fairly” continues to expand as discussed in the author’s two previous articles in this journal. Now for the first time there are dicta from the Full Federal Court and comment in one academic article which question whether this single conjunctive and conjoined three-part obligation can be separated into three individual obligations. This has prompted the ALRC to make a formal law reform proposal to this effect. This article argues that the proposal is misconceived and recommends retaining the conjunctive three-part obligation as it was intended when it was drafted. The three-part obligation has stood the test of time. .... 160

### **ASIC and Private Litigants – Enforcement of Statutory and Fiduciary Duties of Directors, Financial Advisers and Corporate Trustees – Statutory and Equitable Remedies – Suggested Reforms – *Dr Tom Middleton***

ASIC should be given an express power to investigate suspected breaches of fiduciary duties by directors, financial advisers and corporate trustees, and a discretionary power to seek any equitable remedies for the beneficiaries of the fiduciary relationship who suffer losses because of fiduciary breaches. There should also be greater harmonisation of the relevant provisions of the *Corporations Act*, *ASIC Act* and the *Superannuation Industry (Supervision) Act* and the relevant equitable rules. The reforms would reduce the risk of

any duplication of litigation by ASIC and private litigants in relation to the same factual circumstances. Harmonisation would also avoid the current costly, time-consuming and inconsistent “case by case” approach to resolving regulatory issues. The reforms would improve the range of enforcement options available to ASIC and would assist it to achieve its regulatory objectives. The reforms would help ensure the public receive advice and services that promote their best interests and financial wealth. .... 171

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