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ARTICLES

The Ripoll Committee recommendation for a fiduciary duty in the broader regulatory context – *Gerard Craddock SC*

This article places the Ripoll Committee's recommendation for a statutory fiduciary duty for financial services licensees in the broader context of regulatory responses to financial adviser conflicts of interest. Though statutory fiduciary duties have existed in the United States for 40 years, the statutory formulations and judicial interpretations are anathema to Australian fiduciary law. Lindgren QC criticised the Committee's fiduciary recommendation and proposed severance of functions. The United States Financial Stability Oversight Council's report on *Dodd-Frank's* Volcker rule suggests that severance of functions may be too difficult, too costly, and impossible to police. Structural severance of a pure advice function may share those difficulties. Advisers may now offer an advice-only service, but few have chosen to do so. The government's response to Ripoll, via the *Corporations Amendment (Further Future of Financial Advice Measures) Bill 2011* (Cth) is to adopt a "fiduciary-style best interests" duty that will do little to promote quality financial advice. Substantial elimination of conflicted remuneration is a positive step, but does not go far enough. This article suggests as worthy of consideration the statutory imposition of terms in the advisory contract directed towards direct engagement between adviser and client as to the adviser's duties and the deleterious effect of conflicts. 216

The future of financial advice reforms – *Andrew J Serpell*

The Future of Financial Advice legislative reforms are designed to improve the quality of financial advice in Australia. They seek to do this in several ways: first, by better aligning the interests of the financial adviser with the client (notably, by prohibiting the payment to licensees and advisers of certain forms of "conflicted" remuneration, such as commission payments from product issuers); secondly, by enabling clients to better monitor the value of the services they receive from their financial adviser (by permitting ongoing fees to be charged to retail clients only if they are provided with annual information about the fees they are paying and only if they renew the ongoing fee arrangement every two years); and thirdly, by raising the required standard of conduct applying to financial advisers who provide personal advice to retail clients (notably, by requiring advisers to act in the best interests of their clients). The article argues that the broader implications of these proposals need to be examined. In particular, there is a risk that some consumers may be unable or unwilling to pay adviser fees and may, instead of obtaining financial advice, place undue reliance on potentially inadequate or unreliable sources of information in order to make financial decisions. Because these consumers may be tempted to purchase financial products without first obtaining financial advice, the adequacy of the current regulation of financial products (including the marketing of financial products) may need to be re-examined. Further, even where consumers do seek and obtain financial advice, there is a risk that they will not always have the financial literacy skills necessary to

understand the advice they receive, or to assess whether they are receiving value-for-money service from their adviser. This raises several issues, including whether the law should expressly require financial advisers to explain the advice they provide to their clients. 240

Derivatives and the elusive "principles of insolvency" in Australia: A post-Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services analysis – *Karen Petch*

In July 2011, the United Kingdom Supreme Court handed down *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, a decision in one of the ongoing instalments of the Lehman Brothers liquidation. The effect of that decision was that a complex secured finance transaction structure, which hinged on whether a certain clause that changed the order of priorities on insolvency of a Lehman entity, remained valid. Aside from its immediate significance to investors, the decision has broader legal significance in the United Kingdom because of the Supreme Court's remarks on the anti-deprivation principle, a principle that has evolved in the United Kingdom over some 200 years. The principle remained intact but not without critique of its ongoing viability and new guidance from the Supreme Court as to how the principle should be applied in a modern commercial context. A United States decision dealing with the same clause reached an entirely different result. There has not been an Australian instalment; however, the question must be asked: if Australian courts were to be faced with deciding the fate of a similar provision, what would be the result? This article considers the implications of the United Kingdom Supreme Court decision for Australian law and whether, given the Australian statutory framework, there is anything to be learned from the United States or United Kingdom approaches to this issue. 253