

Preface

As this book was going to press, the Federal Court of Australia handed down judgment in *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd*, one of the most significant cases involving the management of conflicts of interest within investment banking. The regulator claimed that Citigroup had engaged in unconscionable conduct by trading on its own account while performing corporate advisory services for Toll Holdings in its — eventually successful — bid for Patrick, itself one of the most important takeovers in the current boom. The Court dismissed the application, which was designed to clarify whether and to what extent investment banking owed specific fiduciary duties to its clients and, if so, whether these duties could be overridden through contract. Justice Jacobson ruled that the ‘law does not prevent an investment bank from contracting out of or modifying any fiduciary obligation.’¹

The ruling was a major setback for ASIC, which had hoped that its aggressive enforcement agenda would serve a wider demonstration purpose. ASIC had invested significant reputational capital in the litigation, only to be trumped by a literal interpretation of the law from a distinguished judge, who opined that the imposition of fiduciary responsibilities was ‘a matter for the legislature, not the courts.’² Judicial resolution does not, however, solve the underlying problems identified in the litigation and magnified by the global boom in private equity. The range and intractability of conflicts have deepened, as the dynamics of financial capitalism reconfigure, in profound manner, institutional

¹ NSD 651 (28 June 2006) [601].

² Ibid [602].

timeframes, conceptions of corporate duty, and the efficacy of the shareholder-dominated corporate governance paradigm, and throw into stark relief the roles and responsibilities of financial intermediaries.

The issues that this book address are truly global in nature and the solutions advocated are based on the need to transcend narrow technical legal frameworks, irrespective of whether a rules or principles approach to governance is privileged. The book would not have been possible without the generous support of the Australian Research Council's Governance Research Network and the United Kingdom's Economic and Social Research Council World Economy and Finance Program. I wish to thank the respective directors, Charles Sampford and John Driffill, for providing the financing to hold an international workshop at the Australian National University in March 2007, at which earlier versions of these chapters were presented and critiqued. On behalf of the authors, I would like to thank Stephen Bottomley, John Braithwaite, Tom Campbell, John Coffee, Arie Freiberg, Graeme Hodge, Keith Houghton, Ian Ramsay, Paul Redmond and Sally Wheeler for their erudition and support throughout this process. In particular I am grateful to Malcolm Rodgers, Executive Director of Regulation at ASIC, for giving the keynote address to the workshop. My colleagues at the Centre for Applied Philosophy and Public Ethics provided exceptional logistical support and I thank Ian Sharpe and Andrew Long. I also want to record my appreciation to Michael Buckingham and Aparna Rao for their excellent research assistance.

The success of socio-legal research on financial regulation is predicated on access. Regulatory and practitioner sources in Australia, New York and London have been remarkably generous with their time. I wish to acknowledge my gratitude to the ESRC for funding my ongoing program of research (RES 156–22–0033). I also want to thank Seumas Miller and Ian Ramsay for making me feel so welcome professionally in Australia. To Darina, Elise, Jack and Justin, this book represents another investment of your time for which I am forever indebted.

Justin O'Brien
Canberra, July 2007