

## Chapter 13

# Statutes and a Fiduciary Course of Dealing

*Simone Degeling\**

### Introduction

Fiduciary analysis may be directed to the question of how, when and why do equitable fiduciary relationships, or at least equitable fiduciary duties, arise? The analysis in this chapter approaches fiduciary duties in Anglo Australian law from a different perspective and instead asks about their pattern of interaction with statutes. Sometimes the remit of equitable fiduciary law may *not* be extinguished by statute. Statutory regimes purporting to regulate certain activities, or to facilitate particular legal arrangements may, within their own terms, specifically preserve the reach of the general law including equity and thus fiduciary law.<sup>1</sup> Equally, statutes may be silent as to the operation of equitable principle.<sup>2</sup> Thus, parties may potentially be subject both to statutory oversight and also to equitable fiduciary principle.

So what are the consequences of equitable fiduciary principle and statute both being engaged by the same landscape? At one level, the observation that equitable fiduciary principle and statute are both engaged is completely unremarkable. Legal actors in our society are often subject to a matrix of obligations, where the origin of the differing obligations lies in statute and/or common law. However, this chapter observes a different phenomenon, which is that such statutes may mandate a pattern of interaction or course of dealing, the effect of which is itself to create a risk of equitable fiduciary obligations arising. Moreover, having created the potential for fiduciary obligations arising, these statutes may not within their own terms ensure that the fiduciary conducts themselves such that their fiduciary obligations are thereby discharged.

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1 For example, *Corporations Act 2001* (Cth) s 960B.

2 For example, *Federal Court of Australia Act 1976* (Cth) Pt IVA which introduces a class actions regime; s 5(2) (Creation of Court) states that the Federal Court of Australia is 'a superior court of record and is a court of law and equity'. However, this section does not address the further questions of whether, or to what extent, fiduciary obligations are insinuated into the group procedures mandated by Pt IVA.

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