

AUSTRALIAN BUSINESS LAW REVIEW

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EDITORIAL 5

ARTICLES

Indemnities, gross negligence and the “accidental insurer” – *Nuncio D’Angelo*

Despite being widely used in Australian commerce, indemnities have stubbornly defied attempts at precise definition and consistent analysis in the courts. The use of the word “indemnity” in a clause or document does not assure a certain outcome in relation to effect, operation or remedy, and the authorities are in a state of confusion about the rules to apply in interpreting and construing indemnities. One area of great uncertainty is the degree to which an indemnity can operate to indemnify (or, in a sense, “insure”) the beneficiary against the consequences of their own negligence – regardless of the indemnifier’s intentions in that respect. The discussion raises the practical questions of whether to include a carve-out in relation to the beneficiary’s negligence, and the related question of whether it is worth arguing over the difference between “negligence” and “gross negligence” in negotiating such carve-outs. 7

Rethinking unconscionable conduct under the Trade Practices Act – *Peter Strickland*

The courts have so far given the word “unconscionable” in s 51AC of the Trade Practices Act its ordinary dictionary meaning. There are, however, some tensions within that meaning as to what constitutes unconscionable conduct within s 51AC. Those tensions, combined with the standard, rather than rule, proscribed by the ordinary meaning create a degree of uncertainty in law and contract compared to the position under the general law. This paper identifies the prevailing judicial views on s 51AC and seeks to ascertain the true meaning of unconscionable conduct under s 51AC in accordance with modern statutory interpretation principles. The paper then explores the impact of this interpretation in two areas: cases where clear unfairness and opportunism have been found; and the case of small to medium-size business transacting with large business. 19

The competence and diligence required of trustees of a 21st century superannuation fund – *M Scott Donald*

Trustees of superannuation funds in Australia are required by legislation to exercise “the same degree of care, skill and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide”. This contrasts the position in comparable jurisdictions, and the position at general law, where a more expert level of skill is typically required. This paper argues that the difference, while not as marked as it appears on the surface, is nevertheless important. The paper argues that under statute trustees are not expected to be experts in all areas of superannuation fund investment and administration. Rather they are expected to contribute a layer of common sense across the full range of activities of the superannuation fund. The paper also argues that this standard remains in place, even where the trustee embarks on a more “corporatised” set of activities, at least in so far as its obligations qua trustee are concerned. The paper does not however attempt to question whether trustees ought to be

held to a higher standard of competence, beyond noting that they are uniquely able to contribute an appreciation of contemporary community values into the decisions that determine the activities of the superannuation fund. That input is especially valuable because it is likely to be complementary to the expert judgments of their advisers and agents and also because of the “public” nature of superannuation funds in Australia. 50

COMPANY LAW AND SECURITIES – *Robert Baxt AO*

A new deal for directors? At last some movement on the personal liability front 63

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