

AUSTRALIAN BUSINESS LAW REVIEW

Volume 46, Number 6

2018

ACKNOWLEDGMENTS 331

ARTICLES

Commercial Imperatives and Public Benefit: Recognising Commercial Purposes as Charitable Purposes – *Derwent Coshott*

The Non-Charitable Purpose (NCP) trust has stood as a challenge to the concept of the traditional charitable trust through its rejection of the charitable purpose and public benefit requirements. Yet various jurisdictions have seen the economic benefits of adopting such structures or legislating in their favour. Meanwhile, in common law jurisdictions such as Australia, the law of charitable purposes has been undergoing significant, albeit subtle, changes, the result of which is a growing recognition of commercial purposes as being valid charitable purposes. The result is that the law of charitable trusts in Australia stands on the conceptual precipice of recognising the kinds of commercial purposes offshore NCP trusts facilitate. This article shows how such a change has occurred and why. In doing so it also offers a proposed legislative means of advancing the charitable trust further along this path so as to potentially promote greater international investment in Australia. 332

Moving Beyond Murry – From Attraction of Custom to Everything that Adds Value – *Tyrone M Carlin*

This article examines the jurisprudence of goodwill in Australia with particular focus on the nature and application of the attraction of custom doctrine. While in *Commissioner of Taxation (Cth) v Murry* the High Court endorsed this doctrine as being of central importance to the concept of legal goodwill, it also sowed the seeds of confusion by appearing to embrace a broader, value-added approach to understanding goodwill. As a result, stark differences of judicial opinion have emerged with respect to whether or not the attraction of custom doctrine operates to sharply circumscribe the universe of fact circumstances where material legal goodwill may be found to exist. This has generated substantial uncertainty in cases in which an inquiry into the value of goodwill is of importance and driven conflicting understandings of the relationship between goodwill for accounting and legal purposes. It is argued that the time has come for the High Court to decisively settle these matters. 345

“Knowledge” and Pre-contract Disclosure under the Insurance Contracts Act – *Julie-Anne Tarr*

This article focuses upon the pivotal pre-contract disclosure provisions in the *Insurance Contracts Act 1984* (Cth) and, in particular, upon the critical element of “knowledge”, which has generated a considerable volume of case law. Sections 21 and 21A of the Act endeavour to achieve a balance between the interests of the insurer and the insured in the process of transacting an insurance contract and also in the outcomes attendant upon failure or asymmetry in such disclosure when a claim is made. However, the determination of the scope of disclosure obligations has long been, and remains, a complex question as “knowledge” takes on chameleon-like subtleties in diverse contexts and circumstances. For

example, difficulties arise in determining the boundary between “belief” and “knowledge”, in resolving upon distinctions drawn between “actual”, “constructive”, or “imputed” knowledge, and “knowledge” held by an inanimate legal construct, such as a company. Furthermore, as the disclosure obligation extends to matters a “reasonable person in the circumstances could be expected to know” a dividing line must be drawn between extrinsic and intrinsic factors brought to account in resolving upon this hypothetical insured’s knowledge. The article considers also matters that do not need to be disclosed, the special rules applicable to eligible contracts of insurance and the insurer’s obligation to give notice of the duty of disclosure to the insured. 355

COMPANY LAW AND SECURITIES

Protecting Whistleblowers: A Critical Analysis of Mandatory Corporate Whistleblower Policies – *Sonny Scott*..... 379

VOLUME 46 – 2018

Table of Authors – Articles 387

Table of Authors – Sections 391

Table of Cases 393

Index 407