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ARTICLES

THE BEST INTERESTS DUTY AND THE STANDARD CARE FOR SUPERANNUATION TRUSTEES

Paul Collins

The duty of best interests has come to prominence as a foundational duty of a trustee of a superannuation fund since the decision in Cowan v Scargill [1985] 1 Ch 270, a duty combining other specific trust duties. This article seeks to answer what the best interests duty effectively requires of a trustee and whether the duty functions as a type of performance standard that requires a trustee to do the "very best" that it can for the beneficiaries. Since the duty has been codified in s 52(2)(c) of the Superannuation Industry (Supervision) Act 1993 (Cth), this article explores whether the statutory standard is consistent with the general law. It also answers whether the duty of best interests is consistent with the trustee's duty of care, skill and diligence, both under the general law and as codified in s 52(2)(b). 632

"CONFUSION HATH NOW MADE HIS MASTERPIECE": FEDERAL JURISDICTION, STATE TRIBUNALS AND CONSTITUTIONAL QUESTIONS

Gim Del Villar and Felicity Nagorcka

There have been a number of decisions to the effect that State tribunals cannot decide constitutional questions in the exercise of judicial power. The basis for this conclusion seems to be either that a tribunal which answered a constitutional question would be "impermissibly" exercising federal jurisdiction, or that State Parliaments cannot confer jurisdiction to decide constitutional questions on their courts or tribunals. Neither of these approaches withstands analysis. The cases demonstrate that denying State tribunals the ability to decide constitutional questions (and some other matters mentioned in ss 75 and 76 of the Constitution) causes confusion and inconvenience: we argue it is also unnecessary and wrong. The confusion which plagues this area can best be resolved if the conviction that State tribunals cannot be allowed to answer constitutional questions is abandoned. 648

READING WORDS INTO STATUTES: WHEN HOMER NODS

Stephen Lumb and Sharon Christensen

The grammatical meaning of a statutory provision may not always gel with the purpose of the statute. The court may strive to give the provision an interpretation at odds with its ordinary and natural meaning to meet the purpose of the legislation. On occasion, this may involve notionally adding words to, or substituting words in, a statutory provision. This process of "reading in" words demands that close attention be paid to the boundary between statutory construction and judicial legislation, particularly where a court is invited to carve out an exception from grammatically clear words. In Jones v Wrotham Park Settled Estates [1980] AC 74, Lord Diplock identified three pre-conditions to reading words into a statute. This article analyses the utility of those conditions within the context of the modern purposive approach to statutory interpretation and evaluates whether they remain sufficient guideposts for identifying the boundary between interpretation and legislation. 661

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