AUSTRALIAN BUSINESS LAW REVIEW

Volume 39, Number 2

April 2011

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ARTICLES

Why vicarious liability must be abandoned – *Anthony Gray*

The principles by which an employer might be liable for actions or omissions of their employee/s are of ancient lineage. However, as they have been adapted through the years, these principles have arguably become intellectually incoherent, isolated from their original raison d'etre, no longer explicable by any one rationale of liability, and inconsistent with developments elsewhere in the law of tort. This article argues for a radical reconsideration of the principles in this area, in favour of making employers liable based on principles of fault and of agency. These principles would be closer to the original conception of the rules in this area, and would be more consistent with developments in the law of tort generally which have favoured principles of fault-based liability of general application rather than narrow anomalous principles in particular areas. Changes in the way that work is conducted today mean that the past distinction between employees and independent contractors, crucial to the application of current principles in this area, are increasingly difficult to apply and based on assumptions which, if they ever were true, are no longer applicable. Further, liability cannot be based on which party has or is likely to have the deeper pockets, or access to insurance. 67

Together alone: Corporate group structures and their legal status revisited – *Anil Hargovan* and *Jason Harris*

Corporate groups are an essential part of the Australian commercial landscape and in many instances group members are controlled by the same managers and ultimately owned by the same shareholders. Notwithstanding these hallmark features, for better or worse, the separate entity doctrine and corporate rule of limited liability extends to group members. Given this legal treatment, it is not uncommon for a parent company to establish a subsidiary company for dedicated purposes, such as providing in-house finance to support the commercial activities of the corporate group. The consequences of such structuring, in particular for tax law, is highlighted in the recent *BHP Billiton* litigation which dealt with the intersection between company law and tax law principles. In focussing upon such legal issues in the *BHP Billiton* litigation, the article addresses the limits of the separate entity doctrine as applied in a corporate group context. 85

When is a trustee or responsible entity insolvent? Can a trust or managed investment scheme be "insolvent"? – *Nuncio D'Angelo*

There is abundant case law on the meaning of "insolvency" in relation to companies. Insolvency is the gateway for a range of consequences under the *Corporations Act 2001* (Cth) for a company and its stakeholders, particularly its directors and creditors. However, while a trust or managed investment scheme may be described as "insolvent" in certain contexts, it cannot be an insolvent person under the *Corporations Act*; the analysis for the purposes of the Act must be conducted at the level of the trustee or responsible entity,

although the viability of the trust fund or scheme is relevant in that analysis. At this point, the matter becomes quite complicated, due to the arcane nature of trusts and the resultant complexities when they are used as business vehicles. This article explores the challenges facing directors and creditors in ascertaining if and when a trustee or responsible entity has become insolvent, and what it means for a trust or scheme to be "insolvent" – matters on which there is a surprising lack of guidance. It concludes by offering some practical suggestions for testing the critical factors in any given case. 95

Floods, earthquakes and insurance coverage – issues, problems and solutions – *Julie-Anne Tarr*

The recent floods in Queensland and elsewhere in Australia as well as the recent earthquakes in New Zealand have again given rise to very significant uninsured losses. This article looks at the issue of cover protection against catastrophes such as floods and earthquakes affecting home buildings and contents insurance and the standard cover provisions of the *Insurance Contracts Act 1984* (Cth). It points also to the possibility of a national scheme to cover natural disasters including floods. 111

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