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KNOWING ASSISTANCE

Hon William Gummow AC

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| There is in much of the contemporary Anglo-Australian case law concerning the two “limbs” of <i>Barnes v Addy</i> an over refinement of verbal analysis. This obstructs an appreciation that the two “limbs” are not and were not designed to be an exhaustive statement of accessorial or participatory liabilities for breaches of duty by trustees and other fiduciaries, particularly company directors. It also curtails an appreciation of insights provided by linkage with other species of accessorial liability in the criminal law and the law of tort. | 311 |
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PACIFIC ADVENTURER OIL SPILL 2009: LESSONS PAST AND FUTURE

Michael White

In 2009, MV Pacific Adventurer lost containers over the side in a severe storm off the southern Queensland coast. Some containers punctured the ship’s hull thereby releasing a considerable quantity of oil that washed on to the nearby Australian coastline. The court and other proceedings that followed continued until 2012 and are the only recent example of a significant maritime oil spill from a ship in Australia that went through the full legal procedures. These provide a suitable precedent for courts and practitioners who may be involved in a similar incident in the future. This article traces the shipping incident and the court proceedings and sets out the law as it then was and now is. It concludes by making some suggestions for future handling of similar incidents. The legislation discussed here was particular to this incident but it is similar to that in all of the States and the Northern Territory and to the Commonwealth legislation so it has parallels Australia-wide.

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FUNDING OPEN CLASSES THROUGH COMMON FUND APPLICATIONS

Jarrah Hoffmann-Ekstein

Class actions are expensive undertakings. In the absence of a public class actions fund or lawyers being permitted to charge contingency fees, other mechanisms have emerged to fund class actions. Third party litigation funders have relied on the provisions in the Federal Court of Australia Act 1976 (Cth) which permit incomplete classes and have sought to protect their investment and minimise their risk by funding closed classes which are defined by group members having entered into an agreement with the funder. Australian courts have moved away from their historical discomfort with third parties supporting and profiting from litigation, and have recognised the important role that litigation funders play in supporting access to justice. However, commentators across the spectrum have acknowledged that access to justice is not served by the trend towards closed classes and the lack of funding for open classes. Accordingly, legal practitioners and academics are looking to mechanisms in other common law jurisdictions which have class actions regimes which support the funding of open class actions such as common fund applications. The existing legislative framework would arguably empower courts to approve common fund applications which include a commission in favour of a litigation funder at the outset of a class action.

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“AND/OR” IN THE LAW: CONDEMNATIONS, USES AND MISUSES

Liam Boyle

The grammatical tool “and/or” is frequently found in many everyday documents. It is also found in many legal documents, despite a formidable weight of judicial and academic advice counselling against this course. This article will look at some of the cases in which the use of “and/or” has proven problematic. The article gives the general caveat against its use in formal legal documents, but urges particular caution where the statement is in the nature of obligation or mandatory direction, or where the statement purports to make a definite assertion. Some acceptable uses of the term are also considered.

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