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ARTICLES

THE EQUITABLE DUTIES OF COMPANY DIRECTORS

Hon William Gummow AC

This article considers the equitable duties of company directors, including in light of the Bell litigation. Three matters in particular are examined. First, the distinction between directors’ fiduciary and other equitable duties is analysed, and the different types of accessorial liability that may attach in equity and pursuant to statute for breach of such duties outlined. Secondly, it is argued that equity should not fix criteria for accessorial liability for breach by directors of non-fiduciary duties that are more severe than those provided by statute. Finally, the availability of an award of compound interest, against both a director for breach of equitable duty and a third party accessory, is considered. 753

THE ROLE OF THE “APPLICANT” IN NATIVE TITLE DISPUTES

Justice Darryl Rangiah and Justin Carter

Proceedings under the Native Title Act 1993 (Cth) are conducted, on behalf of the native title claim group, by authorised members of the claim group known as “the applicant”. This article considers the identification of “the applicant” for the purposes of the Act, and considers the nature and extent of the applicant’s authority to negotiate, and bind the claim group to, settlements of native title disputes. The principal opportunities for negotiation of disputes – mediation in connection with determination proceedings, the negotiation of indigenous land use agreements, and negotiations pursuant to the right to negotiate provisions – are considered. The authors particularly focus on how dysfunction in the claim group and the applicant can stymie the progress of native title disputes, and how legal representatives and opponents can respond to such difficulties. 761

ARE THE HIGH COURT’S REASONS FOR REFUSING SPECIAL LEAVE
BINDING?

Oliver Jones

The status in precedent of the High Court’s reasons for refusing special leave has long been apparent. The reasons are not binding but instead offer guidance for lower courts. However, the author submits that, where they are seriously considered, and delivered by an appropriate number of Justices, the reasons can be binding. In other cases, the impact of the reasons will depend on how fully they explain the law. Still, the reasons cannot, as guidance, compel a court to depart from authority that is otherwise binding. The author argues that, to the extent that *Western Export Services Inc v Jireh International Pty Ltd* (2011) 86 ALJR 1 fell short of the foregoing, it should be discounted by lower courts. 774

SECTION 53 OF THE CONSTITUTION: AN OVERLOOKED REFERENCE TO THE
CONSTITUTIONAL PEOPLE

Elisa Arcioni

Section 53 of the Constitution sets out the limitations on the power of the Senate with respect to financial legislation. There is ongoing disagreement as to what legislation is caught by the section. This article does not resolve that disagreement. Instead, it focuses on exploring the meaning of “the people” in the third paragraph of s 53. That paragraph states: “The Senate may not amend any proposed law so as to increase any proposed charge or burden on the people.” Those people are identified as the national people who receive representation in both Houses of Parliament. 784

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