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Articles

Obligations and powers of superannuation trustees concerning situations of actual or possible conflict

— *JC Campbell* 1

Part 1 summarises the present status as a matter of precedent in Australia of the general law rule that a fiduciary not be in a situation of conflict, the meaning of being 'in a situation of conflict', and the recognised circumstances in which there is an exception to the rule. It also criticises the application of the rule to a superannuation trustee in *Jones v AMP Perpetual Trustee Co NZ Ltd*. Part 2 considers the relationship of the pre-existing general law and statute law governing trusts to the provisions of the Superannuation Industry (Supervision) Act 1993 (Cth). Part 3 considers the effect of the initial introduction of the Superannuation Industry (Supervision) Act on the application of the no-conflicts rule to superannuation trusts. Part 4 considers how the replacement of the original statutory covenants in the Superannuation Industry (Supervision) Act with a set that included express obligations concerning conflicts affects the possible application of the general law no-conflicts rule. It argues that it is still possible, in some circumstances, for the general law no-conflicts rule to apply, and considers the limitations on now amending a trust deed that did not already exclude the no-conflicts duty to amend or limit that duty. Part 4 also considers various aspects of the construction and practical application of the new covenants concerning conflicts, including the role of the prudential standards, and some other statutory amendments that came into operation in 2013 and 2019 that bear upon a trustee's actions in a situation of conflict. Part 5 provides several miscellaneous examples, discussed with particular reference to outsourcing, of principles that do not mention the word 'conflict' but that could need to be taken into account when a superannuation trustee is in a situation of conflict.

Purposive contract interpretation and the High Court

— *Ryan Catterwell* 54

Purposive justification plays a key role in contract interpretation. As this article demonstrates, the High Court of Australia has adopted a sensible and principled approach to purposive construction. The Court has paid due regard to the contract text, while still enforcing the objects secured by the contract (where appropriate). Through a detailed analysis of 8 recent decisions of the High Court, this article outlines a principled approach to purposive contract interpretation. The aim in construction is to establish what was objectively intended by the choice of words in the contract. Each dispute involves a unique contest between arguments based on potential meanings for the words, background, contractual purpose, and so on. However, disputes involving a similar argument composition are resolved in a similar way. In some cases, the meaning of the words is a better indicator of intention. In others, purposive considerations hold sway (particularly when the relevant contractual objective is evident from the contract text). And, in a small number of cases, purposive justification is determinative in that it reinforces a linguistic interpretation or it acts as a tie breaker between evenly-matched textual or linguistic considerations.

Vulnerability, autonomy and protection: The role of actual and hypothetical contracts in the duty of care to protect against pure economic loss
— *Alexander Jackman* 82

The meeting point of tort and contract presents fascinating questions about the principles underlying each body of law. One pertinent example of this interaction lies in the extent to which a tortious duty of care is owed to protect against pure economic loss when the plaintiff and defendant were, or could have been, in a contractual relationship. If a plaintiff was able to protect itself in contract, the High Court of Australia has held in two notable decisions that such a plaintiff was not sufficiently 'vulnerable' to warrant protection in tort. This article exposes the danger of some of the assumptions that underlay those decisions and proposes alternative reasoning for some of the decisions' key elements. As state governments turn their minds to protecting vulnerable consumers, particularly in the context of defective structures, this article hopes to spark some necessary debate about the state of the common law and how it should be best supplemented by legislative developments.

Class action settlements beyond the pleaded case
— *James O'Hara* 117

Settlement is one of the most important parts of a class action. It is the only measure of whether the result is fair when all is said and done. But group members play a passive role throughout the class action and have no control as to how the case is run and how it is settled. That is why court approval is required. But in settling a class action, the parties want finality. To that end, the representative party negotiates and settles the class action, and provides broad releases, indemnities and covenants not to sue. Court approval comes around and the parties, now friends of the deal, ask the court to approve the settlement. On settlement approval, the court's role is to protect the interests of group members. This article examines how far a class action settlement can travel beyond the pleaded case. Should the court approve a settlement that extends to the common issues which could have been brought in the class action but were not? Should the court approve a settlement purporting to extinguish unrelated individual defences or causes of action of group members? What if they are related but idiosyncratic? What if extinguishment is compensated? What if extinguishment is authorised? The court must be cautious to ensure that claims based upon the individual circumstances of group members, about which the court knows nothing, are not unfairly prejudiced. This article suggests that it may be possible for the court to approve a class action settlement which goes beyond the pleaded case, but only in narrow circumstances.

Constitutional imperatives
— *Joshua Thomson and Madeleine Durand* 154

The term 'constitutional imperative' has been used by the High Court of Australia in a variety of contexts. Yet this term's precise meaning and significance have not been analysed. This article demonstrates that the High Court has adopted the rubric to denote various different concepts: representative and responsible government, the separation of powers, judicial independence and integrity, and the balance between the Commonwealth and the states. However, despite the unifying label, there are distinct considerations of constitutional text and structure which underpin the various imperatives. As well, they do not always operate in the same way. This article examines the precise justification for the different imperatives, and the way in which they have been applied to substantively limit legislative, executive and judicial power.

The medieval law of debt and the interests served by the statutes merchant

— *Samuel Walpole* 167

The latter part of the 13th century was a period of great legislative reform of the early common law. It was also a time of social and economic change in England, marked by an expanded role for merchants and an increased demand for credit. Within this context came the Statute of Acton Burnell 1283 and Statute of Merchants 1285 which provided a statutory system for recognition and enforcement of debts that ameliorated several shortcomings of the medieval common law of debt. This article will consider whose interests were served by the statutes. It will be suggested that the statutes were intended to serve merchants, both domestic and foreign, though they were also intended to assist creditors more generally. These aims accorded with the parties that the statutes in their operation ultimately came to benefit.

In the interim: Assessing and managing risk when doctors are accused of sexual misconduct

— *Gabrielle Wolf* 176

We have witnessed a radical shift in attitudes towards sexual misconduct. There is a determination no longer to conceal or tolerate sexual abuse, and exposure of its prevalence has led to an urgent drive to protect the community. This is evident in the sphere of administrative law that involves the regulation of doctors. When allegations are made that a doctor has engaged in sexual misconduct, before those allegations may be investigated and tested in a disciplinary proceeding, regulators of the Australian medical profession are empowered to take 'immediate action', which entails restricting the doctor's medical practice. This authority and its exercise have recently been modified: all regulators can now take immediate action on a 'public interest' ground; and one of them has largely abandoned the use of chaperones as a form of immediate action. This article analyses the impact of these changes on the balance that is struck between the interests of the public and doctors when the veracity of allegations have not yet been determined. It is vital that regulators address potential threats to patients, the medical profession and regulators, but especially given the effects of these changes, regulators should consider carefully how they assess and manage risk in this interim period.