

# Australian Bar Review (ABR)

## Volume 53 Part 2

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Trusts and trustees: Their successes and successors

— *Mark Leeming*

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#### Articles

Loss quantification in greenwashing cases

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Both in Australia and overseas, numerous corporations are being investigated and sued for making misleading net zero commitments or other climate-related misstatements. These developments raise a contentious question: how would a plaintiff's loss be quantified if a claim for damages were brought? This article explores how loss would be proven and quantified if a plaintiff shareholder were to bring proceedings under, for example, s 1041I(1) of the Corporations Act 2001 (Cth) after a company is found to have engaged in misleading or deceptive conduct by making a misleading net zero commitment.

Three issues concerning the interpretation of sections 5O and 5P of the Civil Liability Act 2002 (NSW)

— *Sirko Harder*

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Section 5O of the Civil Liability Act 2002 (NSW) excludes liability for professional negligence where the defendant acted in a manner widely accepted in the profession. Section 5P excludes the provision of particular information from the scope of s 5O. This article investigates three issues relating to the provisions' interpretation. The first issue is whether s 5O requires that the defendant followed a practice in the sense of a regular course of conduct or whether it is sufficient that expert witnesses regard the defendant's conduct as competent. The second issue is whether s 5O is capable of excluding the liability of a corporation. The final issue is whether s 5P covers the giving of (or the failure to give) any professional information about a risk of death or injury or whether that risk must be associated with a professional service other than the provision of the information itself.

Pour-over and other pouring provisions in Australia

— *Bernard Walrut*

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A pour-over provision is a North American term used to describe a gift, often of a residuary estate, made by will in favour of an inter vivos trust. In Australia, the decision in *Gregory v Hudson* ([1998] NSWSC 582 sub nom [1997] NSWSC 140) is often cited as authority for the validity of pour-over

provisions. The significant point decided by that case is that such a provision is not a delegation of the testator's testamentary capacity. The validity of such a provision, where there is a power of variation in the recipient trust, was not decided. Notwithstanding the apparent approval of pour-over provisions in that decision, a line of English authority and, more recently, some Canadian decisions call into question the validity of such provisions, in particular where the recipient trust is amendable or revocable. In light of those decisions the article considers more broadly the effectiveness of pour-over and like provisions.

## Testamentary undue influence — A historical overview

— *Daniel Yazdani*

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The doctrine of testamentary undue influence arose, in large part, from the Ecclesiastical Courts of England to provide a safeguard for interested persons adversely affected by a will which was procured by fear or importunity. This article outlines the origins, historical development and core principles of undue influence, a doctrine which plays a critical role in preventing wills being procured by the unlawful influences of others.

## Book Review

*The Australian Class Action: A 30 Year Perspective*, James Metzger, Michael Legg (eds)

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— *Kathleen Morris*