

Australian Bar Review (ABR)
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(articles and case note included in this part are linked to the LexisNexis platform)

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Articles

- [Best practice to prevent elder financial abuse](#)
— *Darryl Browne* 249

With an ageing and generally affluent population, there are greater prospects of elder financial abuse. By adopting sound procedures, the legal profession can act to prevent this abuse. This article explores the best actions that legal practitioners can take from the first engagement to the long-term retention of records.

- [The independence of authentication](#)
— *David Caruso and Jordan Phoustanis* 277

This article argues that the oppositional decisions of Bryson J in *National Australia Bank Ltd v Rusu* and Perram J in *Australian Competition and Consumer Commission v Air New Zealand Ltd [No 1]* regarding the inclusion and exclusion, respectively, of a question of authentication under the Australian Uniform Evidence Law are each wrong or inadequate in the reasoning and substantiation provided for the respective position adopted. It is further argued that the line of High Court authority regarding the interpretation of the clause in s 55 of the Uniform Evidence Law is wrong. On these bases, we construe the provisions of the Uniform Evidence Law, and their geneses in reports of the Australian Law Reform Commission and the United States Federal Rules of Evidence. We conclude the Uniform Evidence Law provides for a question of authentication to be considered by the tribunal of law as a precursor to a question of relevance. We suggest our analysis displaces 20 years of law that either wrongly states or inadequately reasons as to the role of authentication under the Uniform Evidence Law. We contend this article offers the correct construction of authentication under the Uniform Evidence Law and refutes incorrect reasoning which has informed the approach to authentication under the Uniform Evidence Law since enactment.

- [Pleading tortious conspiracy](#)
— *Michael Douglas* 306

This article explores issues relevant to the pleading of two distinct yet related causes of action: conspiracy by lawful means, and conspiracy by unlawful means. It considers how these causes of action should be pleaded. It is hoped that the article will be of value to those interested in these economic torts, and to practitioners considering how to plead a tortious conspiracy in litigation before an Australian court.

Progressive punitiveness in Queensland

— *Andrew Dyer*

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Jonathan Crowe and Bri Lee have recently argued that the mistake of fact excuse, for which sch 1 s 24 of the Criminal Code Act 1899 (Qld) provides, should be rendered inapplicable to rape and sexual assault proceedings in that State. In this article, I argue that this proposal is objectionable because, however progressive its promoters consider it to be, it is incompatible with human rights — and would probably breach the Human Rights Act 2019 (Qld). Moreover, the Queensland Law Reform Commission and the Queensland Parliament should reject an alternative proposal of Crowe and Lee's, which seems to be aimed at achieving indirectly what their primary proposal would achieve directly. Even if Crowe and Lee's research demonstrated that mistake of fact is causing injustice for rape and sexual assault complainants — and it does not — absolute liability for serious crime is indefensible.

'Plainly wrong': The application of the Federal Court's threshold of error

— *Rebecca Lucas*

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The phrase 'plainly wrong' is commonly used in judgments of Australian courts, but particularly within the judgments of the Federal Court of Australia in the consideration of whether it is appropriate to depart from a previous judicial opinion. While it is often applied uncontroversially, a question has arisen as to whether its application within the Federal Court is based upon the jurisdiction being exercised — either original or appellate — or whether its application is determined by the constitution of the bench. Specifically, the question has arisen in circumstances where a Full Court exercising appellate jurisdiction is asked to depart from the decision of a single judge made within the Federal Court's appellate jurisdiction: must the Full Court be satisfied that the single judge's decision is 'plainly wrong'? Clarification in respect of this question is important in light of the growing size of the Federal Court's migration caseload; a caseload which is increasingly being dealt with by single judges sitting in the Federal Court's appellate jurisdiction. By reference to the Federal Court's statutory regime, existing articulations of the 'plainly wrong' threshold within the Federal Court's jurisprudence and practical considerations, this article argues that the latter approach is to be preferred. It is argued that whether a bench of the Federal Court must reach the requisite state of satisfaction that a previous decision was 'plainly wrong' depends on whether the bench is comprised of a single judge or a Full Court, not the jurisdiction it is exercising.

The merely evidentiary role of contracts in ascertaining the scope of fiduciary obligations

— *Daniel Reynolds*

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What is the relationship between contract and fiduciary obligations? Are fiduciary obligations created consensually, and ascertained by a process of construction of the parties' agreement? Or are they imposed by equity, and ascertained by a process of characterisation of the facts? This article advocates the latter view, and then addresses the next question: 'what then is the role of contract in ascertaining whether and to what extent fiduciary obligations exist?'. The answer, it is argued, is that the parties' contract is merely evidence of the nature of their relationship, to which equity has regard in determining whether fiduciary obligations are to be imposed.

Thorne v Kennedy — A reminder by the High Court of Australia the law of contract and equity underpin family law financial agreements

— *Lance Rundle*

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A family law financial agreement made pursuant to pt VIIIA for parties to a marriage and pt VIIIAB for de facto relationships, of the Family Law Act 1975 (Cth), make it possible for parties to enter into an agreement with respect to the alteration of their property in the event of separation without a court scrutinising the terms. Where a party alleges their genuine consent or judgment has been compromised an application can be made to the Federal Circuit Court of Australia or Family Court of Australia pursuant to ss 90K and 90KA of the Family Law Act seeking the intervention of the common law or equity to overturn the financial agreement in circumstances where conduct is found to vitiate the agreement in the form of duress, undue influence or unconscionable conduct. This article explores the context in which equitable intervention, namely duress, undue influence and unconscionable conduct, were considered and applied by the High Court of Australia in the 2017 decision of *Thorne v Kennedy* and analyses the impact of the decision for legal practitioners and parties when negotiating, drafting and signing a family law financial agreement.

Case Note

Fraud, wilful blindness, and dishonest assistance

— *William Gummow*

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