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The present paper attempts a statistical analysis of the influence of the Journal of Contract Law in Commonwealth court decisions over the last 30 years since the Journal was founded.

The Undue Influence of 'Non-Australian' Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*? Part I
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The judgments of the plurality and Gordon J in the recent High Court decision of *Thorne v Kennedy* have undoubtedly altered the prior law relating to undue influence in Australia. But the most significant alterations, which are twofold, are both unacknowledged and unsupported by justificatory reasons. First, undue influence is presented as a single concept not having different forms, or involving different principles, across the traditional categories or 'classes' of undue influence. Accompanying that is surreptitious abandonment of the 'fiduciary' explanation for the second, 'relational' category of undue influence, prominent in antecedent authorities such as *Johnson v Buttress*. This is demonstrated, in particular, by the unacknowledged and unexplained evaporation of the 'prophylactic' function and content of the traditional 'presumption' of undue influence. But nowhere do their Honours openly address and credibly respond to the conventional rationale — the generic policy foundations — that originally motivated the strict fiduciary regulatory regime in those cases where the presumption traditionally operated. Second, as a single concept, undue influence is, in stark contrast to unconscionable dealing, rationalised as a 'plaintiff-sided', 'impaired-consent' ground of relief. Although prior dicta existed to support such an outlook on undue influence, those dicta, themselves of dubious lineage, were accepted in *Thorne* without pause or explanation, and certainly without acknowledgment of a strong current of senior judicial opinion to the contrary, both domestically and abroad. We are left, then, in the wake of *Thorne*, with an unexplained disjunctive rationalisation of two equitable

exculpatory doctrines that are nevertheless acknowledged to be 'closely related'. This does not augur well for the logical taxonomisation of those sibling doctrines, both as between themselves and relative to other exculpatory categories that equally function to discipline the abuse of unofficial power–vulnerability relationships or encounters in connection with bilateral transactions.

Contract Interpretation and Deleted Words:
A Not So Pleasant Diversity of Authority
— *David McLauchlan* 90

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This article discusses the vexed question whether words that have been deleted from a written contract prior to its execution are a permissible aid to the interpretation of the contract. After outlining the development of the unsatisfactory and conflicting case law in England and Australia, the article discusses the recent decision of the High Court of Australia in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* where an opportunity to clarify the law was missed, although arguably the consideration given to the deleted words served to divert attention from the real issue in that case.

From Unconscionability to Unfairness: A Critique of Hong Kong's
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Hong Kong courts have read into its Unconscionable Contracts Ordinance the general doctrine of unconscionability requiring suppliers' identification and knowing exploitation of consumer weakness, making the Ordinance unsuitable for consumer protection. This has resulted in an approach straddling the unconscionability doctrine and the more intuitive 'unfairness'-based concepts in unfair terms legislation. Through an analysis comparing Hong Kong's position and Australian developments in unconscionable conduct and unfair terms in the Australian Consumer Law, and unjust contracts in the Contracts Review Act 1980 (NSW), this article argues that new unfair terms legislation (rather than a reinterpretation of the Ordinance) is needed for Hong Kong. Applying contemporary understandings of consumer behaviour, it proposes a new 'unfairness' standard for the legislation with consideration of three factors: unfair tactics in procuring an agreement, erosion of consumer autonomy and choice, and whether the term is reasonably necessary to protect the legitimate business interests of the supplier.

Contract Codification and 'Certainty'
— *John Eldridge* 146

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In March 2012, the Commonwealth Attorney-General's Department issued a brief but wide-ranging discussion paper which canvassed the possibility of codifying or otherwise reforming the Australian law of contract. This article is concerned with a particular dimension of the debate sparked by that paper: namely the question of whether codification would promote 'certainty' in the Australian law of contract. It first seeks to establish an understanding of the likely nature of any successful Australian

contract codification project. It then proceeds to set out and apply a framework for understanding the concept of 'certainty' in the present context. It is concluded that although there may be cause to think that codification might promote 'certainty' to at least some extent, there are good reasons to think that its impact in this respect would likely be less significant than has often been suggested.

Disagreement over the Illegality Defence
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The rationalisation of the analytical framework for the illegality defence in private law was always bound to be controversial. The replacement of the rule-based approach with a more flexible 'range-of-factors' approach in *Patel v Mirza* upends the traditional approach and implicates the bounds of the judicial function. The approach was vigorously contested by the minority. More recently, it was repudiated by the Singapore Court of Appeal in *Ochroid Trading Ltd v Chua Siok Lui*, which propounded an incremental yet progressive approach. In retaining a rule-based analytical framework, the symmetry between statutory illegality and common law illegality for contractual claims is maintained, while the reliance principle is recast; notably unjust enrichment is introduced as an independent cause of action, and the stultification principle embraced for working out the illegality defence in this context. This paper critically examines the contrasting approaches, and suggests that a simpler and more elegant approach might be distilled in actions for restitutionary recovery.

Book Reviews

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