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Articles

Inheritance issues with superannuation death benefits:
Can a legal personal representative ignore the deceased's
death benefit? — *Darryl Browne* 1

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No one who has fiduciary duties may enter into engagements in which the fiduciary has or may have a personal interest conflicting with the interests of those whom the fiduciary is bound to protect, unless duly authorised. *McIntosh v McIntosh*, and *Brine v Carter* are examples of an orthodox application of the conflict principle. The unorthodoxy from *McIntosh v McIntosh* is the statement that an administrator of an intestate estate has a duty to apply for payment of superannuation funds to the estate. The unorthodoxy from *Brine v Carter* is that '[t]he entitlement to consideration of exercise of the [superannuation fund] trustee's decision in its favour was an asset of the estate'. Because a legal personal representative owes a duty to collect assets of the estate the unorthodoxy meant that the legal personal representative had a duty to claim the death benefit. The unorthodoxy is therefore the extension of the duty to collect the deceased's assets to include the collection of the death benefit payable as a result of the deceased's death. The unorthodoxy is treating death benefits, or the right to claim them for the estate, as part of a deceased's estate.

Briginshaw v Briginshaw: Eighty years on — *R J Desiatnik* 69

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On 30 June 1938 a decision was handed down by the High Court which has had an exceptional influence on the law in Australia, not for what it actually determined, but for part of the reasoning of four of the judges who heard that appeal, particularly one of them, Dixon J. That case was *Briginshaw v Briginshaw*, and while cited innumerable times, it has, surprisingly, received scant close analysis. This article aims to correct this.

Legal and factual causation in equitable compensation claims
against defaulting fiduciaries — *Mohammud Jaamae Hafeez-Baig* 79

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Equitable compensation is an equitable remedy which is still the subject of a number of heated debates. This article addresses one of those debates: factual and legal causation in claims for equitable compensation against defaulting fiduciaries. With respect to the former, it argues that plaintiffs must show traditional 'but for' causation between the loss suffered and the breach by the defaulting fiduciary. The article draws attention to the numerous similarities with the causal rules

applicable in deceit claims, but argues, by reference to the unique functions of equitable compensation, that the two should not be completely assimilated. With respect to legal causation, the article first argues that courts have accepted the application of the 'scope of duty' limitation to claims for breach of fiduciary duty, and defends that course of action. It then argues for the application of the deceit remoteness rules to such claims.

Coercion in federal industrial law — *C N Jessup*

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The judgment of Gyles J in *Finance Sector Union (Australia) v Commonwealth Bank of Australia* provided what came to be described as a 'settled' construction for the expression 'intent to coerce' in ss 343 and 348 of the *Fair Work Act 2009* (Cth): it was necessary that the putative contravenor apply pressure that was intended to negate choice on the part of the putative victim, and that the pressure applied involve conduct that was unlawful, illegitimate or unconscionable. These elements derived from the requirements of common law economic duress as identified by McHugh JA in *Crescendo Management Pty Ltd v Westpac Banking Corporation*. In the recent High Court judgment in *Esso Australia Pty Ltd v Australian Workers' Union*, the correctness of the second of these elements was questioned. In the present article, the course of the court decisions which gave rise to the 'settled' construction is examined, and it is concluded that there are grounds to doubt the correctness of that construction.

An accident waiting to happen: Questioning the relevance of the equitable doctrine of accident — *Maria Mellos*

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The equitable doctrine of accident is no recent manifestation of the equitable jurisdiction. Indeed, it is among the most ancient of equitable heads, described by Story as being coeval with the existence of equity itself. Despite its historical significance, the equitable doctrine of accident remains an elusive and relatively unexplored concept. In the modern equitable jurisdiction, few decisions make mention of the doctrine, and yet fewer decisions apply it. Academic literature also fails to provide elucidation; the doctrine is condemned as 'subsumed' or 'superseded', but little analysis is presented by way of explanation. This article aims to answer three questions. First, what is accident in the equitable sense? Second, what has triggered the stagnation of the doctrine of accident? And third, does this stagnation signify the doctrine's demise, or is there potential for its continued relevance?

Still defending orthodoxy: The new front in the war on *Codelfa* — *Thomas Prince*

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In a number of recent decisions, the NSW Court of Appeal and the Federal Court have endorsed an interpretation of Mason J's 'true rule' in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* that allows the admission of evidence of surrounding circumstances to interpret a contract without ambiguity. This article addresses the merits of that interpretation.

Developments in public policy challenges to enforcing foreign awards
in Mainland China — *Stephen Puttick and Kanaga Dharmananda*

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This article explores recent developments regarding the application of the public policy exception by the courts of Mainland China in proceedings for the enforcement of foreign and foreign-related arbitral awards. It argues that recent developments present new and significant commercial risks for parties dealing with Chinese counterparties. The article includes a thorough overview of the implementation of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* in Mainland China, discussion of recent decisions of the Supreme People's Court, as well as an outline of legal and practical responses that may effectively mitigate business risk and ensure the practical realisation of an award. Developments in Mainland China are especially important for Australian practitioners, not least given that China is one of Australia's largest trading and investment partners, and that the number of foreign and foreign-related arbitral awards requiring enforcement by Chinese courts continues to increase.

Choice of law in federal jurisdiction after *Rizeq v Western Australia*
— *James Stellios*

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This article considers the impact of the High Court's decision in *Rizeq v Western Australia* on choice of law in federal jurisdiction. Section 79(1) of the *Judiciary Act 1903* (Cth), along with s 80 of that Act, have been seen as central to choice of law when a court exercises federal jurisdiction. The High Court's decision in *Rizeq* has reconceptualised the operation of s 79(1) and, while *Rizeq* was not a choice of law case, the High Court's decision undoubtedly has choice of law implications.