

# Australian Bar Review (ABR)

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*(francis forbes society for australian legal history 10th annual jh plunkett lecture, edmund barton lecture, articles and book review included in this part are linked to the LexisNexis platform)*

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A serious harm threshold for Australian defamation law

— *David Rolph*

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The recent reforms to the national, uniform defamation laws introduced a new element to the plaintiff's cause of action: serious harm to reputation. At the same time, the statutory defence of triviality was abolished. The statutory serious harm threshold now becomes the principal means by which trivial or marginal defamation claims are excluded. It represents a significant change to the cause of action in defamation and the way in which Australian defamation law thinks about damage to reputation. This article considers the implications of the statutory serious harm threshold in Australia. Given that it was modelled on the statutory serious harm threshold which operates in England and Wales under s 1 of the Defamation Act 2013, this article examines in particular what lessons may be drawn from the already substantial case law in that jurisdiction.

Unit trusts and partnerships — Where goes equity?

— *Amrit MacIntyre*

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Unit trusts are widely used in Australia to hold property investments. Beneficial ownership of property held in this way has traditionally thought to vest in the beneficiaries of unit trusts. Developments in the case law, however, may no longer allow for the rights of unitholders to easily assume the character of an ownership right of this kind. A parallel evolution of the case law considering what interest partners have in partnership property leaves in the hands of partners something less than the beneficial ownership once thought to lie with them. The nature of a trustee's right of indemnity and exoneration

for liabilities incurred by trustees has also undergone an evolution such that it is now understood to be a beneficial interest in trust property rather than a mere encumbrance. Equity has never insisted on a simple bifurcation of legal and equitable estates such that each vests neatly in the trustee and beneficiary, recognising instead a wide range of interests falling short of full ownership. Nevertheless, the absence of beneficial ownership rights of the kind that equity has traditionally upheld reduces the protections investors have enjoyed to safeguard their interests in property held in unit trusts and partnerships. A further unintended consequence of the absence of beneficial ownership rights is a narrowing of the difference between unit trusts and common law partnerships on one hand and their civil law equivalents on the other.

## Reflective loss and the policy of the law

— *Richard Scruby*

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It is a rule of the common law of Australia that reflective loss cannot be recovered. Reflective loss is suffered where a shareholder suffers damage merely because a company has suffered damage as a result of the same wrongdoing. The Supreme Court of the United Kingdom recently reconsidered the reflective loss rule in *Marex Financial Ltd v Sevilleja* ('*Marex*'). A majority stated the rule in a form that is inconsistent with current Australian authority. A minority would have abandoned the rule altogether. This article reconsiders the application of the rule in Australia in light of *Marex*. It contends that the minority's decision was correct and that the retention of the rule in Australia requires public policy reasoning of a kind that should be regarded as unsound.

## A common law *vindicatio*? Property rights as an independent basis for restitution

— *Rachael Short*

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A steadily increasing number of Australian cases have recognised that a victim of theft has a right at common law to a personal restitutionary remedy against a volunteer recipient of her stolen money. The basis for such a right, however, remains under-explored. This article assesses the two leading justifications for the victim's claim against an innocent volunteer: that it is directed towards the reversal of unjust enrichment and that it vindicates a pre-existing property right. This article concludes that the second offers the more compelling account and illustrates the practical importance of that conclusion by demonstrating its impact on the calculation of the ultimate remedy.

## Book Review

*The Constitution of the Australian Capital Territory* by David Mossop

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