

INDEX

- adverse possession, 56
 - determination of beginning of limitation period, 57–8
 - exception to indefeasibility, 92–3
 - fencing and voluntary rates payment, 60–2
 - relevance of Limitation Acts, 56–7
 - Torrens system and, 62
- Alternate Dispute Resolution community and strata title schemes, 175
- assignments and subleases, 201
 - effect and nature of a sublease, 203
 - effect and nature of an assignment, 203
 - refusing consent to assign, 202
 - right to assign or sublease, 202
 - terminology, 201
- Bentham, Jeremy, 8–9
- body corporate. *See* owners corporation
- boundaries. *See* land boundaries
- caveat
 - exceptions to indefeasibility and, 89–90
 - restrictive covenants and, 248–9
- characteristics of easements, 219
 - capable of forming subject matter of grant, 219–20
 - diversity of ownership, 221–2
 - dominant and servient tenements. *See* dominant and servient tenements
- chattels real, 181, 186
- common law implied
 - covenants, 196
 - furnished dwellings reasonably fit for habitation, 199
 - keep and deliver up premises in good repair, 199
 - non-degrogation from grant, 198
 - quiet enjoyment, 197–8
 - use premises in tenant-like manner, 198–9
 - ‘usual covenants’, 197
- common law licences, 209
 - bare or mere, 209
 - contractual, 209
 - coupled with a grant or interest, 209
- common property, 7, 15
 - as association property, 162
 - of humanity, 16
 - strata title schemes and, 162, 164–5
 - Torrens system and, 163
 - water, 115
- community title, 162, 166–7
- community title schemes
 - ambit of authority of owners corporation, 167–9
 - community associations, 174
 - comparison to strata title schemes, 174–5
 - dispute mechanisms and processes, 175–6
 - issues between owners and executive committees, 169–74
 - operation of, 167–74
- co-ownership, 141–3
 - creation of, 149–52
 - disposition of interests, 154–5
 - joint tenancy. *See* joint tenancy
- rights and duties of co-owners, 152–3
- tenancy in common. *See* tenancy in common
- termination of, 158–9
- covenants, 196
 - Austerberry* Rule, 240, 241
 - benefit of, 240–1
 - breach of, forfeiture and, 205
 - burden of, 241–2
 - implied by common law. *See* common law implied covenants
 - implied by statute. *See* statute implied covenants
 - positive, 241
 - restrictive. *See* restrictive covenants
 - ‘touches and concerns’ the land, 203, 240
 - ‘usual’, 197
- creation of common law
 - leases, 185–8
 - certainty of duration, 187
 - exclusive possession, 186–7
 - subject matter and parties, 187–8
- creation of easements, 226
 - common intention and, 227–8
 - in equity, 232–3
 - express grant or reservation, 226
 - general words imported into conveyances, 229–30
 - implication from description of land, 230
 - implied grant, 228
 - implied reservation, 226
 - necessity and, 227
 - non-derogation from grant, 230
 - by prescription, 231–2
 - by statute, 232
 - Wheeldon v Burrows*, 228–9

- determination of leases, 203–4
 - frustration, 205
 - merger, 206
 - operation of or reliance upon terms of lease. *See* operation of or reliance upon terms of lease
 - specific statutory grounds, 206
 - surrender. *See* surrender
- doctrine of accretion and erosion, 101–2
- doctrine of estates, 48–9
 - freehold estates. *See* freehold estates
- doctrine of fixtures, 106–10
- doctrine of tenure, 42–5, 183
 - English feudalism and. *See* English feudalism
 - in Australia, 45–8
 - Mabo (No 2)* and, 106–10
- dominant and servient tenements, 219–20
 - accommodation of dominant tenement, 220–1
 - interference with easements, 233–4
- easements
 - abatement and, 233
 - characteristics of. *See* characteristics of easements
 - creation of. *See* creation of easements
 - definition, 215
 - exceptions to indefeasibility and, 72
 - extinguishment of. *See* extinguishment of leases
 - fencing and, 60–2
 - interference with, 233–4
 - law of, industrial revolution and, 214
 - leasehold estate and, 217
 - nature of, 216
 - negative, 216–17, 238
 - nuisance and, 233
 - positive, 216
 - profit à prendre and, 218–19
 - restrictive covenants and, 217–18
 - types of. *See* types of easements
- encroachment, 102–3
 - building on the land of another, 103–5
 - encroaching buildings, 105–6
- English feudalism
 - process of commendation, 43
 - simplification and abolition of tenure in, 45
 - subinfeudation, 43, 45
 - tenures in, 43–5
- equitable leases, 192–3
 - agreement for, 193
 - estoppel, 192–3
- equitable protection of mortgagor's rights
 - equitable vitiating factors, 263
 - equity of redemption, 261–3
 - penalties, 263–4
- equity
 - creation of easements in, 232–3
 - of redemption, 261–3
 - restrictive covenants in, 242–4
- equity courts
 - as courts of conscience, 55, 86
 - development of jurisdiction of, 53–4
 - enforcement of the *use* by, 53–6
 - in personam, 55–6
- estoppel, 192–3
- exceptions to indefeasibility, 71
 - adverse possession, 92–3
 - caveat and, 89–90
 - easements express exception, 72
 - express exceptions generally, 72
 - extent of caveatable interests, 90
 - fraud exception, 73–6
 - in personam exception, 81–4
 - overriding legislation, 91–2
 - registered mortgagees, 79–81
 - registered volunteers, 85–6
 - resolution of priority disputes, 87–9
 - short-term lease express exception, 72–3
 - unregistered and equitable interests, 86–7
 - wrong descriptions of boundaries, 97
- extinguishment of leases, 234
 - by abandonment, 234–5
 - express release, 234
 - through obsolescence, 235–6
 - by unity of ownership and unity of possession, 235
- factual possession
 - 'adverse to the true owner', 60
 - 'continuous and exclusive', 59–60
 - 'open not secret', 58
 - 'peaceful, not by force', 59
- fee simple, 35, 49–50, 51–2, 90, 215
- fee tail, 40, 50–1
- fencing
 - adverse possession and, 60–2
 - as type of easement, 225
- foreclosure, 271–2
 - Torrens mortgages and, 271–2
- fraud
 - actual and registered mortgages, 76–8
 - exception to indefeasibility, 73–6
 - Torrens title. *See* Torrens title fraud
- freehold estates, 49–52
 - fee simple, 49–50
 - fee tail, 50–1
 - life estates and revisioner and remainderman interests, 51–2
- Great Fire of London, 212–13
 - establishment of Court of Fire, 213

- Hanson, Sir Richard, 30, 36, 37
 Hohfeld, Wesley Newcomb, 9–10
 Honoré, Anthony, 10
 housing affordability, 176–7
 Hübbe, Ulrich, 31–5
- improper mortgagee's sale. *See* power of sale
- indefeasibility
 exceptions to. *See* exceptions to indefeasibility
 Torrens title and. *See* Torrens title indefeasibility
- Indigenous Australian land
 law, 120–3
 boundaries and, 124
- joint tenancy
 nature of, 146–8
 right of survivorship, 144–5
 severance of. *See* severance of joint tenancy
 or tenancy in common, 148–9
 unity of interest, 144
 unity of possession, 141, 143
 unity of time, 144
 unity of title, 144
- justifications for private property, 15
 economic efficiency, 18–20
 labour, 16–17
 natural or environmental use, 20–1
 personality and human flourishing, 17–18
- land boundaries, 97
 artificial, 97–8
 doctrine of accretion and erosion, 101–2
 encroachment. *See* encroachment
 Indigenous Australian land law, 124
 natural, 98–9
 non-tidal waters, 100–1
- land law
 concept of possession in. *See* possession
 creation of future interests, 53
 doctrine of estates. *See* doctrine of estates
 doctrine of fixtures, 52
 doctrine of waste, 52–3
 enforcement of the *use* by courts of equity, 53–6
 Indigenous Australian, 120–3
 land rights legislation, 125–6
 reception of English law, 124–5
- land titles
 allodial, attempt to gain, 183
 role in establishment of South Australia. *See* Wakefield theory
- leasehold estate, 49, 186, 191, 193, 203
 easements and, 217
- leases, 181
 assignments and subleases. *See* assignments and subleases
 common law, creation of. *See* creation of common law leases
 common law leasehold, 181, 184
 determination of. *See* determination of leases
 development of, 181
 distinguishing from licences, 207–8
 equitable. *See* equitable leases
 extinguishment. *See* extinguishment of leases
 historical development of in Australia, 183–5
 legal. *See* legal leases
 pastoral, 132–3, 184, 189
- rights and obligations of lessors and lessees. *See* covenants
 short-term, 72–3
 statutory mortgagee's remedies and, 270
 statutory or Crown, creation of, 189–90
 tension between choice and obligation, 182–3
 terminology, 185
 Torrens system and, 188–9
 types of, 190
- legal leases, 190–2
 at sufferance, 192
 at will, 191
 concurrent, 192
 determination of. *See* determination of leases,
 equitable leases
 fixed-term, 190
 for life, 191
 periodic, 190–1
- licences
 nature and transmission of. *See* nature and transmission of licences
 statutory or Crown, 210
 types of, 208
- Locke, John, 16–17
- Mabo (No 1)*, 127
Mabo (No 2), 127–9, 135
 doctrine of tenure and, 47–8, 106–10
- mediation
 community and strata title schemes, 176
- mortgagees
 registered, 79–81
- mortgagee's rights and remedies
 power of sale. *See* power of sale
 sources of, 267–8
 statutory remedies. *See* statutory mortgagee's remedies
- mortgagee's sale. *See* power of sale

- mortgages, 259
 - 'all money', 285–6
 - as form of security, 259
 - nature of at general law, 259–60
 - Torrens. *See* Torrens mortgages
- mortgagor protections,
 - statutory. *See* statutory mortgagor protection
- mortgagor's remedies for
 - improper sale, 276
 - injunctive relief, 277
 - monetary compensation, 276–7
 - protection of purchaser provisions, 280–1
 - setting sale aside, 277–80
- mortgagor's rights
 - common law, 260
 - equitable protections. *See* equitable protection of mortgagor's rights
- National Credit Code*
 - priorities between
 - mortgages and, 284–5
 - statutory mortgagor protection and, 264–5
- native title, 15
 - applications, 130
 - common law, 126–30
 - extinguishment, 132, 135–9
 - Native Title Act*, 130–2
 - nature of, 119
 - pastoral leases and, 132–3
 - Wik* and 1998 amendments, 132–5
- nature and transmission of
 - licences, 207
 - definition of licence, 207
 - distinguishing leases and licences, 207–8
 - exclusive or non-exclusive, 208
 - transmission of licences, 208
- operation of or reliance upon
 - terms of lease, 167–74
 - expiry, 204
- forfeiture, 204–5
 - notice to quit, 204
- owners corporation
 - ambit of authority, 167–9
 - issues with executive committees, 169–74
- ownership of minerals and
 - other resources, 111
 - ownership of minerals, 111–14
 - property in water, 114–17
- pastoral leases, 132–3, 184
 - Wik* and, 189
- possession, 48, 51
 - adverse. *See* adverse possession
 - elements of, 58
 - exclusive, 186–7, 189
 - factual. *See* factual possession
 - intention to possess, 58, 60
 - Torrens mortgages and, 269–70
 - unity of, 235
- power of sale, 272–3
 - Australian cases, 274–5
 - English cases, 273–4
 - factors determining
 - improper sale, 276
 - mortgagor's remedies
 - for improper sale. *See* mortgagor's remedies for improper sale
 - selling mortgagee's duty, 273
- priorities between mortgages
 - 'all money' mortgages, 285–6
 - further advances, 286–8
 - mortgagor protections
 - affecting priorities, 282–6
 - National Credit Code*, 284–5
 - starting position, 282
 - verification of identity requirements, 282–3
- private property
 - indeterminate concept of, 7
 - justifications for. *See* justifications for private property
- proceeds of sale
 - application of proceeds of sale, 281–2
 - priority between mortgages. *See* priorities between mortgages
- profit à prendre, 218–19
- property
 - as social relationship, 11–13
 - as things, 8–9
 - common. *See* common property
 - Critical Legal Studies and, 12
 - dephysicalised, 9
 - legal rights and, 9–11
 - liberal rights conception of, 10–11
 - private. *See* private property
 - relationship to scarce resources, 8
 - spatial dimensions of, 13–14
 - structure of landscape and, 213–15
- quiet enjoyment, 187, 197–8
- Radin, Margaret, 10, 17–18
- residential tenancies, 176–7
 - definition, 177
- restrictive covenants, 87, 238–9
 - caveat and, 89–90
 - easements and, 217–18
 - in equity, 242–4
 - policy and planning law and, 255–6
 - Torrens system and. *See* Torrens system and restrictive covenants
 - under common law, 239–42
- severance of joint tenancy, 155
 - methods of, 156–8
- squattocracy, 183, 189, 194, 195
- statute-implied covenants, 199
 - entry for inspection, 200
 - re-entry for breach of other than pay rent covenant, 201
 - re-entry for non-payment of rent, 201

- rent, 199–200
- repair, 200
- statutory mortgagee's remedies
 - appointment of receiver, 270–1
 - foreclosure, 271–2
 - generally, 268
 - lease, 270
 - make demand, 268
 - proceed against mortgagor personally, 268–9
 - take possession, 269–70
- statutory mortgagor protection
 - ASIC Act*, 265–6
 - Australian Consumer Law*, 266
 - Contracts Review Act 1980* (NSW), 266–7
 - National Credit Code*, 264–5
- statutory or Crown leases, 194–6
 - creation of, 189–90
 - exclusive possession and, 189
 - non-perpetual convertible tenures, 195
 - non-perpetual 'non-convertible' tenures, 195
 - perpetual leasehold, 189, 194
 - perpetual tenures, 195
- strata title, 162–6
 - definition of 'lot', 164–5
- strata title schemes
 - ambit of authority of owners corporation, 167–9
 - common property and, 162
 - comparison to community title schemes, 174–5
 - dispute mechanisms and processes, 175–6
 - floor and location plans, 165
 - issues between owners and executive committees, 169–74
 - management of, 165–6
 - operation of, 167–74
 - subdivision of land under, 164–5
- surrender, 206
 - express, 206
 - leasee's repudiation or breach of fundamental term, 206
 - by operation of law, 206
- tenancy in common, 148
 - or joint tenancy, 148–9
- tenancy laws
 - overview of jurisdictional reforms, 178–9
- tenure, doctrine of. *See* doctrine of tenure
- Torrens, Robert Richard, 24, 28
 - background and goals of, 28–31
- Torrens mortgages, 35, 260
 - foreclosure and, 271–2
 - Hopkinson v Rolt* rule and, 287
 - mortgagor's rights. *See* mortgagor's rights
 - possession and, 269–70
 - registered, factors protecting priority of, 282–6
 - statutory remedies, 267–8
- Torrens system
 - adverse possession and, 62
 - as prisoner of own history, 40
 - background to, 25–8
 - bijural ambiguity of, 64, 67–8, 73, 93
 - common property and, 163
 - differences to 'old system', 27
 - early years of, 35–9
 - enactment of, 28
 - exceptions to indefeasibility. *See* exceptions to indefeasibility
 - indefeasibility of title. *See* Torrens title indefeasibility
 - introduction to foreign jurisdictions, 38, 39
 - introduction to other Australian colonies, 38–9
 - leases and, 188–9
 - mortgages under. *See* Torrens mortgages
 - restrictive covenants and. *See* Torrens system and restrictive covenants
 - supposed German source of, 31–5
 - title fraud and. *See* Torrens title fraud
 - title indefeasibility. *See* Torrens title indefeasibility
 - wrong descriptions of boundaries, 98
- Torrens system and restrictive covenants, 244
 - caveat and, 248–9
 - notification of on register, 245–8
 - registration of, 248
 - scheme of development and, 250–3
 - Westfield Management Ltd*, 254–5
- Torrens title fraud
 - agents and, 78–9
 - legislative response to, 79–81
- Torrens title indefeasibility, 189, 284
 - background, 65–8
 - deferred or immediate, 68–71
 - Westfield Management Ltd*, 254–5
- types of easements, 223
 - fencing, 225
 - floating easement, 225–6
 - right of light/air, 225
 - right of support, 224–5
 - right-of-way, 223–4
- types of licences
 - common law. *See* common law licences
- unregistered leases, 72, 188–9
- Wakefield, Edward Gibbon, 23, 24
- Wakefield theory, 23
 - criticism of by Marx, 24