

INDEX

- accession 18–20
- actual authority
 - actual express authority 141–2
 - actual implied authority 142–4
 - consent as basis for 141
- actual express authority 141–2
- actual implied authority 142–4
- actual possession 11
- advertising, misleading and deceptive conduct 480–4
- agency, as legal concept 136–41
- agency by estoppel *see* ostensible authority
- agency relationship
 - agency by necessity 137, 169–72
 - and bailment 199–200
 - breach of warrant of authority 173–4
 - consent to agency 137–40
 - duties 172–3
 - key elements 140–1
 - liability of agents 173–4
 - primary players 136
 - ratification
 - elements 161–4
 - limitation 164–6
 - nature of 161
 - termination 176–7
 - see also* actual authority; ostensible authority
- agents
 - breach of warrant of authority 173–4
 - definition 136–7
 - liability 173–4
 - representations by 152–8
- apparent authority *see* ostensible authority
- ascertained goods 70
- attachment
 - creation of security interest 212–14
 - and perfection of security interests 214–17
- Australian Competition and Consumer Commission (ACCC)
 - civil proceedings 501–2
 - criminal prosecutions 502–3
 - defective goods actions 372
 - unfair contract term actions 382
- Australian Consumer Law
 - operation 378–9
 - rationale 375–8
 - remedies available 492
 - see also* regulators
- bailment
 - and agency relationships 199–200
 - by attornment 188
 - categories 187–92
 - and contractual relationships 201–2
 - definition 179–80
 - distinguished from other legal relationships 199–202
 - duties
 - care of goods 192–6
 - common duties 192
 - comply with terms of bailment and not convert goods 197–9
 - delivery of goods 196–7
 - gratuitous bailment 188–9
 - and licensee – licensor relationships 200–1
 - quasi-bailment 188
 - requirements 180–5
 - for reward 189–92
 - sub-bailment 185–7
 - substitutional bailment 187–8
 - and trust relationships 200
- barter 105–8
- borrower of personal property *see* grantors of personal property
- ‘but for’ test of causation 496–7
- character merchandising 489–90
- charge *see* secured party
- charger of personal property *see* grantors of personal property
- chattels, nature of 9–10
- chattels personal 7, 8, 34
- chattels real 7, 8
- choses in action, nature of 8–9
- choses in possession, nature of 9
- circulating assets 205
- civil proceedings, brought by regulators 501–2
- collateral
 - definition 205
 - proceeds from 222–3
- commercial law, place of consumer law 375
- commercial property, definition 226
- common law, and retention of title clauses 94–8
- common law maxims
 - de minimis non curat lex* 113–14
 - nemo dat quod non habet* 77–92

- compensation
 - defective goods actions 348–9
 - and redress orders 497–8
- constructive possession 12
- consumer contracts, definition 383–5
- Consumer Credit Code*, regulation of guarantees 287
- consumer guarantees
 - acceptable quality of goods 420–4
 - acquiring goods as a consumer 403–4
 - actions against manufacturer 429–30
 - application 403
 - classification of consumer transactions 405–8
 - correspondence with description 425
 - definition of consumer 403–5
 - express warranties 426–8
 - fitness for purpose 424–5
 - for goods 410–11
 - goods free from security, charge or encumbrance 419–20
 - manufacturer's indemnification of supplier 430–1
 - non-consumer exception 408–10
 - prescribed amount payable 404–5
 - remedies for non-compliance 428–31
 - repairs and spare parts 426
 - seller's right to sell goods 411–14
 - supply of goods by sample 425–6
 - as to title 411–14
 - undisturbed possession of goods 415–19
- consumer law
 - relevance for commercial law 375
 - see also* Australian Consumer Law
- consumer property, definition 226
- consumer protection, rationale 381–2
- contra proferentem* 311–12
- contract of guarantees *see* guarantees
- contract of insurance *see* insurance contracts
- contracts
 - and bailment 201–2
 - regulation 287–9
 - and unconscionable conduct 455–6
 - see also* unfair contract terms
- contribution from co-sureties, guarantor's rights 293–5
- contributory negligence, defective goods actions 367–8
- conversion
 - damages for 16–17
 - personal actions for 14–15
- cost, insurance, freight (CIF) contract of carriage 122–3
- credit contracts, regulation 287
- criminal prosecutions 502–3
- damages
 - assessment of 497
 - 'but for' test of causation 496–7
 - causation 495–7
 - causes of actions 494–5
 - conversion 16–17
 - defective goods actions 348
 - detinue 16
 - non-acceptance of goods by buyer 128–9
 - non-delivery of goods 125–6
 - provisions for 493–7
 - trespass to goods 16–17
- de facto possession 11
- de minimis non curat lex* 113–14
- deemed security interests 210
- defective goods actions
 - causes 347, 348, 358–9
 - compensation 348–9
 - consumer expectation test 355–8
 - damages 348
 - defences
 - component in assembled good 366–7
 - contributory negligence 367–8
 - no defect at supply 359–61
 - overview 347, 359
 - regulatory compliance 361
 - state of the art 362–6
 - definition 348
 - goods supplied in trade or commerce 354–5
 - limitations of actions 369–70
 - parameters 347
 - role of ACCC 372
 - safety defects 355–8
 - strict liability 347
 - success of 348
 - supplier's claims against manufacturers 371–2
 - see also* manufacturer's liability
- detinue
 - damages for 16
 - personal actions for 15

- domestic property, taking free of security
 - interest 229–30
- duress, and validity of guarantees 274–5
- estoppel
 - by negligence 82–4
 - by representation 79–82
 - exception to nemo dat rule 78–84
 - and liability of guarantors 271
- extrinsic evidence, in contracts of
 - guarantee 258–9
- fixed charge 205
- fixtures 20–1
- floating charge 205
- fraud, and voiding of insurance contracts
 - 335–7
- fraudulent misrepresentation, in insurance
 - contracts 333–5
- fraudulent non-disclosure, in insurance
 - contracts 333–5
- free on board (FOB) contract of carriage 122
- future goods 70
- general security agreements 205
- goods
 - categories 69–71
 - classification and transfer 71
 - definition 9–10, 34–5
 - see also* sale of goods contracts; trespass to goods
- grantors of personal property
 - definition 206
 - vesting rule 221
- guarantees
 - all debts clauses 248
 - all monies clauses 246–8
 - co-extensive liability 244–5
 - collateral obligations
 - co-extensive nature of 244–5
 - continuing obligations 245–8
 - of guarantors 243–4
 - revocation 248–50
 - consideration clauses 259–60
 - construction of contracts 256–60
 - contingent liability 248
 - continuing guarantees 264–5
 - creditors' general duty to explain 277
 - distinguished from similar transactions
 - 260–3
 - duress 274–5
 - extrinsic evidence 258–9
 - formation of contracts 253–4
 - incidence of use 240
 - independent advice 277–8
 - letters of comfort 252
 - liability
 - continuing or specific guarantees
 - 264–5
 - designation of parties 269–70
 - effect of terms of principal transaction
 - 270–4
 - limitations on 263, 269–70
 - primary liability 251–2
 - see also* consumer guarantees; guarantor's liability
 - nature of 241–2
 - principal debtor's obligation 242–3
 - problems with 240–1
 - purpose 240
 - recitals 259
 - scope of contracts 250–1
 - specific guarantees 264–5
 - statutory regulation 287–9
 - supply of goods on credit 252
 - terms of principal transaction 270–4
 - time limitations 265
 - and transaction type 266
 - unconscionable bargains 275
 - undue influence 275–6
 - unenforceable contracts 273–4
 - validity 274–6
 - voidable contracts 273
 - for whole or part of debt 265
 - see also* consumer guarantees
- guarantors
 - collateral obligation of 243–4
 - security over obligations 268–9
- guarantor's liability
 - for costs of creditor 268
 - defective guarantee 272–3
 - discrepancy between guarantee and principal transaction 270–1
 - estoppel 271
 - for interest under principal transaction
 - 266–8
 - mistake 272
 - personal liability 254–6
 - scope of 256–8
 - unenforceable contracts 273–4

- guarantor's liability (cont.)
 - voidable contracts 273
 - whole sum to be paid on default 271
- guarantor's liability, discharging of
 - appropriation of payments and securities 281
 - by creditor on principal's breach 284–5
 - by determination 278
 - by operation of law 285–6
 - creditor's breach 283–4
 - novation of principal transaction 283
 - partial release 282–3
 - release of principal 281–2
 - satisfaction of principal obligation 279
 - termination of principal contract 283–4
 - undue preference 279–80
 - variation of contract 284
- guarantor's rights
 - contribution from co-sureties 293–5
 - doctrine of marshalling 293
 - indemnity 289–91
 - subrogation 291–3
- household property, taking free of security
 - interest 229–30
- human body, property rights in 26–7
- indemnity
 - distinguished from guarantee 260–2
 - guarantor's right of 289–91
 - manufacturer's indemnification of suppliers 370, 430–1
- injunctions 498–9
- insurance contracts
 - agreements 300
 - breach of terms 337–40
 - claims
 - insured's duty of disclosure 340–2
 - insured's right to notify circumstances 342–3
 - insurer's obligations of disclosure 342
 - co-insureds 326
 - construction 302–3, 311
 - contra proferentem* rule 311–12
 - cover notes 300
 - distinguished from guarantees 262–3
 - duty of disclosure
 - common law requirements 314–19
 - eligible contracts 324–6
 - reasonable person test 319–24
 - statutory requirements 313–14
 - formation 300–2
 - fraud 335–7
 - insurable interest 302
 - life insurance 302
 - misrepresentation 328–9
 - payment of premium 300
 - proposals 300
 - remedies
 - fraudulent misrepresentation and non-disclosure 333–5
 - of insurer 330
 - for non-disclosure and misrepresentation 330–3
 - as 'risk transfer' from insured to insurer 298
 - third party beneficiaries 326–8
 - unusual terms 313
 - utmost good faith
 - breach of implied term 305–6
 - concept of 303–4
 - as implied term 305
 - insured's duty 306–7
 - insurer's duty 307–11
- insurance law, sources in Australia 298–9
- intermixture 17–18
- inventory, definition 226, 234–5
- legal possession 11–12
- letters of comfort 252
- licences, and bailment 200–1
- life insurance 302
- Maiden, Re* decision 235–8
- manufacturer's liability
 - consumer guarantees 429–30
 - definition of manufacturer 350–3
 - exclusion clauses 369
 - manufacturer's indemnification of suppliers 370, 430–1
 - statutory requirements 346
 - supplier's claims against manufacturers 371–2
 - unknown manufacturer 353–4
 - see also* defective goods actions
- marshalling, guarantor's rights 293
- mercantile agents 84–8
- misleading and deceptive conduct
 - categories 480

- character merchandising and passing off
 - 489–90
- comparative advertising 480–4
- elements of conduct 464–5
- intermediary liability 473–5
- liability 465
- methodology for establishing 475–80
- promises and statements of future actions
 - 487–9
- puffery 484
- silence where disclosure is expected
 - 485–6
- and standard for commercial behaviour 463
- as statutory form of misrepresentation 463
- statutory prohibition 463–5
- in trade or commerce 465–73
- misrepresentation
 - fraudulent 333–5
 - in insurance contracts 328–9, 330–3, 333–5
- mortgagors of personal property *see* grantors of personal property
- motor vehicles, taking free of security interest 226–8
- nemo dat rule 77–92
- ostensible authority
 - detriment 161
 - elements 146–7
 - nature of 144–6
 - reliance 158–61
 - representation
 - by agent 152–8
 - by principal to third party 147–52
 - from course of dealings 148–9
 - from job title, office or indicia of authority 149–52
- passing off 489–90
- pecuniary penalties 501–2
- perfection of security interests
 - and attachment 214–17
 - by control 219–21
 - by possession 218–19
 - by registration 217
 - priority of competing interests 216–17
- personal property
 - categories 7
 - challenges to common law concept 22–8
 - classification 7, 8
 - defining 6–10
 - definition in PPSA 206–7
 - taking free of security interest 229–30
- personal property rights
 - created by statute 10
 - loss of 17–21
 - accession 18–20
 - fixtures 20–1
 - intermixture 17–18
- Personal Property Securities Act (PPSA)
 - application 9
 - default priority rules 231–2
 - extinguishment rules 224
 - impact on existing security interests 206
 - personal property, definition 206–7
 - proceeds from collateral 222–3
 - property interests excluded 207
 - purpose and design 204
 - security interest, definition 208
 - vesting in grantor 221
 - see also* security interests
- personal property securities leases, categories 205
- Personal Property Securities Register (PPSR)
 - inclusion of existing security interests 206
 - purpose 204
 - registration of security interests 217
- possession
 - definition in PPSA 218–19
 - interference with 13–17
 - nature of 10
 - and perfection of security interests 218–19
 - types 10
- price 101–5
 - agreement to sell at valuation 104
 - ascertainment of 102–4
 - sale and agreement to sell 101–2
- price gouging 440, 455
- proceeds, definition 222
- product liability
 - compensation for injury or damage 348–9
 - statutory regime 346–8
 - see also* defective goods actions; manufacturer's liability
- promises, and misleading and deceptive conduct 487–9
- property
 - meaning in commercial law 7–10
 - types 7–10

- puffery 484
- purchase money security interests (PMSI)
 - definition 232–3
 - nature of 205
 - super-priority 233–5
- real property, nature of 7
- recitals, role in guarantees 259
- redress orders 497–8
- regulators
 - approaches to enforcement 500–1
 - civil proceedings 501–2
 - criminal prosecutions 502–3
 - objectives of enforcement regime 500–1
 - see also* Australian Competition and Consumer Commission (ACCC)
- remedies
 - available under Australian Consumer Law 492
 - civil pecuniary penalties 501–2
 - civil proceedings 501–2
 - consumer guarantee breaches 428–31
 - criminal prosecutions 502–3
 - declarations as to unfair terms 499–500
 - injunctions 498–9
 - insurance contract breaches 330–5
 - objectives of enforcement regime 500–1
 - rescission 498
 - sale of goods contract breaches
 - for buyers 115–27
 - for sellers 127–33
 - specific performance 126–7, 498
 - trespass, detain and conversion 15–17
 - types 492
 - warranty breaches 123–4
 - see also* compensation; damages
- rescission 498
- retention of title (Romalpa) clauses *see* Romalpa clauses
- retention of title (Romalpa) security interests 205
- Romalpa clauses
 - and common law 94–8
 - purpose of 93, 205
- sale of goods contracts
 - ascertainment of price 38–9
 - barter 105–8
 - buyer's right to quiet possession 64–6
 - correspondence with description 40–6
 - breach of condition 44–6
 - reliance 43–4
 - sale by description 41–2
 - definition 33–4, 101
 - distinguished from other transactions 35–8
 - fitness for purpose 47–58
 - disclosure of purpose 53–7
 - knowledge of purpose 47–53
 - seller supplies good of that description 57
 - trade name exception 57–8
 - freedom from encumbrance 66
 - goods
 - categories 69–71
 - classification and transfer 71
 - definition 9–10, 34–5
 - implied terms 39–40
 - legislation 30
 - application of Victorian Act 32–9
 - statutory interpretation 30–2
 - merchantable quality 58–61
 - performance of contract 108–14
 - delivery by instalments 114, 124–5
 - payment and delivery of goods 108
 - rules of delivery 108–9
 - wrong quantity supplied 109–14
 - price 101–5
 - agreement to sell at valuation 104
 - ascertainment of 102–4
 - sale and agreement to sell 101–2
 - remedies for buyers 115–27
 - acceptance and CIF contract of carriage 122–3
 - acceptance and FOB contract of carriage 122
 - acceptance of goods by purchaser 118–22
 - breach of warranty 123–4
 - damages for non-delivery 125–6
 - defective instalment deliveries 124–5
 - specific performance 126–7
 - remedies for sellers 127–33
 - actions for price 128
 - damages for non-acceptance 128–9
 - lien or right to retain goods 130–1
 - unpaid seller against the goods 129
 - withholding delivery 131–3
 - sale by sample 61–3
 - seller's right to sell goods 63–4
- secured party, types 206
- security agreements, written 215

- security interests
 - attachment 212–14
 - control 219–21
 - creation 212, 221
 - deemed security interests 210
 - definition 208
 - elements 205, 208–9
 - enforceability against third parties 214–15
 - exclusions 210–11
 - existing interests, impact of PPSA 206
 - ‘first-in-time’ rule 232
 - perfection
 - and attachment 214–17
 - by control 219–21
 - by possession 218–19
 - by registration 217
 - possession 218–19
 - priority between competing interests 216–17, 231–2, 233–5
 - purchase money security interests 232–5
 - Re Maiden* decision 235–8
 - registration 217
 - super-priority of PMSI 233–5
 - taking free rules 224
 - collateral sold in ordinary course of business 228–9
 - defects in serial numbers 225–6
 - motor vehicles 226–8
 - personal, domestic or household property 229–30
 - unperfected security interests 224–5
 - transactions creating 209
 - transitional security interests 237
- serial numbers, defects in 225–6
- software
 - as goods 34–5
 - property rights in 22–3
- specific goods 69–70
- specific performance
 - mandatory injunctions 498
 - sale of goods contracts 126–7
- spectacles, property rights in 27–8
- Statute of Frauds, and personal liability of guarantors 255
- statutory interpretation, sale of goods contracts 30
- subrogation, guarantor’s right of 291–3
- transfer of property
 - by non-owner 77–92
 - estoppel 78–84
 - mercantile agents 84–8
 - negligence by owner 82–4
 - representations as to ownership 79–82
 - sale under voidable title 88–90
 - seller or buyer in possession after sale 90–2
 - nemo dat rule 77–92
 - presumptions 71–7
 - retention of title
 - and common law 94–8
 - purpose of clauses 93
 - rules for 69, 71–7
- transitional security interests 237
- trespass to goods
 - damages for 16–17
 - personal actions for 13–14
- trust relationships, and bailment 200
- unascertained goods 70
- unconscionable bargains, and validity of guarantees 275
- unconscionable conduct
 - application of elements in *Armadio* case 437–8
 - bargaining positions of the parties 454–5
 - boundaries of 459–60
 - business to consumer transactions 448
 - business to small business transactions 448
 - and ‘clouded judgement’ 438–42
 - in commercial relationships 456
 - common law meaning 445–8
 - determining factors 454–6
 - doctrine of 433–4
 - elements of unconscionability 434–7
 - equitable notions of unconscionability 448–51
 - failure to disclose intended conduct 455
 - inconsistent treatment 455
 - industry codes 455
 - interpretive difficulties 451–4
 - lack of actual knowledge and predation 442–4
 - lack of good faith 456, 459
 - leading statutory cases 456–9
 - meaning of 448–54
 - price gouging 440, 455
 - protection of legitimate interests 455

- unconscionable conduct (cont.)
 - statutory regulation in commercial sphere 433, 444–5
 - terms and conditions of contracts 455–6
 - true meaning of bargain obscured 455
 - undue influence, pressure or unfair tactics 440, 455
- undue influence
 - and unconscionable conduct 440, 455
 - and validity of guarantees 275
- unfair contract terms
 - consumer contracts 383–5
 - and consumer protection 381–2
 - declaratory orders 499–500
 - detriment if applied or relied on 397–9
 - examples 399–400
 - excluded terms 387–9
 - expressly permitted terms 388–9
 - meaning of ‘unfair’ 389–99
 - negotiated contracts 385
 - operative provisions 383–7
 - protection of legitimate interests 396–7
 - significant imbalance of parties’ rights and obligations 390–6
 - standard-form contracts 385–7
 - statutory regime 381, 382–3
 - subject matter definitions 387–8
 - upfront price terms 388
- verba chartarum fortius accipiuntur contra proferentem* 311–12
- virtual property 23–6
- warranties
 - distinguished from guarantees 262
 - remedy for breach 123–4