

# INDEX

- abandonment, 317
- absolute obligations, 228, 273–4
- ACCC *See* Australian Competition and Consumer Commission
- acceptable quality
  - goods, of, 181–2
- acceptance
  - communication of to offeror, 86–8
  - counter-offers and, 81, 84–5
  - electronic, 88, 159–60
  - establishing agreement and, 84–5
  - instantaneous communication and, 87–8
  - methods of, 85
  - postal acceptance rule, 86–8
  - unilateral contracts and, 86
  - See also* offer and acceptance analysis
- accessorial liability, 50, 353–4
- accord and satisfaction, 257
- account of profits, 49, 157, 460
- ACL *See* Australian Consumer Law
- actual undue influence, 372–4
- adaptation of contracts, 287–8
  - See also* variation of contracts
- ADR *See* alternative dispute resolution
- advertisements
  - offer and acceptance and, 81
- affirmation
  - bar to rescission, 339
  - termination of contract, 310–11, 315–16
  - unfair, 315–16
- agency, 135–6
  - avoidance of privity doctrine through, 142–4
- agents
  - authority of, 135–6
  - use of in preparing a contract, 61–2
- agreed damages clauses, 64–5, 320, 434
  - 446–53, 458
- agreements
  - agreements to agree, 115–16
  - agreements to negotiate in good faith, 116–17
  - establishment of *See* establishing agreement
  - preliminary *See* preliminary agreements
  - See also* contracts
- alternative dispute resolution, 43–6
- ancillary obligations, 319–20
- anticipated contracts that fail to materialise, 70–1, 487
- anticipatory breach, 135, 294–5, 300, 303, 307, 477
- apparent authority, 135–6
- apportionment legislation, 233
- apportionment of liability, 357, 475
- arbitration, 41, 45
- ASIC *See* Australian and Securities Investments Commission
- assessment of loss, 456–7
  - See also* damages
- assignment of contractual rights
  - absolute, 268
  - effect of an assignment, 269
  - equity, in, 268
  - involuntary, 270–1
  - methods, 268
  - rights that cannot be assigned, 269
  - statutory provisions, 268
  - use of assignments, 267–8
- assumpsit, 11–12, 137, 447, 455, 481
- auctions, 82
  - consumer guarantees and, 180
  - online, 88, 180
  - sale by, definition, 180
- Australian Competition and Consumer Commission (ACCC), 18, 28, 55, 183, 356, 391, 396, 404–5
- Australian Consumer Law (ACL), 14, 17, 24, 33
  - consumer guarantees *See* consumer guarantees
  - damages under, 354–6
  - definition of consumer, 178–9
  - federal law, as, 16, 343–4
  - misleading or deceptive conduct and, 343–4
  - pre-contractual conduct and, 68–9
  - remedies under, 353–7
  - source of contract law, 17–18
  - specific performance and, 441
  - State or Territory law, as, 16, 343–4
  - trade or commerce, conduct in, 18, 68, 344–6
  - unconscionable conduct, 379–80, 389–97
- Australian Securities and Investments Commission (ASIC), 239
- authority
  - agent, of, 135–6
- bailment, 227
- bankruptcy, 271
- battle of the forms, 62, 89–90, 157
- bilateral contracts, 7–8, 81, 86, 93, 231
- bill of lading, 54, 143
- Bitcoin, 34, 229
- blockchain, 34

- boilerplate terms, 64–5
- bonds, 11, 446–7
- boycotts, 29, 430
- breach of contract, 227–8
  - actual breach, 295
  - anticipatory *See* anticipatory breach
  - consequences of, 227–8
  - damages as primary remedy for, 455
  - efficient breach, 442, 455–6
  - fundamental *See* fundamental breach
  - misinformation as, 331
  - threatened, 435
- building industry, 44
  - progress payments and, 44, 233, 321
  - subcontractors, use of, 270
- business efficacy, 170–1, 176, 243
- 'but for' test, 357, 469–70
- CAANZ *See* Consumer Affairs Australia and New Zealand
- CAF *See* Legislative and Governance Forum on Consumer Affairs
- Canada Steamship* principles, 212, 225
  - status of, 212–13
- canons of construction, 202–4
- capacity, 102
  - mental capacity and intoxication, 104
  - minors, 102–3
- care *See* duty of care; negligence
- carriage of goods by sea, 145, 209, 284–5
- cascade clause, 428
- causa*, 7
- causation,
  - damages and, 356–7, 469–70
  - duress and, 370–1
- CBP *See* Code of Banking Practice
- certainty
  - discretion and uncertainty, 101
  - formation of contracts, requirement of, 99
  - mechanisms for resolving uncertainty, 101–2
  - preliminary agreements, 114–17
  - value of, in commercial dealings, 32, 74
- champerty, 289, 415
- change of circumstances, 250, 273, 275, 336
  - contract planning and, 275
  - See also* frustration; variation of contracts
- charities
  - conduct in trade or commerce and, 346
- children *See* minors
- choice of law
  - jurisdiction of courts, 53–4
  - mandatory laws, 54–5
  - proper law of the contract, 54
  - resolving conflicts of laws, 52–5
- CISG *See* Vienna Convention
- Civil Liability Acts, 468, 475
- civil penalties, 49–50, 354, 396–7
- classical contract law, 12, 30–1
- clean hands, 371, 439
- Code of Banking Practice (CBP), 217–20, 223
- codification of contract law, 35
- collateral contracts, 82
  - pre-contractual statements, 167–8
  - third parties and, 148
- collective action, 28–9
- collective bargaining, 28–9
- comic strip contracts, 64
- commercial arbitration, 45–6, 416
- commercial construction
  - principles of, 194–5
- commercial contracts, 14, 54, 63–4, 242, 245, 250, 274, 449, 452
  - essential terms in, 296
  - fiduciary obligations and, 237–8
  - good faith and, 242, 245
  - interpretation of, 194–5
  - standard form, 203
  - termination clauses in, 292, 306
- commercial dealings
  - certainty in, need for, 32
  - functions of contracts in relation to, 9
  - intention to create legal relations and, 77
- common law
  - meanings of, 10, 20
  - source of contract law, 18–20
- common mistake, 358, 360–1, 363–4
  - rectification of, 362–3
- compensable loss
  - cost of correction, 464–6
  - expectation damages, 462–3
  - gain-based damages, 460
  - loss of a chance, 466–7
  - non-pecuniary loss, 467–8
  - reliance damages, 460–1
  - sale of goods, 463–4
  - types of compensation, 458–9
  - See also* damages
- compensation, 47–8
  - damages *See* damages
  - equitable, 48, 131
- completeness of contracts, 9, 99–102
- compromise agreements, 97–8
- conciliation, 44, 416
- concurrent causes of loss, 357, 469–70
- concurrent liability *See* apportionment of liability; joint parties
- condition
  - contingent, 91–2
  - different meanings of, 90–1

- condition (cont.)
  - essential term, 90, 156, 295–8
  - order of performance, 231–6
  - sale of goods legislation, 177, 296
- conditional bond, 11, 446–7
- conditional contracts, 90–2
- conditional gift
  - distinction between unilateral contract, 94
- conflict of laws, 52–5
- conscience
  - equity, role in, 20, 32, 380
  - See also* unconscionability
- consensus ad idem*, 74–5, 358
- consent
  - theory, 37–8
  - See also* establishing agreement
- consequential loss, 187, 207, 456, 458, 478
  - fraud and, 341
- consideration, 7, 262
  - adequacy of, 96
  - compromise agreements, 97–8
  - duties owed to third parties, 98
  - exchange, element of, 93–4
  - failure of *See* failure of consideration
  - fresh, requirement for *See* variation of contracts
  - illusory, 98–9
  - need for, 92–3
  - past, 94
  - pre-existing duties, 96–8, 251–6
  - practical benefit, 96, 253–6
  - privity of contract and, 137–8
  - sufficiency of, 95–9
  - total failure of *See* total failure of consideration
  - value, requirement of, 7, 95
- Constitution, 16–17
- construction
  - canons of, 202–4
  - commercial, 194–5
  - See also* interpretation
- construction industry *See* building industry
- constructive trust, 49, 106, 130–1
- consumer
  - definition, 178–9
- Consumer Affairs Australia and New Zealand (CAANZ), 179, 187, 392
- consumer contracts
  - definition, 399
  - unfair terms, controls on, 399–406
- consumer guarantees, 54, 177–88
  - excluding and limiting, 185, 213
  - false or misleading representations, 187–8
  - goods, for, 178–83
    - acceptable quality, 181–2
    - conformity to description or sample, 182–3
    - fitness of goods for purpose, 182
    - ownership and possession, 180–1
    - spare parts and repairs, 183
  - major failure, 185–7
  - non-major failure, 185–7
  - remedies against manufacturers, 187
  - remedies against suppliers, 185–7
  - scope of, 178–9
  - services, for, 178–9, 184–5
    - due care and skill, 184
    - fitness of services for purpose, 184
    - time of supply, 185
- contextualism, 10, 37
- contingent condition
  - effect of, 91–2
  - fulfilling, waiving or relying on, 92
- contra proferentem* principle, 203–4, 208–11, 306
- contract
  - breach of *See* breach of contract
  - definition, 4–5, 73
  - exchange, as, 6–7
  - privity of *See* privity of contract
  - terms of *See* terms
  - valid, requirements for, 73
  - will theory of, 30
- contract law
  - boundaries of, 22–4
  - certainty, value of, 32
  - classical approach to, 30–1
  - codification of, 35
  - conscience and good faith, 32–3, 240–6, 380
  - development of *See* development of contract law
  - digital technologies and, 33–4
  - feminist analysis, 37, 78
  - economic perspectives, 39
  - general law of, 65
  - harmonisation of, 15, 35–6
  - national, 34–5
  - moral theories, 37–8
  - protective regulation, 31–2
  - relational analysis, 38
  - relevance of, 29–30
  - sources of *See* sources of contract law
  - welfarist regulation, 14, 29, 31
- contract planning
  - role of, 9, 274–5
- contracts
  - aleatory, 91
  - bilateral, 7–8, 81, 86, 93, 231
  - collateral *See* collateral contracts
  - commercial *See* commercial contracts
  - conditional *See* conditional contracts
  - divisible, performance and, 233–4

- duration *See* duration of contracts
- enforcement of, 47
- entire, 232–6
- formation of *See* formation
- frustration of *See* frustration
- functions in relation to commercial dealings, 9
- illegal *See* illegality
- impossible to perform, frustration and, 277
- incomplete, 9, 99–102
- internet, 88
- interpretation of *See* interpretation
- multi-party, 134
- necessaries, for, 102
- parties to *See* parties to a contract
- performance of *See* performance
- power imbalances in, 27–9
- preparation of *See* preparation of contracts
- prevalence of, 4
- process contracts, 83
- sale of goods *See* sale of goods contracts
- sham, 169–70
- small business *See* small business contracts
- smart, 34
- termination of *See* termination of contracts
- unenforceable, 9, 103–6, 219, 351, 409, 411–12, 417, 419, 435
- unfair *See* unfair terms
- unilateral *See* unilateral contracts
- utmost good faith, of *See* utmost good faith
- variation of *See* variation of contracts
- vitiating factors, 107–8
- void *See* void contracts
- voidable *See* voidable contracts
- written *See* written contracts
- contractual disputes
  - jurisdiction of courts, 50–1, 53–4, 415–16
  - resolution of *See* dispute resolution
  - remedies *See* remedies
- contractual indemnity, 215, 222–3
  - types of, 222
- contractual obligations
  - absolute, 228, 273–4
  - ancillary, 319–20
  - care or effort based, 228–9
  - non-contractual obligations, and, 157
  - novation and, 270
  - performance of *See* performance
  - primary, 319
  - secondary, 319
  - strict, 228–9
  - transferring responsibility for performance for, 269–70
- contractual rights
  - assignment of *See* assignment of contractual rights
- contributory negligence, 357, 475
- counter-offer, 83, 90
  - acceptance and, 84–5
  - distinction between acceptance, 81
- course of dealing, 161–2
- Court of Chancery, 20–1, 46, 372, 379, 381, 434, 446–7
- courts
  - jurisdiction of, 50–1, 53–4, 415–16
- critical legal studies, 37
- custom and practice
  - interpretation of contracts, 194, 202
  - terms implied by, 156, 173–4
- damages, 47–8, 108, 228
  - ACL, under, 354–6
  - actions for, 140–2
  - agreed damages, 64–5, 320, 434, 446–53, 458
  - assessment of loss, 456–7
  - consequential loss, 187, 207, 456, 458, 478
  - contractual provisions on, 457–8
  - date of assessment, 476–7
  - direct loss, 456
  - disappointment or distress, for, 355–6, 467–8
  - exemplary, 49, 355, 457
  - expectation, 456, 459, 461–3
  - gain-based, 460
  - inadequacy of, 436–7
  - interest on, and loss of the use of money, 477–8
  - liquidated damages, 64–5, 320, 434, 446–53, 458
  - Lord Cairns' Act*, 478–9
  - loss of bargain, 293, 307, 319, 457
  - misleading or deceptive conduct, 354–6
  - misrepresentation, 341–3
  - nominal, 50, 455
  - non-pecuniary loss, 467–8
  - primary remedy for breach of contract, 455
  - punitive, 49, 457
  - reliance, 460–1
  - restrictions on recovery *See* restrictions on damages
  - right to perform or pay damages, 445–6
  - sale of goods, 463–4
  - specific performance or injunction, damages in lieu of, 478–9
  - termination and, 457
  - unliquidated, 434, 449–51
- de minimis* principle, 234–5
- debt
  - action for, 11, 47, 315, 434, 445
  - part-payment of, 256–8
  - sexually transmitted, 216
- debt collection agencies, 268, 371, 395
- deceit, 65, 330, 341
- declaration
  - remedy of, 50

- deeds, 7, 11, 43, 107
- default rules *See* terms implied by law
- delay
  - bar to rescission, 339
  - equitable remedies, as reason for not granting, 441
  - See also* laches
  - frustration of contract, 278
  - termination for, 303–5
- dependent obligations, 231–2
- deposits, 42, 322–3, 446
- detached objectivity, 74
- detriment
  - estoppel, element of, 127–9
- development of contract law
  - Australianising the common law, 12–13
  - development of English law of contract, 11–12
  - growth in legislation, 13–14
  - internationalisation, 14–16
  - nature and origins of the common law, 10
- deviation, 209
- digital technologies, 33–4
- discharge
  - termination and, 292
- disclaimers, 206, 346–7, 357
- disclosure of information
  - common law, 65–7
  - general rule, 65
  - insurance, 67, 336
  - misleading or deceptive conduct, 348–50
  - misrepresentation, 335–6
  - statutory obligations, 67–8
- disgorgement, 49
- dispute resolution
  - agreed processes, 44–6
  - choice of law *See* choice of law
  - commercial arbitration legislation, 45–6
  - jurisdiction of courts, 50–1, 53–4, 415–16
  - limitation periods, 51–2
  - negotiated, 43
  - settlement agreements, 43
  - third party assistance, 43–4
  - See also* remedies
- divisible contracts, 233–4
- drafting styles, 63–4
- duration of contracts, 42, 64, 100, 174, 230–1, 278, 292
- duress, 49, 73, 108, 221, 366–71
  - causation and, 370–1
  - economic *See* economic duress
  - goods, of, 366–7
  - illegitimate pressure, 368
  - lawful act, 369, 376
  - nature of at common law, 367
  - person, to the, 366
  - remedies, 371
  - statutory, 367, 371
  - types of, 366–7
- duty of care, 23, 147–8, 211, 334, 342, 475
- duty of good faith and fair dealing *See* good faith
- eBay, 88, 180
- economic analysis, 9, 39
  - efficient breach theory, 442, 455–6
- economic duress, 258–60, 367–70
- economic loss, 23, 147–8, 342, 355, 357, 371, 467, 475
- efficient breach theory, 442, 455–6
- election
  - rescission of contracts, 338–40
  - termination of contracts, 308–11, 315–16
  - waiver and, 263–4
- electronic acceptance, 88, 159–60
- electronic communications, 34
- Electronic Transactions Acts, 33–4, 81, 88, 105, 159–60
- email, 88, 164
- employment contracts
  - assignment of, 267
  - duration and termination of, 100, 230–1, 307–9
  - frustration of, 278
  - good faith and, 245
  - misleading or deceptive conduct, 345
  - personal nature of, 229, 439
  - post-employment restraints, 319, 424–30
  - remedies for breach of, 439, 444–5, 468
  - statutory regulation, 17, 177, 214, 416
  - terms implied in law, 175–6
- enforcement of contracts, 47
  - action for debt *See* debt, action for
  - injunction *See* injunctions
  - specific performance *See* specific performance
  - third parties and, 140–2
- enforcement of promises
  - moral explanations for, 8
  - practical perspective for, 8–9
- enterprise agreements, 28, 233
- entire agreement clauses, 65, 166–7
- entire contracts and obligations, 232–6
- equitable compensation, 48, 131
- equitable estoppel, 94, 119–21
  - assumption or expectation, 123–4
  - detriment, 127–8
  - elements of, 123
  - failure to avoid detriment, 129
  - inducement, 124–6
  - knowledge or intention, 129
  - minimum equity, 130–1
  - reliance, 126–7
  - remedies, 129–32
  - unconscionability, role of, 129

- equity
  - assignment of contractual rights in, 268
  - estoppel *See* equitable estoppel
  - fiduciary obligations *See* fiduciary obligations
  - 'fusion fallacy', 21
  - minimum, 130–1
  - mistake and, 330, 358–61, 380
  - nature and origins of, 20
  - part performance *See* part performance
  - penalties *See* penalty doctrine
  - remedies *See* equitable compensation;
    - injunctions; rectification; rescission;
    - specific performance
  - restitution and, 488–90
  - source of contract law, 20–2
  - special, married women *See* special equity for married women
  - time stipulations, 303–4
  - unconscionability *See* unconscionability;
    - unconscionable bargains
  - undue influence *See* undue influence
- essential terms
  - breach of, precluding termination, 310
  - completeness of contracts and, 9, 99–100
  - conditions, as, 90, 156, 295
  - identification of, 296–8
  - repudiation, 300–1
  - termination for breach of, 156, 228, 295–8
- establishing agreement
  - acceptance and unilateral contracts, 86
  - acceptance by other means, 87–8
  - acceptances and counter-offers, 84–5
  - advertisements and displays, 81
  - auctions, 82
  - battle of the forms, 62, 89–90, 157
  - communication and the postal acceptance rule, 86–7
  - limits of offer and acceptance analysis, 88–9
  - methods of acceptance, 85
  - offer and acceptance principles, 80–1
  - offers and invitations to treat, 81
  - tenders, 82–3
  - termination of an offer, 83–4
  - ways of signifying agreement, 79–80
- estoppel, 7, 111, 119–20, 330
  - by acquiescence, 120
  - by conduct, 120–1
  - by convention, 120
  - by deed, 120
  - by encouragement, 120
  - by judgment, 120
  - by record, 120
  - by representation, 120
  - categories of, 120–1
  - common law, 119–20
  - equitable *See* equitable estoppel
  - in pais, 120
  - misinformation, remedy for, 331–2
  - promissory *See* promissory estoppel
  - proprietary, 106, 120–2, 124–5, 130–2
  - third parties and, 148–9
- ex turpi causa* principle, 412–13, 419, 421, 483
- exchange, 93–4
- exclusion clauses, 207
  - See also* exemption clauses
- exemplary damages, 49, 355, 457
- exemption clauses
  - interpretation of *See* interpretation
  - nature and types of, 207–8
  - risk allocation, 9
  - statutory controls on, 213–15
  - termination, effect of, 320
  - use of, 206–7
- expectation loss, 341, 354, 458–9, 461, 463, 466
- expert determination, 41, 45, 416
- express prohibition, 410
- express terms, 156, 174
  - limits on
    - shams and pretences, 169–70
    - unfair terms *See* unfair terms
    - unlawful or unenforceable terms, 168
  - pre-contractual statements *See* pre-contractual statements
- extrinsic evidence, 192–4, 202
  - See also* parol evidence rule
- factual matrix evidence *See* surrounding circumstances evidence
- failure of basis *See* failure of consideration
- failure of consideration, 48, 70, 274, 283–4, 324–5, 420, 483–4, 486
- fair dealing *See* good faith
- Fair Work Commission, 33, 233
- feminist analysis, 37, 78
- fiduciary obligations, 21, 66, 237–8, 336, 350
- financial services, 9, 177
  - regulation of, 32, 178, 344, 389
- fitness of goods for purpose, 182
- Foakes v Beer* rule, 256–8
  - Australia, 258
  - promissory estoppel and, 263
- forbearance, 262
- force majeure clauses, 64, 227, 275, 280, 292, 309
- forfeiture, relief against, 21, 32, 312–14, 322, 391
- formalism, 10, 13, 30, 37
- formalities, 104–7
  - deeds and, 107
  - Statute of Frauds* and, 12–13, 104–5
- formation
  - capacity and *See* capacity
  - certainty *See* certainty
  - completeness, 99–102

- formation (cont.)
  - conditional contracts *See* conditional contracts
  - consideration *See* consideration
  - establishing agreement *See* establishing agreement
  - intention to create legal relations *See* intention to create legal relations
  - objective approach to intention, 74–5
  - requirements for a valid contract, 73
- forum non conveniens*, 53
- Franchising Code of Conduct, 70, 239
- fraud
  - deceit, tort of, 65, 330, 341
  - equitable concept, 380
  - unilateral mistake and, 359
- free acceptance, 325, 485–7
- freedom of contract, 12, 14, 30
- freehold covenant, 23, 136, 151
- frustration, 228, 292
  - absolute contractual obligations and, 273–4
  - alternatives to current law of, 287–8
  - Codelfa* and, 275–7
  - common purpose of, 278–9
  - criticisms of law on, 286–7
  - development of doctrine of, 273–4
  - effect of
    - common law rules, 282–4
    - New South Wales, 284–5
    - South Australia, 285
    - Victoria, 285–6
  - impossibility of performance, 277
  - limits on
    - contracts concerning land, 281–2
    - contractual provision for potentially frustrating event, 280
    - foreseeable events, 280–1
    - self-induced frustration, 279–80
    - self-induced, 279–80
    - temporary impossibility, 278
- fundamental breach
  - basis for terminating contract, 156, 228, 295–6, 298–300, 303, 310
  - exemption clauses and, 209–10
- future, representation as to, 350–1
- gap filling
  - courts, by, 101, 170, 174, 287
- global value chains, 14–15
- good consideration *See* consideration
- good faith
  - agreements to negotiate in, 116–17
  - definition, 243–5
  - duty to negotiate in, 69–70
  - general duty of in performance, 19, 38, 69, 176, 227, 240–6
  - implied in fact, 242–3
  - implied in law, 241–2
  - rise of in contract law, 33
  - termination of contracts, 314
  - utmost *See* utmost good faith
- goods
  - claims for goods supplied *See quantum valebat*
  - consumer guarantees for *See* consumer guarantees
  - display of, 81–2
  - duress of, 366–7
  - implied terms for sale of, 175, 177, 296, 298
  - sale of *See* sale of goods contracts; sale of goods legislation
- goods and services, 14, 185
  - consumer guarantees *See* consumer guarantees
  - global value chains and, 14–15
  - misleading representations about, 343
  - statutory obligations for supply of, 177–88
- gratuitous promise, 7, 93, 96, 98, 107, 119, 124
- guarantees
  - all-moneys guarantees, 216, 219
  - close personal relationships and, 216–17
  - consumer *See* consumer guarantees
  - disclosure of information, 67, 217–18
  - enforcement of, 219–20
  - escaping liability under, 221
  - formality requirements and information disclosure, 217–18
  - goods and services, for *See* consumer guarantees
  - interpretation of, 219
  - nature of, 215–16
  - protections for future credit and all moneys guarantees, 218–19
  - rights of guarantor after payment, 220–1
  - tripartite relationship within, 215
  - use of, 216–17
- guarantor indemnity, 215, 223
- Hague/Visby rules, 145
- hardship
  - adaptation of contracts, 287–8
  - specific performance and, 440
- harmonisation of contract law, 15, 35–6
- heads of agreement, 64, 111
  - See also* preliminary agreements
- Himalaya clauses, 143–5
- illegality
  - changing impact of, 408
  - claims under collateral or related agreements, 421
  - ex turpi causa* principle, 412–13, 419, 421, 483
  - 'illegal' and 'void', 408–9
  - proprietary claims, 422–3
  - public policy, contracts contrary to, 413–18
  - raising the issue of, 409



- restitution of benefits transferred under
    - contracts affected by, 419–21, 483
  - severance of terms affected by, 418–19
  - statutory *See* statutory illegality
  - tort claims, 421–2
- illegitimate pressure, 370
- illusory consideration, 98–9
- immoral conduct
  - principle of denying relief for, 412–13
  - public policy and, 413–14
- implied prohibition, 411
- implied terms, 149, 156, 169, 175–6, 178, 180, 185, 237
  - as default rules, 174–5
  - by custom and practice, 156, 173–4
  - by law *See* terms implied by law
  - by statute, 156, 175, 177
  - in fact *See* terms implied in fact
  - sale of goods, 175, 177, 296, 298
- in pari delicto* principle, 419, 421
- incapacity *See* capacity
- incompleteness, 9, 99–102
- incorporation of written terms
  - electronic acceptance as signature, 159–60
  - incorporation by reference, 162–3
  - onerous or unusual terms, 161
  - prior course of dealing, 161–2
  - reasonable notice, 62–3, 158–63
  - rectifying mistakes, 163
  - signature, 158–9
  - types of incorporation, 157–8
- indemnities
  - contractual *See* contractual indemnity
  - guarantor, 223
  - insurance, 222
  - interpretation of, 224–5
  - party–party, 223
  - reverse, 224
  - third party claims, 223–4
  - types of, 222
- independent obligations, 231
- inducement,
  - estoppel, 124–6
  - rescission for misrepresentation and, 336–7
- inertia selling, 85
- infants *See* minors
- inferred terms, 156
- injunctions, 47–8, 434
  - contracts of personal service, 444–5
  - damages in lieu of, 478–9
  - interlocutory injunctions, 442–3
  - mandatory injunctions, 354, 434, 443
  - prohibitory injunctions, 434, 443
  - resolution of contractual disputes, 442–4
- innominate terms *See* intermediate terms
- instantaneous communication
  - acceptance and, 87–8
- insurance contracts, 64, 91, 222
  - disclosure of information, 67, 336
  - illegality and, 412–13
  - indemnity and non-indemnity insurance, 222
  - privity rule and, 138–40, 148, 238
  - termination of, 307
  - unfair contract terms and, 400
  - utmost good faith and, 66–7, 336
- integration clauses, 166–7
- intention, 190–1
  - formation of contract *See* intention to create legal relations
  - objective approach to, 74–5, 190–1
  - preliminary agreements and, 111–15
- intention to create legal relations, 5–6
  - ascertaining the parties' intention, 75–6
  - associations, 79
  - commercial dealings, 77
  - objective test of, 30, 74–5
  - private arrangements, 78–9
  - problematic cases, 77–8
  - role of presumptions, 76–7
- interest
  - judgment sums, on, 477–8
- interlocutory injunctions, 442–3
- intermediate terms, 156, 228, 295–6, 298–9
  - fundamental breach of, 156, 228, 295–6, 298–300, 303, 310
- International Institute for the Unification of Private Law (UNIDROIT), 16
- international law
  - private, 15, 52
  - source of contract law, 22
- interpretation
  - absurdity and unlikelihood, 199–201
  - admissible evidence, 190
  - Canada Steamship* rules, 212–13
  - canons of construction, 202
  - Codelfa* and the true rule, 196–9
  - commercial construction, 194–5
  - considering the whole of the contract, 202–3
  - exemption clauses
    - excluding liability for negligence, 211–12
  - judicial control of, 208
  - modern approach, 210–11
  - rules of interpretation, 208–10
- maxims, 204
- parol evidence rule, 192–4
- post-contractual conduct, 201
- prior negotiations, 191, 193, 197
- resolving ambiguities, 203–4
- steps to, 192
- surrounding circumstances, 195–9
- summary of position, 201–2



- intoxication, 104
- invitation to treat, 81–2
  - offers and, 81
- involuntary assignment of contractual rights
  - death, bankruptcy and other situations, 270–1
- joint parties, 134–5, 138, 221, 257
- jurisdiction of courts, 50–1, 53–4, 415–16
- laches, 52, 441
- ladder clause, 428
- lapse of time,
  - as bar to rescission, 339
  - See also* delay
- law merchant, 16
- Legislative and Governance Forum on Consumer Affairs (CAF), 179–80, 187, 380
- letter of intent, 64, 111
  - See also* preliminary agreements
- letters of comfort, 77–8
- lex mercatoria*, 16
- liability
  - accessorial, 50, 353–4
  - apportionment of, 357, 475
  - concurrent, 23
  - exclusion or limitation of misleading or deceptive conduct, for, 357
  - See also* exemption clauses; limitation clauses
  - guarantor, 215
  - pre-contractual, forms of, 68–9
  - proportionate, 357, 475
  - ultimate, 215
- limitation clauses, 33, 63, 137, 158, 207, 320, 337, 457
- limitation periods, 51–2
- liquidated damages, 64–5, 320, 434, 446–53, 458
- Lord Cairns' Act*
  - damages under, 478–9
- loss
  - chance or opportunity, 355, 466–7, 478
  - compensable *See* compensable loss
  - consequential *See* consequential loss
  - economic, 23, 342, 355, 357, 371, 467, 475
  - expectation, 341, 354, 458–9, 461, 463, 466
  - mitigation of, 315, 473–5
  - non-pecuniary *See* non-pecuniary loss
  - pure economic, 23, 147–8, 342
  - reliance, 354, 458–9, 461
- loss of bargain damages, 293, 307, 319, 457
- maintenance, 289, 415
- major failure
  - consumer guarantees, 185–7
- mandatory injunctions, 354, 434, 443
- mandatory laws, 54–5
- manufacturers
  - remedies against under consumer guarantees, 187
- marriage
  - agreements prejudicial to the state of, 417
- married women, special equity for *See* special equity for married women
- mediation, 41, 44, 110, 416
- memorandum of understanding, 111
  - See also* preliminary agreements
- mental incapacity, 104
- mere representation, 164
- merger clauses, 166–7
- minimum equity, 130–1
- minors
  - capacity, 102–3
- misinformation, 330
  - as breach of contract, 331
  - estoppel as remedy for, 331–2
  - remedies for, 330–1
- misleading or deceptive conduct, 68, 330
  - ACL and, 343–57
  - causation and contribution, 356–7
  - conduct in trade or commerce and, 344–6
  - damages for, 354–6
  - exclusion of liability, 357
  - law, statements of, 348
  - 'misleading or deceptive', 346–7
  - opinions, 351
  - pre-contractual conduct, 68–9
  - promises, 351–2
  - puffs, 348
  - relaying information, 352–3
  - remedies, 353–7
  - silence and, 348–50
  - trade or commerce, requirement of conduct in, 344–6
  - victims of deception, 347–8
- misrepresentation, 49, 65–6, 73, 108, 164, 221, 332–43
  - bars to rescission, 339–40
  - contracts for the sale of goods, 340
  - damages for, 341–3
  - definition, 333–6
  - inducement, 336–7
  - intention or opinion, statements of, 333–4
  - law, statements of, 334–5
  - remedies, 338–43
  - representation or warranty, 164–5
  - rescission for, 332–3, 338–40
  - silence as, 335–6
  - specific performance and, 440
  - State and Territory Acts, 341
- mistake, 73, 221, 357–8
  - common mistake, 358, 360–1, 363–4
  - equitable, 330, 358–61, 380

- mutual mistake, 358, 360, 363
- non est factum, 362
- rectification of *See* rectification
- specific performance and, 440
- unilateral *See* unilateral mistake
- mistaken payments, 482
- mitigation of loss, 48, 315, 457, 469, 473–5
  - party–party indemnities and, 223
- modification *See* variation of contracts
- money claims
  - action for money had and received, 48, 324, 481–4
  - damages *See* damages
  - debts *See* debt, action for
  - mistaken payments, 482
  - money had and received *See* money had and received
  - payments under void, voidable and unenforceable contracts, 482–3
  - payments when a contract is discharged, 483–4
- money had and received, 48, 324, 481–4
- moral theories, 8, 37–8
- multi-party contracts
  - parties to, 134
- mutual mistake, 358, 360, 363
- mutuality principle, 438–9
- National Credit Code (NCC), 217–19, 221, 223
- National Employment Standards, 177, 214
- NCC *See* National Credit Code
- necessaries, 103
- necessity
  - implication of terms in fact, for, 171–2
  - implication of terms in law, for, 175–6
- negative covenants or stipulations, 151, 434, 443–4
- negligence, 23, 330
  - contributory negligence, 357, 475
  - damages for misrepresentation and, 342–3
  - damages in, 23
  - excluding liability for, 211–12
- negotiable instruments, 12, 149, 267, 271
- negotiation
  - dispute resolution, 43
  - good faith, and, 69–70
  - lack of, 27–8
  - techniques, 60–1
  - See also* preparation of contracts
- neoliberalism, 31
- nominal damages, 50, 455
- non-disclosure *See* disclosure of information; silence
- non-essential terms, 156, 295, 298, 331
- non est factum, 75, 104, 362, 483
- non-major failure
  - consumer guarantees, 185–7
- non-pecuniary loss
  - damages for, 467–8
- non-performance
  - termination for *See* termination of contracts
- novation, 134, 267, 270
- obligations
  - contractual *See* contractual obligations
- offer
  - identification of, 80–1
  - invitation to treat and, 81
  - termination of, 83–4
- offer and acceptance analysis, 80–90
  - limits of, 88–9
- offeree, 80, 82, 85, 231
  - communication of acceptance and, 87
  - termination of offer and, 83–4
  - variation of offer by, 84
- offeror, 80–1, 84–5, 231
  - communication of acceptance to, 86–8
  - revocation of offer by, 83
- ombudsman, 44
- option, 84, 96
- oral agreement, 104–5, 165–6, 261
- order and completeness of performance
  - dependent and independent obligations, 231–2
  - divisible contracts, 233–4
  - entire contracts and obligations, 232–6
  - quantum meruit* claims, 235–6
  - statutory provisions, 233–4
  - substantial performance, 235
  - sufficiency of partial performance, 234
- ostensible authority, 135–6
- parol evidence rule
  - identification of terms, 165–7, 169, 331
  - interpretation of contracts, 192–4, 201
- part payments
  - debts, of, 256–8
  - resolution of contractual disputes and, 42
  - termination and, 321–2
- part performance
  - equitable doctrine of, 106, 435
- parties to a contract, 5
  - agency, 135–6
  - identification of, 134
  - joint parties, 134–5, 138, 221, 257
  - multi-party contracts, 134
  - privity of contract *See* privity of contract
- party–party indemnity, 223
- past consideration, 94
- penal bonds, 447
- penalties
  - civil, 49–50, 354, 396–7
  - rule against *See* penalty doctrine
- penalty clauses *See* penalty doctrine

- penalty doctrine, 22, 227, 323, 409, 434
  - consequences of stipulation being a penalty, 451–2
  - contemporary, scope of, 447–9
  - history of, 446–7
  - new law of, 452–3
  - operation of new ‘interests test’, 450–1
  - penalty, test for identifying, 449–50
- performance, 227
  - breach of contract and its consequences, 227–8
  - complete, 227, 232–4, 236, 321–2
  - concurrent, 232
  - contracts impossible to perform, 277
  - contractual sums accruing independently of, 446
  - counter-performance, 232, 234, 268, 324, 484
  - delay in, termination and, 303–5
  - duty of cooperation in, 236–7
  - duty of good faith in, 240–6
  - fiduciary duties, 237–8
  - order and completeness of *See* order and completeness of performance
  - pre-existing duties, consideration and, 96–8, 251–6
  - standards and methods of *See* standards and methods of performance
  - substantial, 234–5
  - temporary impossibility and, 278
  - time of *See* time of performance
  - transferring responsibility for, 269–70
  - vicarious, 229
  - withholding of, 41–2, 227, 231, 301
- performance interest, 441, 455
- plain English drafting, 63–4
- post-employment restraints, 319, 424–30
- postal acceptance rule, 86–8
- practical benefit, 96, 253–61
- pragmatism, 10, 37
- pre-contractual statements
  - collateral contracts, 167–8
  - determining the status of, 163–4
  - entire agreement clauses, 166–7
  - parol evidence rule, 165–7, 331
  - presumption of integration, 166
  - warranty or representation, 164–5
- pre-existing duties
  - consideration and, 96–8, 251–6
- preliminary agreements
  - agreements to negotiate, 115–17
  - intention to form contract, 111–15
  - legal issues, 110–11
  - prevalence of, 110
- preparation of contracts
  - common provisions in written contracts, 64–5
  - disclosure of information *See* disclosure of information
  - drafting styles, 63–4
  - duty to negotiate in good faith, 69–70
  - negotiation techniques, 60–1
  - pre-contractual liability, 68–9
    - See also* pre-contractual statements
  - standard form contracts, 62–3
  - use of agents, 61–2
  - ways to make a contract, 60
- presumed undue influence, 372, 374–6
- presumptions of intention
  - role of, 76–7
- pretence, doctrine of, 169
- primary obligations, 319
- prior course of dealing, 161–2
- private international law, 52–5
- privity of contract, 5, 24, 36, 50, 136–52
  - agency and, 142–4
  - consideration and, 137–8
  - doctrine of, 137–8, 140, 149, 151
  - insurance contracts, 138–40, 148, 238
  - reform to doctrine of, 149–50, 152
  - statutory reform, 149–50
  - third party benefits *See* third parties
  - third party burdens, 151
- process contract, 83
- Productivity Commission, 17, 28, 32, 397
- professional activity
  - conduct in trade and commerce, as, 344
- progress payments, 44
- prohibitory injunctions, 434, 443
- promissory estoppel, 21, 32, 52, 70, 120, 262–3, 380
  - as way around *Foakes v Beer* rule, 263
  - development of, 121–2
  - See also* equitable estoppel
- promissory note, 271
- promissory theory, 37
- proper law of the contract, 54, 414
- proportionate liability, 357, 475
- proprietary estoppel, 106, 120–2, 124–5, 130–2
  - See also* equitable estoppel
- public policy
  - assignment of rights, 269
  - ex turpi causa* principle, 412–13, 419, 421, 483
  - enforceability of a contract contrary to, 413–18
  - illegal or immoral conduct and, 413–14
  - implication of terms and, 175–6
  - penalties *See* penalty doctrine
  - restraint of trade *See* restraint of trade
- puffs, 77, 333, 348
- punitive damages, 49, 355, 457
- quantum meruit*, 48, 71, 234–6, 325–6, 419, 481, 484, 486–7
- quantum valebat*, 325, 481, 484
- quasi-contractual actions, 23, 48, 51, 481, 488
- quiet possession, 177, 180

- reading down, 428–9
- reasonable notice
  - estoppel and, 129
  - incorporation of written terms and, 62–3, 158–63
  - termination of contracts by, 42, 100, 173, 230–1, 265, 308
- recovery of debts *See* debt, action for
- recreational services, 55, 185, 214
- rectification, 21, 48, 163, 167, 264, 330, 358, 362–4
  - common mistake, 362–3
  - limited scope of, 264
  - unilateral mistake, 364
- regulatory theory, 36–7
- relational analysis, 38–9, 250
- reliance
  - estoppel, 126–7
- reliance loss, 354, 458–9, 461
- relief against forfeiture, 21, 32, 312–14, 322, 391
- remedies
  - account of profits, 49, 157, 460
  - ACL, 353–7
  - anticipated contracts that fail to materialise, 70–1, 487
  - civil penalty, 49–50, 354, 369–70
  - constructive trust, 49, 106, 150–1
  - consumer guarantees, 185–7
  - court-ordered, 46–50
  - damages *See* damages
  - debt *See* debt, action for
  - declaration, 50
  - duress, 371
  - equitable estoppel and, 129–32
  - injunction *See* injunctions
  - misinformation, 330–1
  - misleading or deceptive conduct, 353–7
  - misrepresentation, 338–43
  - money had and received, 48, 324, 481–4
  - quantum meruit See quantum meruit*
  - quantum valebat*, 325, 481, 484
  - rectification *See* rectification
  - rescission *See* rescission
  - restitution *See* restitution
  - self-help, 41–3
  - specific performance *See* specific performance
  - termination *See* termination of contracts
  - unconscionable conduct, 396–7
  - unfair contract terms, 403–4
- remoteness of damage, 470–3
  - mitigation and, 474
  - party–party indemnities and, 223
- renegotiation, 275, 287–8, 368, 370, 456
  - See also* variation of contracts
- renunciation
  - repudiation by, 300
  - requirement of seriousness, 301
  - types of, 300–1
  - See also* repudiation
- representations
  - false or misleading consumer guarantees, as to, 187–8
  - warranties, distinguished from, 164–5
  - See also* estoppel; misleading or deceptive conduct; misrepresentation
- repudiation, 228, 319–20
  - inability to perform, 302–3
  - misapprehension, based on, 301–2
  - renunciation, 300
- rescission, 21, 42–3, 49, 108, 338–9
  - bars to, 339–40
  - duress, 366, 371
  - election, 338–40
  - misrepresentation, 338–40
  - See also* misrepresentation
  - termination and, 292–3
  - See also* remedies
- Restatement of the Law of Restitution* (US), 487–8
- Restatement (Second) of the Law of Contracts* (US), 35, 137, 240
- restitutio in integrum*, 338–9
- restitution, 48–9, 70, 228, 293, 481–2
  - equity and, 488–9
  - illegality and, 419–21, 483
  - legislation, effect on, 419–21
  - money claims *See* money claims
  - property supplied, for *See quantum valebat*
  - reconceptualisation of, 487–8
  - rise and fall of unjust enrichment, 488–9
  - services rendered, for *See* services rendered, claims for
  - termination of contracts and, 323–6
- restitutionary claims
  - effect of legislation on, 419–21
- restitutionary damages, 458–60
- restraint of trade, 28, 409
  - common law doctrine of, 423–4
  - duration of, 426–7
  - enforcement of restraints, 429
  - legitimate reasons for, 425–6
  - other factors going to reasonableness, 427–8
  - ‘restraint’, 424–5
  - scope of, 426–7
  - severance of unreasonable restraints, 428–9
  - statutory restrictions on anti-competitive arrangements, 429–30
- restrictions on damages, 469
  - causation, 469–70
  - contributory negligence and apportionment, 357, 475

- restrictions on damages (cont.)
  - mitigation of loss, 473–5
  - remoteness *See* remoteness of damage
- reverse, indemnity, 224
- risk allocation, 9, 206–7, 273, 276, 280–1, 286–8
- sale of goods contracts, 177, 232, 340, 436
  - damages in, 463–4
  - implied terms in, 175, 177, 296, 298
  - legislation regulating *See* consumer guarantees; sale of goods legislation
  - rescission of, 340
- sale of goods legislation
  - ACL *See* Australian Consumer Law
  - international, 15–16, 36
  - State and Territory, 13, 17, 35, 178
  - terms implied by, 175, 177, 296, 298
- secondary obligations, 319
- self-help remedies, 41–3
- services
  - claims for *See* services rendered, claims for; *quantum meruit*
  - consumer guarantees for *See* consumer guarantees
- services rendered, claims for,
  - anticipation of a contract, 70–1, 487
  - frustrated contract, 283–6, 486–7
  - partial performance of contract, 234–6
  - quantum meruit* and *quantum valebat*, 48, 481, 484
  - terminated contracts, 325–6, 486
  - valuing services, 484–5
  - void, voidable or unenforceable contracts, 486
- severance
  - illegality, 418–19
  - reading down, distinguished from, 428–9
  - restraint of trade, 428–9
  - uncertainty, 102
- sexually transmitted debt, 216
- sham transactions, 75, 169
- signature
  - electronic acceptance as, 159–60
  - incorporation of written terms and, 158–9
  - See also* formalities
- silence
  - acceptance, as, 85
  - misleading and deceptive conduct, 68, 348–50
  - misrepresentation, 65–6, 335–6
  - pre-contractual, 65–8
  - See also* disclosure of information
- small business contracts
  - inequality of bargaining power, 27
  - protective regulation, 14, 31
  - unfair terms in, 398–400, 405
- smart contracts, 34
- soft law, 22
- sources of contract law
  - ACL, 17–18
  - common law, 18–20
  - equity, 20–2
  - international law, 22
  - soft law, 22
  - statutory rules, 16–17
- special disadvantage, 382–6, 391–2
- special equity for married women, 386–9
- specific performance, 21, 24, 47–8, 434–42, 455
  - availability, 441–2
  - damages in lieu of, 478–9
  - enforcement for benefit of third party, 142
  - hardship or unfairness in making a contract, 440
  - impossibility and futility, 437
  - inadequacy of common law damages, 436–7
  - laches, 441
  - lack of mutuality, 438–9
  - mistake or misrepresentation, 440
  - personal services or relationships, 439
  - plaintiff in breach, 439
  - prerequisite for, 435
  - problem of constant supervision, 437–8
  - statutory powers to grant, 441
- standard form contracts, 29, 62–4, 169, 206, 306
  - controls on unfair contract terms and, 397–405
- standards and methods of performance
  - different types of obligation, 228–9
  - methods of performance, 229
- Statute of Frauds, 12–13, 104–5
- statutory illegality
  - contracts or provisions declared to be ‘void’, 410–11
  - different forms of, 409–10
  - express prohibition, 410
  - implied prohibition, 411
  - statutory declarations of validity, 411–12
- statutory protection, doctrine of, 419–20
- step clause, 428
- strict obligations, 228–9
- subcontractors, 137, 142, 270, 481
- subject to contract, 77, 91, 113–14, 127
- subject to finance condition, 91–2
- subject to sale condition, 91–2
- subrogation, 220, 223
- substantial performance, 234–5
- substantive unfairness, 379–80, 397, 406
- sufficiency of consideration, 95–9
- suppliers
  - remedies against, under consumer guarantees, 185–7
- surety, 215

- surrounding circumstances evidence, 194–9
- suspension
  - contractual obligations, of, 275, 292
  - estoppel, effect of, 129, 262–3
- tenders, 82–3
- termination of contracts
  - abandonment, 317
  - accrued rights after, 320–1
  - conditional contracts, 91–2, 293
  - consumer guarantees, for breach of, 186
  - damages and, 293, 307, 319, 457
  - delay in performance, for, 303–5
  - discharge and, 292
  - effect of
    - ancillary obligations, 319–20
    - primary obligations, 319
    - secondary obligations, 319
    - termination other than for breach, 320
    - unperformed primary obligations, 321, 483
  - election to affirm, 310–11, 315–16
  - election to terminate, 308–10
  - express rights of, 305–7
  - finding a basis for, 308–9
  - for convenience, 304, 314, 320
  - frustration, by *See* frustration
  - good faith, 314
  - implied rights to, 307–8
  - mutual consent to, 316
  - non-performance for
    - actual breach, 295
    - anticipatory breach, 294–5
    - common law rights, 228, 294–305
    - delay, 303–5
    - essential terms, 156, 228, 295–8
    - fundamental breach, 156, 228, 295–6, 298–300, 303, 310
    - intermediate terms, 156, 228, 295–6, 298–9
    - non-essential terms, 156, 295, 298
    - repudiation *See* repudiation
    - time stipulations, 303–5
  - reasons for, 293–4
  - relief against forfeiture, 312–13
  - rescission and, 292–3
  - restitutionary claims 323–6
  - self-help remedy, as, 42, 293
  - statutory rights of, 307
  - termination clauses, 305–7
  - unconscionable, 313–14
  - unfair, 313–14
  - unfair affirmation, 315–16
  - without cause, 307–8
- terms, 27, 31
  - electronic, 159
  - essential *See* essential terms
  - express *See* express terms
  - implied *See* implied terms
  - inferred, 156, 172
  - intermediate, 156, 228, 295–6, 298–9
  - non-essential, 156, 295, 298, 331
  - onerous or unusual, 161
  - types of, 156
  - unfair *See* unfair terms
  - written *See* written terms
- terms implied by custom and practice, 156, 173–4
- terms implied by law, 156
  - default rules, as, 174–5
  - policy or necessity, as basis for, 175–6
  - recognition of new terms, 175–6
- terms implied by statute, 156, 175, 177
- terms implied in fact, 156
  - division between implication and interpretation, 172–3
  - establishing necessity, 171–2
  - inferred terms, 172
  - test for, 170–1
- third parties
  - assistance from in dispute resolution, 43–4
  - conferring benefits on
    - agency arrangements, 142–4
    - collateral contracts, 148
    - enforcement by promisee, 140–2
    - estoppel and, 148–9
    - Himalaya clauses, 144–5
    - privity *See* privity of contract
    - Queensland and Northern Territory legislation, 150
    - statutory reform of privity rule, 149–50
    - tort law and, 146–8
    - trust, inferring a, 145–6
    - Western Australian legislation, 149–50
  - duress by, 370–1
  - duties owed to in consideration, 98
  - imposing a burden on, 151
  - meaning of, 5, 134
  - non est factum and, 362
  - rescission, effect on, 339–40, 359–60
  - specific performance and, 142, 437, 440–1
  - See also* privity of contract
- third party claims indemnity, 223–4
- ticket cases, 160–1, 206
- time is of the essence, 303, 439
- time of performance
  - delay in *See* delay
  - duration of contracts, 230–1
  - order of performance *See* order and completeness of performance
  - when performance is required, 230

- time stipulation, 230, 296, 303, 305
  - at common law and equity, 303–4
  - essential, 296, 303–4
  - non-essential, 304–5
  - termination for breach of, 303–5
- tort claims
  - concurrent liability in tort and contract, 23, 475
  - damages, measure of, 341, 456–7
  - deceit, 341
  - illegality and, 421–2
  - negligent misstatement, 342–3
  - third parties and, 146–8
- tort law
  - contract law and, 11, 22–3
- total failure of consideration, 48, 70, 283–4, 324–5, 420, 483–4, 486
- trade or commerce, conduct in
  - ACL and, 18, 68, 344–6
  - online auctions, 180
  - requirement for, misleading or deceptive conduct, 330–1, 344–6, 390, 392
- trespass, 11, 23, 455
- trustee in bankruptcy, 271
- trusts
  - privity of contract and, 145–6
- uberrimae fidei* See utmost good faith
- ultimate liability, 215
- uncertainty, 99–102, 114–17
- unclean hands, 371, 439
- unconscientious See unconscionability
- unconscionability
  - categories of, 380, 391
  - conscience, concept of, 20, 32, 380
  - equitable estoppel, role in, 129
  - special equity for married women, 386–9
  - statutory prohibitions See unconscionable conduct
  - vitiation factor See unconscionable bargains
- unconscionable bargains, 21, 32, 66, 221, 379–86
  - defences, 386
  - duress, relationship with, 389
  - elements of doctrine, 382–3
  - relief against, 381–2
  - scope of doctrine, 383–6
  - special disadvantage, 382–6, 391–2
  - statutory prohibition, 389–92
  - undue influence, relationship with, 376–7
- unconscionable conduct, 19, 49, 51, 68, 73, 221, 369
  - categories of, 391
  - statutory prohibitions on, 379, 389–97
    - ACL prohibitions, scope of, 392
    - background to, 389
    - business dealings, 395–6
    - consumer transactions, 394–5
    - disclosure of information, and, 68
    - equitable doctrine, relationship with, 390
    - relevant factors, 393–4
    - remedies, 396–7
    - unconscionability, meaning of, 392–3
    - unwritten law in relation to, 389–92
- undue influence, 73, 108, 221, 372–6
  - actual undue influence, 372–4
  - presumed undue influence 372, 374–6
  - types of, 372–3
  - unconscionable bargains, relationship with, 376–7
- undue pressure, 258, 260, 293, 366
  - duress See duress
  - rationalising the law of, 376–7
  - undue influence See undue influence
- unfair affirmation, 315–16
- unfair termination, 313–14
- unfair terms
  - ACL provisions on
    - ACCC reviews and challenges, 404–5
    - background to, 397
    - consumer contracts, 399, 404–5
    - excluded contracts and terms, 400–1
    - remedies, 403–4
    - scope, 397–8
    - small business contracts, 398–400, 405
    - standard form contracts, 398–9
    - statutory examples of unfair terms, 402–3
    - ‘unfair’, meaning of, 401–2
  - exemption clauses, 214–15
  - independent contractors, 406
  - limits on express terms and, 168–9
  - National Credit Code, 405–6
  - standard form contracts, 63, 261
  - statutory controls, on 33, 48, 397–406
  - unjust contracts (NSW), 406
- UNIDROIT Principles of International Commercial Contracts, 16, 36, 69, 201, 240, 251, 287
- Uniform Commercial Code (US), 35, 240
- unilateral contracts, 8, 77, 81, 83–4, 91, 93, 144
  - acceptance and, 86
  - distinction between conditional gifts and, 94
  - order of performance and, 231
- unilateral mistake, 32, 48, 358–9, 380
  - content of contract, as to, 359
  - identity, of, 359–60
  - rectification of, 364
  - types of, 358
- unjust contracts (NSW), 406
- unliquidated damages, 434, 449–51
- unjust enrichment, 323, 487
  - rise and fall of, 488–9



- usage *See* custom and practice
- utmost good faith, 66–7, 218, 222, 238–40
  - insurance contracts and, 66–7, 336
  - statutory obligations, 239
- vague terms *See* uncertainty
- value
  - requirement of in consideration, 7, 95
- variation of contracts
  - consideration, requirement for, 251–6
    - economic duress, 258–60
    - estoppel and, 262–3
    - Foakes v Beer* rule, 256–8
    - forbearance, 262
    - formalities, 260–1
    - informal modifications, 261–2
    - methods of, 250–1
    - need for, 250
    - oral modification, 261
    - part-payment of debts, 256–8
    - practical benefit, 96, 253–6
    - pre-existing duties, 96–8, 251–6
    - replacement, or, 251
    - statutory powers of, 265
    - unilateral, limits on, 261
    - waiver, 263–4
- Vienna Convention, 15–16, 22
- vitiating factors, 107–8
- void and voidable
  - distinction between, 107–8
- void contracts, 69, 107
  - incapacity, 103
  - illegal contracts, 408–11, 417
  - marriage, contracts prejudicial to, 417
  - mistake at common law, 359–61
  - ousting jurisdiction, 415
  - restitution of benefits conferred under, 70, 482–3, 486
    - statutory provisions, 356, 410–11
    - uncertainty or incompleteness, 99, 115
- voidable contracts, 69, 107–8, 338
  - conditional contracts, 92, 293
  - duress, 366, 371
  - incapacity, 103–4
  - misrepresentation, 65–6, 338–9
  - mistake in equity, 74, 358–61
  - rescission of *See* rescission
  - restitution of benefits conferred under, 482–3, 486
  - unconscionable bargains, 366
  - undue influence, 366
- waiver, 262–4
- warranties, 90, 156, 164, 295
  - express, 158, 180, 183, 187
  - implied, 158
  - non-essential terms, 156, 295, 298
  - representations, distinguished from, 164–5
  - sale of goods legislation, 177, 298
- written contracts, 73
  - commercial construction and, 195
  - common provisions in, 64–5
  - deeds, 107
  - drafting, 63–4
  - modification of, 105
  - parol evidence rule *See* parol evidence rule
  - rectification of *See* rectification
  - standard form *See* standard form contracts
  - Statute of Frauds* and, 104–6
  - use of, 60
- written terms
  - incorporation of *See* incorporation of written terms
  - interpretation of *See* interpretation