

CONTENTS

<i>Preface</i>	<i>xxi</i>
<i>Acknowledgements</i>	<i>xxii</i>
<i>Table of cases</i>	<i>xxiv</i>
<i>Table of statutes</i>	<i>xxxvi</i>
<i>List of abbreviations</i>	<i>xl</i>
PART A INTRODUCTION	1
1 An overview of equity	2
1.1 Introduction	3
1.2 Definition	3
1.2.1 Dictionary definition	3
1.2.1a <i>Macquarie Dictionary</i> and <i>Thesaurus Online</i>	3
1.2.2 Philosopher and jurist	4
1.2.2a Aristotle, <i>Nicomachean Ethics</i> , tr WD Ross (Oxford University Press, 1908) Book V: Moral Virtue	4
1.2.2b <i>Earl of Oxford's Case</i> (1615) 1 Ch Rep 1, 6; 21 ER 485, 486	4
1.3 History	5
1.3.1 Origins	5
1.3.1a JH Baker, <i>An Introduction to English Legal History</i> (Oxford University Press, 4th ed, 2002) 99–102	5
1.3.1b Petition c 1417–1424, No 117 from WP Baildon (ed), <i>Select Cases in Chancery</i> (Selden Society, 1896) vol 10	6
1.3.2 Conflict between common law and equity	6
1.3.2a Joshua Getzler, 'Patterns of Fusion' in Peter Birks (ed), <i>The Classification of Obligations</i> (Clarendon Press, 1997) 175	6
1.3.2b <i>Earl of Oxford's Case</i> (1615) 1 Ch Rep 1; 21 ER 485	7
1.3.3 Reform and renewal	8
1.3.3a Charles Dickens, <i>Bleak House</i> (first published 1853)	8
1.3.3b <i>Judicature Act 1873</i> (Imp) s 25(11)	9
1.3.3c <i>Law Reform (Law and Equity) Act 1972</i> (NSW) s 5	9
1.3.3d Keith Mason, 'Fusion: Fallacy, Future or Finished?' in S Degeling and J Edelman (eds), <i>Equity in Commercial Law</i> (Thomson Reuters, 2005)	10
1.4 The maxims of equity	12
1.4a <i>Corin v Patton</i> [1990] HCA 12; (1990) 169 CLR 540	13

PART B	EQUITABLE REMEDIES	15
2	An introduction to equitable remedies	16
2.1	Introduction	17
2.2	Examples of equitable remedies	17
2.2a	<i>Giumelli v Giumelli</i> [1999] HCA 10; (1999) 196 CLR 101	17
2.2b	<i>McKenzie v McDonald</i> [1927] VLR 134	19
2.2c	<i>Nelson v Nelson</i> [1995] HCA 25; (1995) 184 CLR 538	21
3	Specific performance, injunctions and equitable damages	25
3.1	Introduction	26
3.2	Specific performance	26
3.2.1	Inadequacy of damages	27
3.2.1.1	Contracts for the sale of land	27
3.2.1.1a	<i>Loan Investment Corporation of Australasia v Bonner</i> [1970] NZLR 724	27
3.2.1.2	Contracts for the sale of chattels	31
3.2.1.2a	<i>Dougan v Ley</i> [1946] HCA 3; (1946) 71 CLR 142	31
3.2.1.3	Contracts for the benefit of third parties	32
3.2.1.3a	<i>Beswick v Beswick</i> [1968] AC 58	32
3.2.2	Bars to equitable relief	34
3.2.2.1	Continuous supervision	34
3.2.2.1a	<i>Co-operative Insurance Society Ltd v Argyll Stores</i> <i>(Holdings) Ltd</i> [1998] AC 1	34
3.2.2.1b	<i>Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of</i> <i>Australia</i> [1998] HCA 30; (1998) 195 CLR 1	38
3.2.2.2	Lack of mutuality	39
3.3	Injunctions	40
3.3.1	General principles	40
3.3.1a	<i>Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd</i> [2001] HCA 63; (2001) 208 CLR 199	40
3.3.2	The distinction between mandatory and prohibitory injunctions	42
3.3.2a	<i>Smethurst v Commissioner of Police</i> [2020] HCA 14; (2020) 376 ALR 575	42
3.3.3	Social considerations	50
3.3.3a	<i>Miller v Jackson</i> [1977] 1 QB 966	50
3.3.4	Preventing breaches of contract by injunction	53
3.3.4a	<i>Curro v Beyond Productions Pty Ltd</i> (1993) 30 NSWLR 337	53
3.3.5	Interlocutory injunctions	55
3.4	Equitable damages	55
3.4.1	The legislation	56
3.4.2	Criteria for determining whether a damages award should be made	57
3.4.2a	<i>Shelfer v City of London Electric Lighting Co</i> [1895] 1 Ch 287	57

3.4.3	Quantifying damages	59
3.4.3a	<i>Giller v Procopets</i> (2008) 24 VR 1	59
4	Monetary remedies in equity	62
4.1	Introduction	63
4.2	Accounts of profits	64
4.2a	<i>Warman International Ltd v Dwyer</i> [1995] HCA 18; (1995) 182 CLR 544	64
4.2b	<i>Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd</i> [2018] HCA 43; (2018) 265 CLR 1	65
4.2c	<i>Victoria University of Technology v Wilson</i> (2006) 68 IPR 597	69
4.3	Equitable compensation	71
4.3.1	Account	71
4.3.1a	<i>Libertarian Investments Ltd v Hall</i> (2013) 16 HKCFAR 681	71
4.3.2	Substitutive and reparative compensation	73
4.3.2a	<i>Agricultural Land Management Ltd v Jackson (No 2)</i> (2014) 48 WAR 1	73
4.3.3	Substitutive compensation	74
4.3.3a	<i>Re Dawson (deceased)</i> [1966] 2 NSW 211	74
4.3.3b	<i>Youyang Pty Ltd v Minter Ellison Morris Fletcher</i> [2003] HCA 15; (2003) 212 CLR 484	78
4.3.4	Reparative compensation	80
4.3.4a	<i>Nocton v Lord Ashburton</i> [1914] AC 932	80
4.3.4b	<i>O'Halloran v RT Thomas & Family Pty Ltd</i> (1998) 45 NSWLR 262	82
4.3.4c	<i>Stewart v Layton</i> (1992) 111 ALR 687; affirmed <i>Layton v Stewart</i> [1993] FCA 532; [1994] ANZ ConvR 283	85
4.4	Common law principles and equitable compensation	87
4.4a	<i>Pilmer v Duke Group Ltd (in liq)</i> [2001] HCA 31; (2001) 207 CLR 165	88
4.5	Exemplary damages	90
4.5a	<i>Harris v Digital Pulse Pty Ltd</i> (2003) 56 NSWLR 298	90
5	Rescission and rectification	96
5.1	Introduction	97
5.2	Total and partial rescission	98
5.2a	<i>Vadasz v Pioneer Concrete (SA) Pty Ltd</i> [1995] HCA 14; (1995) 184 CLR 102	98
5.3	The election requirement	102
5.3a	<i>Daly v Sydney Stock Exchange Ltd</i> [1986] HCA 25; (1986) 160 CLR 371	102
5.4	The restoration process	107
5.4a	<i>Alati v Kruger</i> [1955] HCA 64; (1955) 94 CLR 216	107
5.4b	<i>Maguire v Makaronis</i> [1997] HCA 23; (1997) 188 CLR 449	110
5.5	Rectification	114
5.5a	<i>Simic v New South Wales Land and Housing Corporation</i> [2016] HCA 47; (2016) 260 CLR 85	114

6	Bars to relief	119
6.1	Introduction	120
6.2	Laches	120
6.2a	<i>Lindsay Petroleum Co v Hurd</i> (1874) LR 5 PC 221	120
6.2b	<i>Lamshed v Lamshed</i> (1963) 109 CLR 440	122
6.2c	<i>Orr v Ford</i> [1989] HCA 4; (1989) 167 CLR 316	124
6.3	Acquiescence	127
6.3a	<i>Orr v Ford</i> [1989] HCA 4; (1989) 167 CLR 316	128
6.4	Unclean hands	129
6.4a	<i>Black Uhlands Inc v New South Wales Crime Commission</i> [2002] NSWSC 1060; (2002) 12 BPR 22,421	129
6.5	Hardship	134
6.5a	<i>Patel v Ali</i> [1984] 1 Ch 283	134
6.5b	<i>ANZ Executors and Trustees Ltd v Humes Ltd</i> [1990] VR 615	136
6.6	Effect of order on third parties	138
6.6a	<i>Giumelli v Giumelli</i> [1999] HCA 10; (1999) 196 CLR 101	138
PART C	EQUITY, CONTRACT AND PROPERTY	141
7	Equity in contract law	142
7.1	Introduction	143
7.2	Equitable estoppel	143
7.2.1	Promissory estoppel	143
7.2.1a	<i>Waltons Stores (Interstate) Ltd v Maher</i> [1988] HCA 7; (1988) 164 CLR 387	143
7.3	Equity and voidable transactions	149
7.3.1	Undue influence	149
7.3.1a	<i>Thorne v Kennedy</i> [2017] HCA 49; (2017) 263 CLR 85	149
7.3.2	Undue influence and third parties	156
7.3.3	Unconscionability in equity	156
7.3.3a	<i>Blomley v Ryan</i> [1956] HCA 81; (1956) 99 CLR 362	156
7.3.3b	<i>Commercial Bank of Australia Ltd v Amadio</i> [1983] HCA 14; (1983) 151 CLR 447	158
7.3.3c	<i>Thorne v Kennedy</i> [2017] HCA 49; (2017) 263 CLR 85	164
7.3.4	<i>Yerkey v Jones</i> liability	166
7.3.4a	<i>Garcia v National Australia Bank Ltd</i> [1998] HCA 48; (1998) 194 CLR 395	166
7.4	Equitable relief against penalties and forfeiture	171
7.4.1	Relief against penalties	171
7.4.1a	<i>Andrews v Australia and New Zealand Banking Group Ltd</i> [2012] HCA 30; (2012) 247 CLR 205	172

7.4.1b	<i>Paciocco v Australia & New Zealand Banking Group Ltd</i> [2016] HCA 28; (2016) 258 CLR 525	174
7.4.2	Relief against forfeiture	182
7.4.2a	<i>Tanwar Enterprises Pty Ltd v Cauchi</i> [2003] HCA 57; (2003) 217 CLR 315	182
8	Equitable proprietary interests	186
8.1	Introduction	187
8.2	The nature of equitable ownership	187
8.2a	<i>DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)</i> (1982) 149 CLR 431	187
8.3	Equitable interests and equities	189
8.3a	<i>Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liq)</i> [1965] HCA 17; (1965) 113 CLR 265	189
8.3b	<i>Walsh v Lonsdale</i> (1882) 21 Ch D 9	195
8.4	The doctrine of notice	196
8.4a	<i>Conveyancing Act 1919</i> (NSW) s 164	196
8.4b	<i>Hermann v Pitt</i> (1890) 11 LR (NSW) Eq 294	197
8.5	Proprietary estoppel	198
8.5a	<i>Giumelli v Giumelli</i> [1999] HCA 10; (1999) 196 CLR 101	198
8.5b	<i>Sidhu v Van Dyke</i> [2014] HCA 19; (2014) 251 CLR 505	201
9	Equitable assignments	204
9.1	Introduction	205
9.1.1	Legal property and equitable property	205
9.1.2	Equity's intervention in assignments of legal property	205
9.1.3	Equity and consideration	205
9.1.4	Presently existing or future property?	206
9.1.5	Transfers of choses in action	206
9.1.6	The requirement for writing in equitable assignments	206
9.2	Equitable recognition of ineffective gifts of legal property	207
9.2a	<i>Milroy v Lord</i> (1862) 4 De GF & J 264; 45 ER 1185	207
9.2b	<i>Corin v Patton</i> [1990] HCA 12; (1990) 169 CLR 540	208
9.3	Assignments of future property	211
9.3a	<i>Norman v Federal Commissioner of Taxation</i> [1963] HCA 21; (1963) 109 CLR 9	212
9.3b	<i>Shepherd v Commissioner of Taxation (Cth)</i> [1965] HCA 70; (1965) 113 CLR 385	216
9.3c	<i>Holroyd v Marshall</i> (1862) 10 HLC 191; 11 ER 999	218
9.4	Gifts of equitable property	220
9.4a	<i>Norman v Federal Commissioner of Taxation</i> [1963] HCA 21; (1963) 109 CLR 9	220

9.5	Assignment of choses in action at common law	221
9.5a	John McGhee QC (ed), <i>Snell's Equity</i> (Thomson Reuters, 2010) 55	221
9.5b	<i>Equuscorp Pty Ltd v Haxton</i> [2012] HCA 7; (2012) 246 CLR 498	222
9.6	Statutory assignment of choses in action	224
9.6a	<i>Conveyancing Act 1919</i> (NSW) s 12	224
9.6.1	Equitable choses in action	225
9.6.1a	<i>Federal Commissioner of Taxation v Everett</i> [1980] HCA 6; (1980) 143 CLR 440	225
9.7	Statutory writing requirements for the assignment of equitable property	228
9.7a	<i>Property Law Act 1958</i> (Vic) s 53(1)	228
9.7b	<i>Comptroller of Stamps (Vic) v Howard-Smith</i> [1936] HCA 12; (1936) 54 CLR 614	229
9.7c	<i>Grey v Inland Revenue Commissioners</i> [1960] AC 1	230
PART D EQUITABLE OBLIGATIONS		233
10	Fiduciary relationships and obligations	234
10.1	Introduction	235
10.2	Identifying fiduciary relationships: recognised or status-based fiduciary relationships	235
10.2a	<i>Hospital Products Ltd v United States Surgical Corporation</i> [1984] HCA 64; (1984) 156 CLR 41	235
10.2b	<i>Daly v Sydney Stock Exchange Ltd</i> [1986] HCA 25; (1986) 160 CLR 371	236
10.3	Identifying fiduciary relationships: criteria	239
10.3.1	'Distil the essence' or the characteristics of the relationship approach	239
10.3.1a	<i>Hospital Products Ltd v United States Surgical Corporation</i> [1984] HCA 64; (1984) 156 CLR 41	239
10.3.2	The 'multifactorial' approach	244
10.3.2a	<i>Breen v Williams</i> [1996] HCA 57; (1996) 186 CLR 71	244
10.3.3	The 'entitlement to expect' approach	246
10.3.3a	<i>Grimaldi v Chameleon Mining NL (No 2)</i> [2012] FCAFC 6; (2012) 200 FCR 296	246
10.3.4	Horizontal relationships	247
10.3.4a	<i>United Dominions Corporation Ltd v Brian Pty Ltd</i> [1985] HCA 49; (1985) 157 CLR 1	248
10.3.5	Equity and contract	251
10.3.5a	<i>Hospital Products Ltd v United States Surgical Corporation</i> [1984] HCA 64; (1984) 156 CLR 41	251
10.3.5b	<i>United Dominions Corporation Ltd v Brian Pty Ltd</i> [1985] HCA 49; (1985) 157 CLR 1	252
10.3.5c	<i>Breen v Williams</i> [1996] HCA 57; (1996) 186 CLR 71	252

10.3.5.1	Termination of contract	253
10.3.5.1a	<i>Prince Jefri Bolkiah v KPMG</i> [1999] 2 AC 222 (HL)	253
10.4	Scope of the fiduciary relationship	259
10.4a	<i>Breen v Williams</i> [1996] HCA 57; (1996) 186 CLR 71	260
10.4b	<i>Howard v Commissioner of Taxation (Cth)</i> [2014] HCA 21; (2014) 253 CLR 83	261
10.5	Fiduciary obligations	265
10.5a	<i>Breen v Williams</i> [1996] HCA 57; (1996) 186 CLR 71	265
10.5.1	Obligation not to obtain any unauthorised profit from the relationship	266
10.5.1a	<i>Regal (Hastings) Ltd v Gulliver</i> [1942] 1 All ER 378; [1967] 2 AC 134	266
10.5.2	Obligation not to be in a position of conflict	267
10.5.2a	<i>Boardman v Phipps</i> [1967] 2 AC 46	268
10.5.2b	<i>Hospital Products Ltd v United States Surgical Corporation</i> [1984] HCA 64; (1984) 156 CLR 41	273
10.5.2c	<i>Commonwealth Bank of Australia v Smith</i> (1991) 42 FCR 390	273
10.5.2d	<i>Breen v Williams</i> [1996] HCA 57; (1996) 186 CLR 71	276
10.5.3	Informed consent	277
10.5.3a	<i>Maguire v Makaronis</i> [1997] HCA 23; (1997) 188 CLR 449	277
10.5.4	Two principles or one?	279
10.5.4a	<i>Chan v Zacharia</i> [1984] HCA 36; (1984) 154 CLR 178	279
10.5.4b	<i>Grimaldi v Chameleon Mining NL (No 2)</i> [2012] FCAFC 6; (2012) 200 FCR 296	281
10.6	Contracting out of fiduciary obligations	283
10.6a	<i>Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)</i> (2007) 160 FCR 35	284
11	Participants in a breach of fiduciary obligation	288
11.1	Introduction	289
11.1a	<i>Barnes v Addy</i> (1874) LR 9 Ch App 244	290
11.2	Knowing receipt	291
11.2.1	Breach of fiduciary duty	291
11.2.2	Receipt of property by a third party	292
11.2.2a	<i>Farah Constructions Pty Ltd v Say-Dee Pty Ltd</i> [2007] HCA 22; (2007) 230 CLR 89	292
11.2.2b	<i>Agip (Africa) Ltd v Jackson</i> [1990] Ch 265	294
11.2.3	Knowledge	295
11.2.3a	<i>Farah Constructions Pty Ltd v Say-Dee Pty Ltd</i> [2007] HCA 22; (2007) 230 CLR 89	295
11.2.3b	<i>Grimaldi v Chameleon Mining NL (No 2)</i> [2012] FCAFC 6; (2012) 200 FCR 296	296
11.2.4	Remedy	299
11.2.5	Alternative grounds of personal recipient liability	300
11.2.5a	<i>Fistar v Riverwood Legion and Community Club Ltd</i> [2016] NSWCA 81; (2016) 91 NSWLR 732	300

11.3	Knowing assistance	305
11.3.1	A dishonest and fraudulent breach of trust	305
11.3.1a	<i>Royal Brunei Airlines Sdn Bhd v Tan</i> [1995] 2 AC 378	305
11.3.1b	<i>Farah Constructions Pty Ltd v Say-Dee Pty Ltd</i> [2007] HCA 22; (2007) 230 CLR 89	306
11.3.2	Assistance in the breach	308
11.3.3	Knowledge	309
11.3.3a	<i>Royal Brunei Airlines Sdn Bhd v Tan</i> [1995] 2 AC 378	309
11.3.3b	<i>Farah Constructions Pty Ltd v Say-Dee Pty Ltd</i> [2007] HCA 22; (2007) 230 CLR 89	310
11.3.4	Remedies for knowing assistance	313
11.3.4a	<i>Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd</i> [2018] HCA 43; (2018) 265 CLR 1	313
11.3.5	Other forms of participatory liability	316
12	Breach of confidence	317
12.1	Introduction	318
12.2	The elements of the cause of action	318
12.2a	<i>Coco v AN Clark (Engineers) Ltd</i> (1968) 1A IPR 587	318
12.2.1	Specifying the confidential material	320
12.2.1a	<i>O'Brien v Komesaroff</i> [1982] HCA 33; (1982) 150 CLR 310	321
12.2.1.1	Quality of confidence	322
12.2.1.1a	<i>Australian Football League v The Age Co Ltd</i> (2006) 15 VR 419	323
12.2.2	Circumstances imposing an obligation of confidence	326
12.2.2a	<i>Smith Kline & French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health</i> [1990] FCA 206; (1990) 22 FCR 73	326
12.2.3	Unauthorised use	329
12.2.3a	<i>Commonwealth v John Fairfax & Sons Ltd</i> [1980] HCA 44; (1980) 147 CLR 39 (the 'Defence Papers Case')	330
12.3	Defences	331
12.3a	<i>Australian Football League v The Age Co Ltd</i> (2006) 15 VR 419	331
12.4	Remedies	335
12.4a	<i>Bluescope Steel Ltd v Kelly</i> (2007) 72 IPR 289	335
12.4b	<i>Giller v Procopets</i> (2008) 24 VR 1	337
PART E	EXPRESS TRUSTS	341
13	The concept of the express trust	342
13.1	Introduction	343
13.2	Towards a definition of the trust	343
13.3	The existence of trust obligations	345

13.3.1	Quarantining assets from creditors of the ‘trustee’	346
13.3.1a	<i>Barclays Bank Ltd v Quistclose Investments Ltd</i> [1970] AC 567	346
13.3.2	Trusts as ‘entities’ in a statutory context	347
13.3.3	Public policy in relation to trusts	348
13.4	Distinguishing trusts from similar concepts	349
13.4.1	Agency	349
13.4.1a	<i>Cohen v Cohen</i> [1929] HCA 15; (1929) 42 CLR 91	350
13.4.2	Equitable charge	351
13.4.2a	<i>Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd</i> [2000] HCA 25; (2000) 202 CLR 588	351
13.4.3	Trust and contract	353
13.4.3a	<i>Trident General Insurance Co Ltd v McNiece Brothers Pty Ltd</i> [1988] HCA 44; (1988) 165 CLR 107	353
13.4.4	Trust and debt	355
13.4.4a	<i>Re Australian Elizabethan Theatre Trust</i> (1991) 30 FCR 491	355
13.4.5	Trust and partnership	359
13.4.5a	<i>Raulfs v Fishy Bite Pty Ltd</i> [2012] NSWCA 135	359
14	Certainty requirements in the law of trusts	365
14.1	Introduction	366
14.2	Certainty of intention to create a trust	366
14.2a	<i>Byrnes v Kendle</i> [2011] HCA 26; (2011) 243 CLR 253	367
14.2b	<i>Re Williams</i> [1897] 2 Ch 12	370
14.2c	<i>Cobcroft v Bruce</i> [2013] NSWSC 774; (2013) 9 ASTLR 397	372
14.2d	<i>Harpur v Levy</i> [2007] VSCA 128; (2007) 16 VR 587	374
14.3	Certainty of subject-matter	376
14.3a	<i>Hunter v Moss</i> [1994] 1 WLR 452	376
14.3b	<i>White v Shortall</i> (2006) 68 NSWLR 650	377
14.4	Certainty of object	379
14.4a	<i>Re Gulbenkian’s Settlement Trusts</i> [1970] AC 508	380
14.4b	<i>McPhail v Doulton</i> [1971] AC 424	382
15	Creating an express trust	387
15.1	Introduction	388
15.2	Declaration of trust	388
15.2a	<i>Conveyancing Act 1919</i> (NSW) s 23C	388
15.2b	<i>Secretary, Department of Social Security v James</i> [1990] FCA 213; (1990) 20 ALD 5	390
15.3	Creating a trust by transfer to the intended trustee	392
15.3a	<i>T Choithram International SA v Pagarani</i> [2001] 1 WLR 1	392
15.4	Exceptions to statutory writing requirements	394
15.4a	<i>Last v Rosenfeld</i> [1972] 2 NSWLR 923	394

15.5	Testamentary trusts	396
15.5a	<i>Voges v Monaghan</i> [1954] HCA 63; (1954) 94 CLR 231	396
15.6	Trusts and public policy	398
15.6.1	Non-statutory public policy	398
15.6.1a	<i>Thrupp v Collett (No 1)</i> (1858) 26 Beav 125; 53 ER 844	398
15.6.2	Statutory public policy: the application of trusts to avoid creditors	399
15.6.2a	<i>Conveyancing Act 1919</i> (NSW) s 37A	399
15.6.2b	<i>Marcolongo v Chen</i> [2011] HCA 3; (2011) 242 CLR 546	400
16	Trusts for charitable and non-charitable purposes	403
16.1	Introduction	404
16.2	What is a charitable purpose?	405
16.2a	Preamble to the <i>Statute of Charitable Uses 1601</i> (Statute of Elizabeth)	405
16.3	Trusts for the relief of poverty	407
16.3a	<i>Downing v Commissioner of Taxation (Cth)</i> [1971] HCA 38; (1971) 125 CLR 185	407
16.4	Trusts for the advancement of education	408
16.4a	<i>Re Shaw (deceased)</i> [1957] 1 All ER 745	408
16.5	Trusts for the advancement of religion	409
16.5a	<i>Church of the New Faith v Commissioner of Pay-roll Tax (Vic)</i> [1983] HCA 40; (1983) 154 CLR 120	409
16.5b	<i>Roman Catholic Archbishop of Melbourne v Lawlor</i> [1934] HCA 14; (1934) 51 CLR 1	411
16.6	Trusts for other purposes beneficial to the community	412
16.6a	<i>Incorporated Council of Law Reporting (Qld) v Commissioner of Taxation (Cth)</i> [1971] HCA 44; (1971) 125 CLR 659	412
16.7	The requirement of public benefit: ‘benefit’	414
16.7a	<i>Gilmour v Coats</i> [1949] AC 426	414
16.7b	<i>Aid/Watch Inc v Commissioner of Taxation (Cth)</i> [2010] HCA 42; (2010) 241 CLR 539	416
16.8	The requirement of public benefit: ‘public or section of the public’	419
16.8a	<i>Oppenheim v Tobacco Securities Trust Co Ltd</i> [1951] AC 297	419
16.8b	<i>Dingle v Turner</i> [1972] AC 601	420
16.9	Trusts for non-charitable purposes	422
16.9a	<i>Re Astor’s Settlement Trusts</i> [1952] Ch 534	422
PART F	PERFORMING THE TRUST	425
17	Trustees’ duties and powers	426
17.1	Introduction	427
17.2	Sources of the trustees’ duties and powers	427

17.3	Trustees' duties	427
17.3.1	Duty to adhere to the terms of the trust	428
17.3.2	Duty to 'get in' the trust assets	428
17.3.2a	<i>Field v Field</i> [1894] 1 Ch 425	428
17.3.3	Investment of trust funds	429
17.3.4	Duty to keep assets separate	429
17.3.4a	<i>Re Lehman Brothers International (Europe) (No 2)</i> [2012] 1 BCLC 487	429
17.3.5	Keeping and rendering accounts	431
17.3.5a	<i>Kemp v Burn</i> (1863) 4 Giff 348; 66 ER 740	431
17.3.6	Duty to give information to beneficiaries	431
17.3.6a	<i>Spellson v George</i> (1987) 11 NSWLR 300	432
17.3.6b	<i>Re Londonderry's Settlement</i> [1965] Ch 918	432
17.3.6c	<i>Schmidt v Rosewood Trust Ltd</i> [2003] 2 AC 709	434
17.3.6d	<i>Avanes v Marshall</i> [2007] NSWSC 191; (2007) 68 NSWLR 595	435
17.3.6e	<i>McDonald v Ellis</i> [2007] NSWSC 1068; (2007) 72 NSWLR 605	437
17.3.7	Duty of care	440
17.3.7a	<i>Speight v Gaunt</i> (1883) 22 Ch D 727	440
17.3.7b	<i>Bartlett v Barclays Bank Trust Co Ltd</i> [1980] Ch 515	441
17.3.8	Duty to act impartially	444
17.3.8a	<i>Tanti v Carlson</i> [1948] VLR 401	444
17.3.8b	<i>Nestle v National Westminster Bank plc</i> (1996) 10 TLI 112	445
17.3.9	Duty to act personally	446
17.3.9a	<i>Speight v Gaunt</i> (1883) 22 Ch D 727	447
17.3.10	Duty to consider exercise of powers	448
17.3.10.1	Trustees' powers	448
17.3.10.1a	<i>Karger v Paul</i> [1984] VR 161	449
17.3.10.1b	<i>Finch v Telstra Super Pty Ltd</i> [2010] HCA 36; (2010) 242 CLR 254	450
17.3.10.2	The consequences of an invalid exercise of power	452
17.3.10.2a	<i>Pitt v Holt</i> [2013] UKSC 26; [2013] 2 AC 108	452
18	Investment of trust funds	456
18.1	Introduction	457
18.2	Sources and content of trustees' investment powers	457
18.3	Trustee duties in the context of investment	458
18.4	The modern approach to 'prudence'	460
18.4a	<i>Will and Estate of William Lionel Buckland (deceased)</i> (Supreme Court of Victoria, Nathan J, 11 August 1993)	461
18.4b	<i>Nestle v National Westminster Bank plc</i> (1996) 10 TLI 112	464
18.5	The case for trustees having regard to ethical considerations	467
18.5a	<i>Cowan v Scargill</i> [1985] Ch 270	467
18.5b	<i>Harries v Church Commissioners for England</i> [1993] 2 All ER 300	469

18.6	Compensation for loss	472
19	Trustees' rights and liabilities	474
19.1	Introduction	475
19.2	Nature of the trustee's right of indemnity	476
19.2a	<i>Chief Commissioner of Stamp Duties (NSW) v Buckle</i> [1998] HCA 4; (1998) 192 CLR 226	476
19.3	'Properly incurred' expenses	478
19.3a	<i>Re Raybould</i> [1900] 1 Ch 199	478
19.3b	<i>Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)</i> [2002] NSWCA 29; (2002) ATPR 41-864	479
19.3c	<i>Nolan v Collie</i> (2003) 7 VR 287	482
19.4	Recovery against beneficiaries personally	486
19.4a	<i>Hardoon v Belilios</i> [1901] AC 118	486
19.4b	<i>JW Broomhead (Vic) Pty Ltd (in liq) v JW Broomhead Pty Ltd</i> [1985] VR 891	487
19.4c	<i>Trustee Act 1925 (NSW) s 100A</i>	491
19.5	Right to seek directions from the Court	492
19.5a	<i>Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand</i> [2008] HCA 42; (2008) 237 CLR 66	492
PART G BREACH OF TRUST		499
20	Breach of trust: defences and remedies	500
20.1	Introduction	501
20.2	Who can sue for breach of trust?	501
20.2a	<i>Young v Murphy</i> [1996] 1 VR 279	501
20.3	Defences	504
20.3.1	Exculpation clauses	504
20.3.1a	<i>Armitage v Nurse</i> [1998] Ch 241	504
20.3.2	Statutory exculpation	507
20.3.2a	<i>Trustee Act 1925 (NSW) s 85</i>	507
20.3.2b	<i>National Trustees Co of Australasia Ltd v General Finance Co of Australasia Ltd</i> [1905] AC 373	508
20.3.2c	<i>Trustee Act 1925 (NSW) s 59</i>	509
20.3.2d	<i>Dalrymple v Melville</i> (1932) 32 SR (NSW) 596	510
20.4	The beneficiary's consent to a breach of trust: statute and equity	512
20.4a	<i>Spellson v George</i> (1992) 26 NSWLR 666	512
20.5	Remedying a breach of trust: removing the trustee	515
20.5a	<i>Miller v Cameron</i> [1936] HCA 13; (1936) 54 CLR 572	515

21	Tracing	518
21.1	Introduction	519
21.1a	<i>Foskett v McKeown</i> [2001] 1 AC 102	519
21.2	Fiduciary requirement?	523
21.2a	<i>Creak v James Moore & Sons Pty Ltd</i> [1912] HCA 67; (1912) 15 CLR 426	523
21.3	Mixing money in a bank account: competition between fiduciary and beneficiary	526
21.3a	<i>Re Hallett's Estate</i> (1880) 13 Ch D 696	526
21.3b	<i>Re Oatway</i> [1903] 2 Ch 356	528
21.3.1	Backward tracing	529
21.4	Mixing money in a bank account: competition between beneficiaries	530
21.4a	<i>Re French Caledonia Travel</i> (2003) 59 NSWLR 361	530
21.5	The lowest intermediate balance rule	533
21.5a	<i>Caron v Jahani (No 2)</i> [2020] NSWCA 117; (2020) 102 NSWLR 537	533
21.6	Mixing by recipients of property from the fiduciary	538
21.6a	<i>Re Diplock</i> [1948] 1 Ch 465	538
21.7	Tracing into profits	543
21.7a	<i>Scott v Scott</i> (1963) 109 CLR 649	544
21.7b	<i>Foskett v McKeown</i> [2001] 1 AC 102	547
21.8	Defences to equitable tracing claims	549
PART H	RESULTING AND CONSTRUCTIVE TRUSTS	551
22	Resulting trusts	552
22.1	Introduction	553
22.2	Overview of resulting trusts	553
22.2a	<i>Anderson v McPherson (No 2)</i> [2012] WASC 19; (2012) 8 ASTLR 321	553
22.3	Presumed resulting trusts	556
22.3.1	Presumption of resulting trust	556
22.3.1a	<i>Anderson v McPherson (No 2)</i> [2012] WASC 19; (2012) 8 ASTLR 321	556
22.3.1b	<i>Calverley v Green</i> [1984] HCA 81; (1984) 155 CLR 242	558
22.3.2	When does the presumption of resulting trust not apply?	561
22.3.2a	<i>Zhang v Metcalf</i> [2020] NSWCA 228	561
22.3.2b	<i>Anderson v McPherson (No 2)</i> [2012] WASC 19; (2012) 8 ASTLR 321	563
22.3.2c	<i>Calverley v Green</i> [1984] HCA 81; (1984) 155 CLR 242	566
22.3.2d	<i>Trustee of the Property of Cummins v Cummins</i> [2006] HCA 6; (2006) 227 CLR 278	569
22.3.2e	<i>Bloch v Bloch</i> [1981] HCA 56; (1981) 180 CLR 390	571
22.3.2f	<i>Nelson v Nelson</i> [1995] HCA 25; (1995) 184 CLR 538	573

22.4	Incomplete dispositions of a beneficial interest	574
22.4a	<i>Re the Trusts of the Abbott Fund</i> [1900] 2 Ch 326	574
22.4b	<i>Air Jamaica Ltd v Charlton</i> [1999] 1 WLR 1399	575
22.5	<i>Quistclose</i> trusts	577
22.5a	<i>Barclays Bank Ltd v Quistclose Investments Ltd</i> [1970] AC 567	577
22.5b	<i>Twinsectra Ltd v Yardley</i> [2002] 2 AC 164	578
22.5c	<i>Raulfs v Fishy Bite Pty Ltd</i> [2012] NSWCA 135	581
22.6	Rationale of resulting trusts	582
22.6a	R Chambers, 'Tracing and Unjust Enrichment' in J Neyers et al (eds), <i>Understanding Unjust Enrichment</i> (Hart Publishing, 2004) 263, 286–7	582
22.6b	W Swadling, 'A New Role for Resulting Trusts' (1996) 16(1) <i>Legal Studies</i> 110–31	583
23	Constructive trusts	588
23.1	Introduction	589
23.2	Common intention constructive trusts	591
23.2a	<i>Allen v Snyder</i> [1977] 2 NSWLR 685	591
23.2b	<i>Green v Green</i> (1989) 17 NSWLR 343	594
23.3	Unconscionability based constructive trusts	601
23.3a	<i>Muschinski v Dodds</i> [1985] HCA 78; (1985) 160 CLR 583	601
23.3b	<i>Baumgartner v Baumgartner</i> [1987] HCA 59; (1987) 164 CLR 137	606
23.4	Constructive trusts as a remedy for estoppel	610
23.4a	<i>Giumelli v Giumelli</i> [1999] HCA 10; (1999) 196 CLR 101	610
23.5	Constructive trusts raised in response to a breach of fiduciary obligation	613
23.5.1	Fiduciary obtains a benefit or profit where there was an actual or possible conflict of interest and duty	613
23.5.1a	<i>Furs Ltd v Tomkies</i> [1936] HCA 3; (1936) 54 CLR 583	613
23.5.1b	<i>Chan v Zacharia</i> [1984] HCA 36; (1984) 154 CLR 178	615
23.5.2	Bribes and secret commissions	616
23.5.2a	<i>Lister & Co v Stubbs</i> (1890) 45 Ch D 1	616
23.5.2b	<i>Attorney-General (Hong Kong) v Reid</i> [1994] 1 AC 324	618
23.5.2c	<i>Grimaldi v Chameleon Mining NL (No 2)</i> [2012] FCAFC 6; (2012) 200 FCR 296	619
23.5.2d	<i>FHR European Ventures LLP v Cedar Capital Partners LLC</i> [2014] UKSC 45; [2015] AC 250	621
23.6	Constructive trusts imposed over stolen money and its proceeds	624
23.6a	<i>Black v S Freedman & Co</i> [1910] HCA 58; (1910) 12 CLR 105	624
23.7	Constructive trusts as a restitutionary remedy for unjust enrichment	627
23.7a	<i>Chase Manhattan Bank NA v Israel-British Bank (London) Ltd</i> [1981] Ch 105	630
23.7b	<i>Wambo Coal Pty Ltd v Ariff</i> [2007] NSWSC 589; (2007) 63 ACSR 429	631

23.8	Constructive trusts and mutual wills	634
23.8a	<i>Birmingham v Renfrew</i> [1937] HCA 52; (1937) 57 CLR 666	634
23.9	Constructive trusts imposed over property transferred under specifically enforceable contracts	636
23.9a	<i>Chang v Registrar of Titles</i> [1976] HCA 1; (1976) 137 CLR 177	637
23.9b	<i>Tanwar Enterprises Pty Ltd v Cauchi</i> [2003] HCA 57; (2003) 217 CLR 315	640
PART I TERMINATING AND VARYING TRUSTS		643
24	Termination and variation of trusts	644
24.1	Introduction	645
24.2	Statement of the principle	646
24.2a	<i>Saunders v Vautier</i> (1841) 4 Beav 115; 49 ER 282	646
24.3	Limits on its application	647
24.3a	<i>CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)</i> [2005] HCA 53; (2005) 224 CLR 98	647
24.3b	<i>Beck v Henley</i> [2014] NSWCA 201; (2014) 11 ASTLR 457	650
24.4	Variation of trusts	655
24.4a	<i>Trustee Act 1925</i> (NSW) s 81	656
24.4b	<i>Trustee Act 1958</i> (Vic) s 63A	656
24.4c	<i>Trustee Act 1936</i> (SA) s 59C	658
Index		659