

# CONTENTS

<i>Preface</i>	xxiii
<i>Acknowledgements</i>	xxv
<i>Table of cases</i>	xxviii
<i>Table of statutes</i>	xl
<b>Chapter 1 Introduction</b>	<b>1</b>
<b>I</b> Introduction	1
<b>II</b> What is a remedy?	1
<i>Ashby v White</i>	2
<i>Photo Production Ltd v Securicor Transport Ltd</i>	5
A Monism and dualism	7
<b>III</b> The common law and equity divide in Australia	12
<i>Roxborough v Rothmans of Pall Mall Australia Ltd</i>	13
<b>IV</b> A functional approach to remedies	18
<b>PART 1 GENERAL PRINCIPLES OF COMPENSATION</b>	<b>21</b>
<b>Chapter 2 Assessment of compensation</b>	<b>22</b>
<b>I</b> Introduction	22
<b>II</b> The compensatory principle and the identification of the wrong	22
<i>Butler v Egg and Egg Pulp Marketing Board</i>	23
<i>Gates v City Mutual Life Assurance Society Ltd</i>	24
<b>III</b> Losses and benefits	26
A Non-pecuniary loss	26
B Cost of repair and diminution in value	27
C Betterment discount	27
<i>Tyco Australia v Optus Networks Pty Ltd</i>	27
<i>Gagner Pty Ltd v Canturi Corporation Pty Ltd</i>	29
<i>Hoad v Scone Motors Pty Ltd</i>	30
<i>Hyder Consulting (Australia) Pty Ltd v Wilh Wilhemsen Agency Pty Ltd</i>	30
D Benefits flowing from mitigating actions of the plaintiff	32
<i>Haines v Bendall</i>	32
<i>British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric</i>	
<i>Railways Co of London Ltd</i>	33
<i>Jenkinson v Young</i>	34
<i>Origin Energy LPG Ltd v BestCare Foods</i>	35

E	Other benefits arising from the wrong	37
	<i>Insurance Australia Ltd v HIH Casualty &amp; General Insurance Ltd (in liq)</i>	38
	<i>Monroe Schneiders Associates (Inc) v No 1 Raberem Pty Ltd</i>	39
F	The impact of tax law	41
<b>IV</b>	Certainty of loss and recovery for the loss of a chance	42
A	Overview of the current law	43
	<i>Malec v JC Hutton Pty Ltd</i>	43
	<i>Sellars v Adelaide Petroleum NL</i>	46
B	Consequential loss	49
	<i>Glenmont Investments Pty Ltd v O'Loughlin</i>	50
C	Personal injury as initial harm	51
	<i>Tabet v Gett</i>	52
D	Pure economic loss as initial harm	54
	<i>Crown Insurance Services Pty Ltd v National Mutual Life Association of Australasia Ltd</i>	55
	<i>Chaplin v Hicks</i>	57
	<i>Hendriks v McGeoch</i>	59
	<i>Badenach v Calvert</i>	61
E	Hypothetical conduct of the defendant	64
	<i>Commonwealth v Amann Aviation Pty Ltd</i>	64
	<i>Port Macquarie-Hastings Council v Diveva Pty Ltd</i>	67
<b>V</b>	Temporal considerations	70
A	The lump sum rule and the 'once and for all' rule	70
B	Date of assessment	71
	<i>Re Dawson (Deceased)</i>	71
	<i>O'Brien v McKean</i>	72
	<i>Webster v Coles Myer Ltd</i>	73
	<i>Johnson v Perez</i>	74
	<i>Vieira v O'Shea</i>	76
	<i>HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd</i>	77
	<i>Potts v Miller</i>	78
C	Relevance of inflation	79
	<i>Egan v State Transport Authority</i>	79
	<i>O'Brien v McKean</i>	80
D	Determining the present equivalent of future pecuniary loss	81
	<i>Todorovic v Waller</i>	81
	<i>Competition and Consumer Act 2010 (Cth) s 87Y(1)</i>	82
	<i>Civil Liability Act 2002 (NSW) s 14(1)–(2)</i>	82
	<i>Transport Accident Act 1986 (Vic) s 93(13)</i>	83
	<i>Law Reform (Miscellaneous Provisions) Act 1941 (WA) s 5(1)</i>	83
E	Interest on compensation awards and compensation for the loss of the use of money	83
	<i>Hungerfords v Walker</i>	84

<b>Chapter 3 Attribution of responsibility</b>	<b>88</b>
<b>I</b> Introduction	88
<b>II</b> The legal concept of causation	88
<i>Barnett v Chelsea and Kensington Hospital Management Committee</i>	89
<i>Alexander v Cambridge Credit Corporation Ltd</i>	91
<i>March v E &amp; MH Stramare</i>	92
<i>Civil Liability Act 2002 (NSW) s 5D</i>	96
<i>Wallace v Kam</i>	96
<b>III</b> Factual causation	97
A Overview	97
B The 'but for' test and its application	98
<i>Adeels Palace Pty Ltd v Moubarak</i>	98
C Causal overdetermination (multiple sufficient causes)	100
1 Duplicative causation	100
<i>Elayoubi v Zipser</i>	101
2 Pre-emptive causation	103
<i>Performance Cars Ltd v Abraham</i>	103
D Evidential uncertainty	104
1 Inference of factual causation	104
<i>Tubemakers of Australia Ltd v Fernandez</i>	104
<i>Amaca Pty Ltd v King</i>	105
2 Material contribution to the harm	106
<i>Bonnington Castings Ltd v Wardlaw</i>	106
<i>Amaca Pty Ltd v Booth</i>	107
<i>Amaca Pty Ltd v Ellis</i>	108
3 Material increase in risk	110
<i>McGhee v National Coal Board</i>	110
<i>Fairchild v Glenhaven Funeral Services Ltd</i>	111
<i>Civil Liability Act 1936 (SA) s 34(2)–(3)</i>	113
<b>IV</b> Scope of liability	113
A Subsequent event	115
1 Distinction between basic loss and additional loss	115
2 Additional loss: intervening event	115
<i>Chapman v Hearse</i>	116
<i>Alexander v Cambridge Credit Corporation Ltd</i>	117
<i>Scott Carver Pty Ltd v SAS Trustee Corporation Ltd</i>	120
<i>Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd</i>	121
<i>Modbury Triangle Shopping Centre Pty Ltd v Anzil</i>	122
<i>Caterson v Commissioner for Railways</i>	123
3 Basic loss: causally independent subsequent event	124
<i>Kmart Australia Ltd v McCann</i>	124
<i>Calvert v William Hill Credit Ltd</i>	126

	<i>Golden Strait Corporation v Nippon Yusen Kubishika Kaisha (The Golden Victory)</i>	127
	<i>Turjman v Stonewall Hotel Pty Ltd</i>	130
	<i>DNM Mining Pty Ltd v Barwick</i>	131
	<i>Baker v Willoughby</i>	132
4	Basic loss: causally dependent subsequent event	133
	<i>Faulkner v Keffalinos</i>	134
B	Remoteness of damage	134
C	The purpose of the duty breached	135
	<i>Roads and Traffic Authority v Royal</i>	135
	<i>Wallace v Kam</i>	136
D	The plaintiff's contribution to the loss	137
1	Contributory negligence	137
	<i>Smith v Badenoch</i>	137
2	Mitigation	138
	<i>Burns v MAN Automotive (Aust) Pty Ltd</i>	140
	<i>Clark v Macourt</i>	142
	<i>Doyle v Olby (Ironmongers) Ltd</i>	145
	<i>Simonius Vischer &amp; Co v Holt &amp; Thompson</i>	146
<b>Chapter 4</b>	<b>Multiple wrongdoers</b>	<b>148</b>
<b>I</b>	Introduction	148
<b>II</b>	Common law rules	148
	<i>Grunwald v Hughes</i>	149
	<i>Thompson v Australian Capital Television Pty Ltd</i>	150
	<i>The Kursk</i>	152
	<i>Schumann v Abbott</i>	153
	<i>Mahony v J Kruschich (Demolitions) Pty Ltd</i>	154
	<i>Brinsmead v Harrison</i>	156
	<i>James Hardie &amp; Co Pty Ltd v Seltsam Pty Ltd</i>	157
	<i>Chillingworth v Chambers</i>	158
	<i>Albion Insurance Co Ltd v Government Insurance Office (NSW)</i>	159
<b>III</b>	Contribution statutes	160
	<i>Wrongs Act 1958 (Vic) s 24AA</i>	161
	<i>De Reus v Gray</i>	161
	<i>Wrongs Act 1958 (Vic) s 23B(1)</i>	163
	<i>Wrongs Act 1958 (Vic) s 24(2)</i>	163
	<i>Vinidex Tubemakers Pty Ltd v Thiess Contractors Pty Ltd</i>	164
<b>IV</b>	Proportionate liability statutes	165
	<i>Wrongs Act 1958 (Vic) s 24A(1)(a)</i>	166
	<i>Hunt &amp; Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd</i>	166
	<i>Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)</i>	169
<b>V</b>	Interplay of the three regimes	171

<b>PART 2</b>	<b>COMPENSATION IN SPECIFIC CONTEXTS</b>	<b>173</b>
<b>Chapter 5</b>	<b>Compensation for breach of contract</b>	<b>174</b>
<b>I</b>	Introduction	174
<b>II</b>	Assessment of compensation	174
A	Protection of the plaintiff's expectation interest	176
	<i>Robinson v Harman</i>	176
B	Measure of expectation loss in particular contexts	178
	<i>Commonwealth v Amann Aviation Pty Ltd</i>	178
1	Failure to deliver goods as promised	180
	<i>Clark v Macourt</i>	180
	<i>Sale of Goods Act 1923 (NSW) s 54</i>	181
2	Failure to convey land as promised	182
	<i>Bain v Fothergill</i>	182
3	Failure to build, maintain or repair property as promised	183
	<i>Bellgrove v Eldridge</i>	183
	<i>Tabcorp Holdings Ltd v Bowen Investments Pty Ltd</i>	184
	<i>Ruxley Electronics and Construction Ltd v Forsyth</i>	185
	<i>Stone v Chappel</i>	187
4	Failure to provide other services as promised	188
	<i>GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd</i>	188
	<i>Zomojo Pty Ltd v Hurd (No 4)</i>	189
C	The impact of <i>Clark v Macourt</i>	190
D	Compensation of reliance loss	190
	<i>McRae v Commonwealth Disposal Commission</i>	190
	<i>Commonwealth v Amann Aviation Pty Ltd</i>	191
E	Non-pecuniary loss	193
1	Restrictions at common law	193
	<i>Baltic Shipping Co v Dillon</i>	193
2	Restrictions under statute	195
	<i>Civil Liability Act 2002 (NSW) ss 11A, 16, 27–28, 31</i>	195
<b>III</b>	Attribution of responsibility	196
A	Remoteness of damage	197
	<i>Alexander v Cambridge Credit Corporation Ltd</i>	197
1	The <i>Hadley v Baxendale</i> test	199
	<i>Hadley v Baxendale</i>	199
2	The significance of the defendant's knowledge of the plaintiff's circumstances	200
	<i>Victoria Laundry (Windsor) Ltd v Newman Industries Ltd</i>	200
3	Assumption of responsibility as overriding criterion?	201
	<i>Transfield Shipping Inc v Mercator Shipping Inc (The Achilles)</i>	202
B	Contributory negligence	203

<b>Chapter 6 Compensation in tort</b>	<b>205</b>
<b>I</b> Introduction	205
<b>II</b> Assessment of compensation	205
A General principle	207
<i>Livingstone v Rawyards Coal Co</i>	207
B Specific contexts	208
1 Damage to reputation: defamation	208
<i>Carson v John Fairfax &amp; Sons Ltd</i>	208
2 Damage to land or fixtures	210
<i>Evans v Balog</i>	210
<i>Pantalone v Alaouie</i>	212
3 Other wrongful interference with land	213
<i>Balanced Securities Ltd v Bianco (No 2)</i>	214
4 Damage to goods	216
<i>Jansen v Dewhurst</i>	216
5 Other wrongful interference with goods	217
<i>Butler v Egg and Egg Pulp Marketing Board</i>	217
6 Defective premises or goods	219
<i>Pyrenees Shire Council v Day</i>	220
7 Damage to economic interests: reliance on a misrepresentation	221
<i>Toteff v Antonas</i>	221
<b>III</b> Attribution of responsibility	223
A Remoteness of damage	226
1 The test of natural and probable consequences	226
<i>Palmer Bruyn &amp; Parker Pty Ltd v Parsons</i>	226
2 The test of reasonable foreseeability	228
<i>Overseas Tankship (UK) Ltd v Morts Dock &amp; Engineering Co Ltd (Wagon Mound No 1)</i>	228
<i>Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (Wagon Mound No 2)</i>	230
<i>Wyong Shire Council v Shirt</i>	232
<i>Mt Isa Mines Ltd v Pusey</i>	234
<i>Sutherland Shire Council v Becker</i>	236
<i>Mayfair Ltd v Pears</i>	238
3 The test of reasonable contemplation	239
<i>National Australia Bank Ltd v Nemur Varsity Pty Ltd</i>	240
4 The 'eggshell skull' rule	241
<i>Purkess v Crittenden</i>	242
<i>Nader v Urban Transport Authority NSW</i>	243
B Contributory negligence	244
1 Common law	244
<i>Radley v London and North Western Railway Co</i>	245
2 Contributory negligence statutes	246
<i>Wrongs Act 1958 (Vic) s 26(1)</i>	247
3 Civil liability statutes	247
4 The plaintiff's conduct	247

	<i>Civil Liability Act 2002</i> (NSW) s 5R	248
	<i>Civil Law (Wrongs) Act 2002</i> (ACT) s 95	248
5	Factual causation and scope of the duty	249
	<i>Allan v Fletcher</i>	249
6	Apportionable loss	251
	<i>Wrongs Act 1958</i> (Vic) s 26(1)(b)	251
7	Apportionment	251
	<i>Pennington v Norris</i>	252
<b>Chapter 7 Compensation for personal injury and death</b>		<b>254</b>
I	Introduction	254
II	The impact of legislation	254
A	Statutory compensation schemes and ancillary regulation of common law damages	255
	<i>Workers' Compensation and Injury Management Act 1981</i> (WA) ss 3(a)(i)–(ii), 18(1)–(2)	255
B	Civil liability statutes	256
	<i>Civil Liability Act 2002</i> (Tas) ss 3, 3B, 24	256
III	Meaning of 'personal injury'	257
	<i>Civil Liability Act 2002</i> (NSW) ss 11, 27, 28(1), 31	257
IV	Loss suffered by an injured person	258
A	Pecuniary loss resulting from needs created by the injury	261
1	Medical expenses and cost of institutional care	261
	<i>Blundell v Musgrave</i>	262
2	Domestic services provided to the injured person	263
	<i>Griffiths v Kerkemeyer</i>	263
	<i>Civil Liability Act 2003</i> (Qld) s 59	265
3	Increased cost of living at home	266
4	Cost of managing a lump sum award	266
	<i>Civil Liability Act 1936</i> (SA) s 57	266
	<i>Gray v Richards</i>	266
B	Pecuniary loss resulting from the impairment of capacities	267
1	Loss of earning capacity	268
	<i>Graham v Baker</i>	268
	<i>Civil Liability Act 1936</i> (SA) ss 3(1), 54(1)–(2)	269
2	Loss of employment-related benefits	270
	<i>Delphin v Martin</i>	270
	<i>Civil Liability Act 2002</i> (Tas) s 25	272
3	Loss of social security benefits	272
4	Loss of capacity to do domestic work	272
	<i>CSR Ltd v Eddy</i>	272
	<i>Civil Law (Wrongs) Act 2002</i> (ACT) s 100	274
C	Non-pecuniary loss	275
1	Pain and suffering	275
	<i>Skelton v Collins</i>	275

2	Loss of amenities	277
	<i>Lawrence v Mathison</i>	277
3	Loss of expectation of life	278
	<i>Sharman v Evans</i>	278
4	Statutory regulation	279
	<i>Civil Liability Act 2002 (WA)</i> ss 9–10	279
D	Overlap between different heads of loss	281
<b>V</b>	Benefits arising from an injury	281
	<i>National Insurance Co of New Zealand v Espagne</i>	282
	<i>Health and Other Services (Compensation) Act 1995 (Cth)</i> ss 3, 7(1), (3), 8(1)	283
<b>VI</b>	Claims based on injury to another person	285
A	Loss of an employee's services	285
	<i>Barclay v Penberthy</i>	285
B	Loss of consortium	286
	<i>Civil Liability Act 1936 (SA)</i> s 65(1)	286
	<i>Civil Law (Wrongs) Act 2002 (ACT)</i> s 218	287
<b>VII</b>	Actions on death	288
A	Claim by the estate of the deceased	289
B	Claim by the dependants of the deceased	289
	<i>Fatal Accidents Act 1846 (UK)</i>	289
	<i>Wrongs Act 1958 (Vic)</i> ss 16–17	290
	<i>Lyle v Soc</i>	291
	<i>Compensation (Fatal Injuries) Act 1974 (NT)</i> s 10(4)(h)	292
	<i>De Sales v Ingrilli</i>	293
	<i>Civil Proceedings Act 2011 (Qld)</i> s 67	295
<b>Chapter 8 Compensation under the Australian Consumer Law</b>		<b>297</b>
<b>I</b>	Introduction	297
<b>II</b>	Assessment of compensation	298
A	General principles	299
	<i>Wardley Australia Ltd v Western Australia</i>	299
B	Compensation for misleading or deceptive conduct	301
1	Reliance loss as the general measure of compensation	301
	<i>Gates v City Mutual Life Assurance Society Ltd</i>	301
	<i>Marks v GIO Australia Holdings Pty Ltd</i>	302
2	Compensation of expectation loss	304
	<i>Murphy v Overton Investments Pty Ltd</i>	304
3	Compensation of reliance loss in excess of expectation loss	305
	<i>Henville v Walker</i>	305
C	Non-pecuniary loss	306
	<i>New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski</i>	306
D	Certainty of loss and recovery for the loss of a chance	309



III	Attribution of responsibility	309
A	The common sense test of causation	311
B	Factual causation	311
	<i>Henville v Walker</i>	311
C	Scope of liability	313
1	Intervening cause	313
	<i>Henville v Walker</i>	313
	<i>Hay Property Consultants Pty Ltd v Victorian Securities Corporation Ltd</i>	314
2	Foreseeability of the loss	315
	<i>Henville v Walker</i>	315
3	The purpose of the provision contravened	316
	<i>Travel Compensation Fund v Tambree</i>	316
4	The plaintiff's contribution to the loss	317
	<i>Competition and Consumer Act 2010 (Cth) s 137B</i>	317
	<i>Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd (No 2)</i>	318
D	Multiple wrongdoers	319
<b>Chapter 9 Equitable compensation for equitable wrongs</b>		<b>320</b>
I	Introduction	320
II	Assessment of equitable compensation	320
A	Object of equitable compensation	321
	<i>O'Halloran v RT Thomas &amp; Family Pty Ltd</i>	321
B	Recoverability of non-pecuniary loss	323
	<i>Giller v Procopets</i>	323
C	Basic measure of equitable compensation	324
	<i>Nocton v Lord Ashburton</i>	324
	<i>Agricultural Land Management Ltd v Jackson (No 2)</i>	326
III	Attribution of responsibility	328
A	Breach of trust	330
1	Independent non-wrongful event	331
	<i>Re Dawson (Deceased)</i>	331
	<i>Target Holdings Ltd v Redfern</i>	332
	<i>Youyang Pty Ltd v Minter Ellison Morris Fletcher</i>	333
	<i>Agricultural Land Management Ltd v Jackson (No 2)</i>	335
2	Intervening acts and remoteness of loss	338
	<i>AIB Group (UK) plc v Mark Redler &amp; Co Solicitors</i>	338
B	Breach of fiduciary duty	340
1	Construction of the hypothetical world	341
	<i>Brickenden v London Loan &amp; Savings Co</i>	341
	<i>Commonwealth Bank of Australia v Smith</i>	342
2	Intervening acts and remoteness of loss	343
	<i>Hodgkinson v Simms</i>	343
	<i>Canson Enterprises Ltd v Boughton &amp; Co</i>	344

3	Contributory negligence	346
	<i>Pilmer v Duke Group Ltd (in liq)</i>	346
4	Mitigation	347
	<i>Canson Enterprises Ltd v Boughton &amp; Co</i>	347
C	Breach of an equitable duty of care	348
1	Scope of liability	349
	<i>Permanent Building Society (in liq) v Wheeler</i>	349
	<i>Bristol and West Building Society v Mothew</i>	351
2	Contributory negligence	352
	<i>Youyang Pty Ltd v Minter Ellison Morris Fletcher</i>	352
<b>PART 3 REMEDIES COMPELLING PERFORMANCE AND RELATED REMEDIES</b>		<b>355</b>
<b>Chapter 10 Specific performance</b>		<b>356</b>
I	Introduction	356
II	The nature of specific performance	356
III	The relationship between specific performance and injunctions	357
IV	Inadequacy of damages and subject matter of contract	357
A	Inadequacy of damages	358
	<i>Harnett v Yielding</i>	358
B	Subject matter of contract	359
1	Contracts involving land	359
	<i>Pianta v National Finance &amp; Trustees Ltd</i>	359
	<i>Loan Investment Corporation of Australasia v Bonner</i>	360
	<i>Semelhago v Paramadevan</i>	361
2	Contracts involving goods	362
	<i>Dougan v Ley</i>	362
	<i>Howard Perry &amp; Co Ltd v British Railways</i>	363
	<i>Eastern Rolling Mill v Michlovitz</i>	364
3	Contracts involving shares and stock	365
	<i>Georges v Wieland</i>	365
	<i>Wight v Haberdan Pty Ltd</i>	366
4	Contracts to loan money	367
5	Contracts for the benefit of third parties	368
	<i>Beswick v Beswick</i>	368
	<i>Coulls v Bagot's Executor and Trustee Co Ltd</i>	369
6	Contracts involving intellectual property	370
	<i>Cogent v Gibson</i>	370
7	Contracts for services	371
	<i>Byrne v Australian Airlines</i>	371
V	Other requirements for specific performance	372
A	Personal remedy	372

B	Binding contract	372
	<i>Costin v Costin</i>	373
	<i>Joseph v National Magazine Co</i>	374
	<i>REW08 Projects Pty Ltd v PNC Lifestyle Investments Pty Ltd</i>	375
<b>VI</b>	Discretionary factors and bars to relief	377
A	General equitable bars to relief	379
	<i>Patel v Ali</i>	379
	<i>Summer v Cocks</i>	380
	<i>Lindsay Petroleum v Hurd</i>	381
	<i>No 68 Ltd v Eastern Services Ltd</i>	382
B	Bars to relief relevant only to specific performance	383
	<i>Price v Strange</i>	384
	<i>Cannavo v FCD (Holdings) Pty Ltd</i>	385
	<i>Ryan v Mutual Tontine Westminster Chambers Association</i>	386
	<i>Posner v Scott Lewis</i>	388
	<i>Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd</i>	389
	<i>Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)</i>	390
	<i>Diagnostic X-Ray Services Pty Ltd v Jewel Food Stores Pty Ltd</i>	392
<b>VII</b>	Specific performance under the <i>Australian Consumer Law</i>	394
	<i>Futuretronics International Pty Ltd v Gadzhis</i>	394
<b>VIII</b>	Specific restitution or specific delivery of property	395
	<i>Doulton Potteries Ltd v Bronotte</i>	396
<b>IX</b>	Debt as a species of specific relief?	397
	<i>Young v Queensland Trustees Ltd</i>	398
	<i>White and Carter (Councils) Ltd v McGregor</i>	399
<b>Chapter 11</b>	<b>Injunctions</b>	<b>400</b>
<b>I</b>	Introduction	400
<b>II</b>	The rights protected by injunctions and inadequacy of damages	401
A	Inadequacy of damages	403
	<i>Evans Marshall &amp; Co Ltd v Bertola SA</i>	403
B	The rights protected by injunctions	404
1	Injury to property rights in land	404
	<i>Bendal Pty Ltd v Mirvac Project Pty Ltd</i>	404
2	Injury to property rights in goods and funds of money	406
	<i>Aristoc Industries Pty Ltd v RA Wenham (Builders) Pty Ltd</i>	406
3	Injury to intellectual property	407
	<i>Patents Act 1990 (Cth) s 122(1)</i>	407
4	Injury to economic rights	407
	<i>Erven Warnink BV v J Townend &amp; Sons (Hull) Ltd</i>	407
5	Injury to bodily integrity	408
	<i>Parry v Crooks</i>	408
6	Injury to reputation	409

	<i>Chappell v TCN Channel Nine Pty Ltd</i>	409
7	Injury to privacy	410
	<i>McKennitt v Ash</i>	410
8	Injunctions restraining breaches of negative covenant in a contract	411
9	Contracts for services	412
	<i>Curro v Beyond Productions Pty Ltd</i>	412
<b>III</b>	<i>Quia timet</i> injunctions	413
<b>IV</b>	Discretionary factors and bars to relief	414
A	General equitable bars to relief	415
1	Hardship and the public interest	415
	<i>Shelfer v City of London Electric Lighting Co</i>	415
	<i>Lawrence v Fen Tigers Ltd</i>	416
2	Lack of clean hands	418
	<i>Duchess of Argyll v Duke of Argyll</i>	418
3	Laches: delay with acquiescence and delay with prejudice	419
B	Bars to injunctions that are equivalent to those in specific performance	419
<b>V</b>	Injunctions under statutes	420
	<i>Cardile v LED Builders Pty Ltd</i>	421
A	Intellectual property	421
B	The <i>Australian Consumer Law</i>	422
	<i>Australian Consumer Law</i> s 232(1)(a), (4)	422
	<i>ICI Australia Operations Pty Ltd v Trade Practices Commission</i>	423
C	The <i>Corporations Act 2001</i> (Cth)	424
	<i>Corporations Act 2001</i> (Cth) s 1324(1), (6)–(8)	424
	<i>Australian Securities and Investments Commission v Storm Financial Ltd</i> ( <i>in liq</i> ) ( <i>recs and mgrs. apptd</i> ) ( <i>No 2</i> )	425
D	Other statutory injunctions	426
<b>Chapter 12 ‘Equitable damages’ or Lord Cairns’ Act damages</b>		<b>427</b>
<b>I</b>	Introduction	427
<b>II</b>	History	429
	<i>Chancery Amendment Act 1858</i> (21 & 22 Vict c 27) s 2	429
<b>III</b>	Advantages of Lord Cairns’ Act damages for a plaintiff	429
<b>IV</b>	Jurisdiction to award Lord Cairns’ Act damages	430
<b>V</b>	The need for a ‘wrongful act’ in some Australian jurisdictions	431
A	Australian legislation which mentions ‘wrongful act’	432
	<i>Supreme Court Act 1970</i> (NSW) s 68	432
B	Australian legislation which does not mention ‘wrongful act’	432
	<i>Supreme Court Act 1986</i> (Vic) s 38	432
	<i>Giller v Procopets</i>	433
C	Lord Cairns’ Act damages for statutory wrongdoing	434
	<i>Wentworth v Woollahra Municipal Council</i>	434

<b>VI</b>	Factors influencing the exercise of the jurisdiction	436
A	General principles	436
1	Where specific relief is no longer available or in addition to specific relief	436
2	To provide a 'middle ground' solution between no relief and specific relief <i>Bendal Pty Ltd v Mirvac Project Pty Ltd</i>	436 437
3	To provide relief for future losses	438
4	To provide novel forms of relief <i>Giller v Procopets</i>	438 438
B	The <i>Shelfer</i> criteria	441
	<i>Shelfer v City of London Electric Lighting Co</i>	441
	<i>Lawrence v Fen Tigers Ltd</i>	442
<b>VII</b>	The basis of assessment	446
A	Timing	446
B	Gain-based relief – 'reasonable fee' awards <i>Morris-Garner v One Step (Support) Ltd</i>	446 447
C	Loss-based relief – compensatory awards of various kinds	448
<b>VIII</b>	Discretionary bars to relief	449
<b>IX</b>	Part 9.5 of the <i>Corporations Act 2001</i> (Cth)	449
	<i>Corporations Act 2001</i> (Cth) s 1324(10)	450
<b>X</b>	The future of Lord Cairns' Act damages	450
<b>PART 4 REMEDIES AS VINDICATION</b>		<b>453</b>
<b>Chapter 13 Self-help remedies</b>		<b>454</b>
<b>I</b>	Introduction	454
<b>II</b>	Tort and self-help	454
A	Eviction of trespassers <i>Cowell v Rosehill Racecourse Co Ltd</i>	456 456
B	Self-defence of property <i>Hackshaw v Shaw</i>	456 456
C	Self-defence of the person <i>Fontin v Katapodis</i>	458 458
D	Recaption, replevin and specific restitution <i>Toyota Finance Australia Ltd v Dennis</i>	459 459
E	Abatement of nuisance <i>Traian v Ware</i>	462 462
<b>III</b>	Contract and self-help	464
A	Rescission	465
B	Liquidated damages and penalties	465
1	Is this a clause to which the penalties doctrine applies? <i>Andrews v Australia and New Zealand Banking Group Ltd</i>	466 466
2	On the facts, is this clause a penalty? <i>Paciocco v Australia and New Zealand Banking Group Ltd</i>	469 469

C	Debt	474
D	Other stipulated contractual remedies	475
	<b>Chapter 14 Exemplary damages and aggravated damages</b>	<b>476</b>
I	Introduction	476
II	Exemplary damages	476
A	The nature and history of exemplary damages in Australia	480
	<i>Gray v Motor Accident Commission</i>	480
1	Need to make out the 'host' cause of action	484
	<i>Fatimi Pty Ltd v Bryant</i>	484
2	Unavailable if criminal punishment already imposed	486
3	Calculation of exemplary damages	486
	<i>Pollack v Volpato</i>	487
B	The causes of action for which exemplary damages can be awarded in Australia	488
1	Exemplary damages available for tort	488
2	Exemplary damages available for breach of some statutes	489
	<i>Copyright Act 1968 (Cth) s 115(4)</i>	489
3	Exemplary damages not available for breach of contract	490
4	Exemplary damages not available for equitable wrongdoing	490
	<i>Harris v Digital Pulse Pty Ltd</i>	490
5	Exemplary damages not available for breaches of the <i>Australian Consumer Law</i>	493
III	Aggravated damages	494
A	The distinction between exemplary damages and aggravated damages	496
	<i>Carson v John Fairfax &amp; Sons Ltd</i>	496
B	Availability of aggravated damages in Australian law	499
1	Aggravated damages available for tort	500
2	Aggravated damages available for some statutory causes of action	500
3	Aggravated damages not available for breach of contract	500
4	Aggravated damages not available for equitable wrongdoing	500
	<i>Giller v Procopets</i>	500
5	Aggravated damages available for breaches of the <i>Australian Consumer Law</i>	502
	<i>New South Wales Lotteries Corporation Pty Ltd v Kuzmanovski</i>	502
IV	'Vindictory damages'	504
	<i>Lewis v Australian Capital Territory</i>	504
	<b>Chapter 15 Apologies and declaratory relief</b>	<b>511</b>
I	Introduction	511
II	Apologies, declarations and nominal damages	511
A	Apologies	512
	<i>Wrongs Act 1958 (Vic) ss 14I–14J</i>	512
	<i>Civil Law (Wrongs) Act 2002 (ACT) ss 12–14</i>	513

	<i>Defamation Act 2005 (NSW) s 20</i>	514
	<i>Eatock v Bolt</i>	514
B	Declarations, nominal damages and contemptuous damages	516
1	Declarations	516
	<i>Supreme Court Act 1970 (NSW) s 75</i>	517
	<i>Competition and Consumer Act 2010 (Cth) s 163A</i>	517
	<i>Corporations Act 2001 (Cth) s 1317E(1)–(2)</i>	518
	<i>Forster v Jododex Pty Ltd</i>	518
2	Nominal damages	521
	<i>The Owners of the Steamship 'Mediana' v The Owners, Master and Crew of the Lightship 'Comet' (The 'Mediana')</i>	521
3	Contemptuous damages	523
	<i>Grobbelaar v News Group Newspapers Ltd</i>	523
III	Other vindicatory remedies under the <i>Australian Consumer Law</i>	524
	<i>Australian Consumer Law s 246</i>	525
	<i>Director of Consumer Affairs Victoria v Gibson (No 3)</i>	526
<b>PART 5</b>	<b>ACCOUNT OF PROFITS AND OTHER GAIN-BASED RELIEF FOR WRONGS</b>	<b>531</b>
<b>Chapter 16</b>	<b>Disgorgement of gains and 'reasonable fee' damages</b>	<b>532</b>
I	Introduction	532
II	The distinction between compensation, restitution and disgorgement and the nature of gain-based remedies	533
III	Disgorgement	534
A	Equity and the account of profits	534
	<i>Warman International Ltd v Dwyer</i>	535
B	Election	540
	<i>Personal Representatives of Tang Man Sit v Capacious Investments Ltd</i>	540
C	Intellectual property and the account of profits	544
	<i>Copyright Act 1968 (Cth) s 115(2)</i>	544
D	Torts and 'waiver of tort'	545
	<i>Hospitality Group Pty Ltd v Australian Rugby Union Ltd</i>	545
E	Breach of contract	549
	<i>Hospitality Group Pty Ltd v Australian Rugby Union Ltd</i>	549
	<i>Attorney-General v Blake</i>	550
F	The <i>Australian Consumer Law</i>	556
IV	'Reasonable fee' damages	558
A	Introduction and history	559
B	Academic and judicial accounts	559
1	Compensatory analyses	559
2	Restitutionary analyses	560
C	General patterns	561

D	Equity	562
E	Intellectual property	562
F	Tort	563
	<i>LJP Investments Pty Ltd v Howard Chia Pty Ltd</i>	563
	<i>Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd</i>	564
	<i>Morris-Garner v One Step (Support) Ltd</i>	567
G	Contract	570
	<i>Wrotham Park Estate Co Ltd v Parkside Homes Ltd</i>	570
	<i>Morris-Garner v One Step (Support) Ltd</i>	573
<b>V</b>	Allowances, discretionary factors and bars to relief	581
A	Allowances for skill and effort	581
	<i>Dart Industries Inc v Décor Corporation Pty Ltd</i>	582
B	Discretionary factors and bars to relief	584
<b>VI</b>	The future of gain-based relief in Australia	584
<b>PART 6</b>	<b>RESTITUTION AND GIVING BACK</b>	<b>585</b>
<b>Chapter 17</b>	<b>Personal remedies for unjust enrichment</b>	<b>586</b>
<b>I</b>	Introduction	586
<b>II</b>	The elements of unjust enrichment	587
<b>III</b>	Precise remedies for unjust enrichment	587
A	Money claims	588
	<i>David Securities Pty Ltd v Commonwealth Bank of Australia</i>	589
B	Services claims	590
	<i>Pavey &amp; Matthews Pty Ltd v Paul</i>	590
C	Goods claims	592
<b>IV</b>	Defences to a claim for restitution	592
<b>V</b>	The relationship between contract and restitution for unjust enrichment	593
	<i>Mann v Paterson Constructions Pty Ltd</i>	594
<b>Chapter 18</b>	<b>Rescission</b>	<b>609</b>
<b>I</b>	Introduction	609
A	Legal rescission	611
B	Equitable rescission	611
C	Rescission under the <i>Australian Consumer Law</i>	611
	<i>Australian Consumer Law</i> s 243(a)–(d)	611
<b>II</b>	The requirement of <i>restitutio in integrum</i>	612
	<i>Clarke v Dickson</i>	613
	<i>Alati v Kruger</i>	614
	<i>Maguire v Makaronis</i>	618
<b>III</b>	Election	619
A	How to make an election to rescind	620



	<i>Car &amp; Universal Finance Co Ltd v Caldwell</i>	620
B	The consequences of an election to rescind	623
	<i>Daly v Sydney Stock Exchange Ltd</i>	624
C	The reasons behind the election requirement	626
<b>IV</b>	'Partial' rescission	627
	<i>Vadasz v Pioneer Concrete (SA) Pty Ltd</i>	627
<b>V</b>	Bars to rescission	630
A	Impossibility of complete restoration	631
	<i>Quek v Beggs</i>	631
B	Affirmation	633
C	Delay	633
	<i>Allcard v Skinner</i>	633
D	Intervening third party rights	636
	<i>Hartigan v International Society for Krishna Consciousness Inc</i>	636
E	Executed contracts and innocent misrepresentation	639
<b>PART 7</b>	<b>PROPRIETARY REMEDIES</b>	<b>641</b>
<b>Chapter 19</b>	<b>Proprietary remedies</b>	<b>642</b>
<b>I</b>	Introduction	642
<b>II</b>	Proprietary remedies	642
A	Constructive and resulting trusts	643
	<i>Muschinski v Dodds</i>	644
B	Proprietary powers	648
C	Equitable liens	649
<b>III</b>	Criteria for award of proprietary remedies	650
A	Proprietary remedies and unconscionability	651
B	Proprietary remedies and perfection	651
C	Proprietary remedies and unjust enrichment	652
	<i>Wambo Coal Pty Ltd v Ariff</i>	653
D	Proprietary remedies and wrongdoing	657
	<i>Grimaldi v Chameleon Mining NL (No 2)</i>	658
<b>IV</b>	Discretionary factors and bars to relief	663
<b>V</b>	The need for more defined criteria	664
<b>PART 8</b>	<b>ENFORCEMENT OF REMEDIES</b>	<b>665</b>
<b>Chapter 20</b>	<b>Enforcement of remedies</b>	<b>666</b>
<b>I</b>	Introduction	666
<b>II</b>	Interlocutory injunctions	666
A	Legal, equitable or statutory right	667
	<i>Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd</i>	667

B	'Serious question to be tried' (or a 'prima facie case')	669
	<i>Australian Broadcasting Corporation v O'Neill</i>	670
C	The balance of convenience	673
D	Mandatory interlocutory injunctions	674
E	<i>Quia timet</i> interlocutory injunctions	674
F	Interlocutory injunctions which finally determine the matter	674
G	Undertakings as to damages	676
H	Interim injunctions under statute	676
	<i>Australian Consumer Law</i> s 234	676
	<i>Corporations Act 2001</i> (Cth) s 1324(1), (4), (8)	677
<b>III</b>	Other pre-judgment remedies	678
A	Arrest of the person	678
	<i>Debtors Act 1870</i> (Tas) s 5	679
	<i>Absconding Debtors Act 1978</i> (NT) ss 5–6	680
B	Freezing orders (Mareva orders)	681
	<i>Supreme Court (General Civil Procedure) Rules 2015</i> (Vic) rr 37A.02–37A.04	681
C	Search orders (Anton Piller orders)	684
	<i>Uniform Civil Procedure Rules 2005</i> (NSW) rr 25.19–25.20	684
<b>IV</b>	Post-judgment enforcement	685
A	Enforcement of money remedies	686
	<i>Court Procedures Rules 2006</i> (ACT) rr 2150, 2154	686
	<i>Uniform Civil Procedure Rules 1999</i> (Qld) rr 828–829	688
	<i>Uniform Civil Procedure Rules 1999</i> (Qld) rr 855–856	689
	<i>Uniform Civil Procedure Rules 1999</i> (Qld) rr 875, 877	691
B	Enforcement of specific remedies	692
	<i>Index</i>	694