CONTENTS

Preface xix
Table of cases xxii
Table of statutes xli
List of abbreviations xlviii

PART A  INTRODUCTION 1

Chapter 1: An overview of equity 3

What is equity? 4

Institutional equity 5

The emergence of institutional equity: medieval origins 5

Competition between common law and equity 7

Reform and the judicature legislation 8

The reception of equity in Australia 10

The judicature legislation in Australia 11

The place of equity in the modern law 12

A map of equity 13

Equitable remedies 13

Contract 14

Property 15

Civil wrongs 17

Civil procedure 18

The maxims of equity 19

What’s online? 21

PART B  EQUITABLE REMEDIES 23

Chapter 2: An introduction to equitable remedies 25

Introduction 26

Personal and proprietary remedies 26
<table>
<thead>
<tr>
<th>Table of Contents</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal remedies</td>
<td>27</td>
</tr>
<tr>
<td>Proprietary remedies</td>
<td>27</td>
</tr>
<tr>
<td>Types of proprietary remedies</td>
<td>27</td>
</tr>
<tr>
<td>Comparing proprietary remedies and personal remedies</td>
<td>28</td>
</tr>
<tr>
<td>The objectives of equitable remedies</td>
<td>28</td>
</tr>
<tr>
<td>Coercion</td>
<td>29</td>
</tr>
<tr>
<td>Compensation</td>
<td>29</td>
</tr>
<tr>
<td>Disgorgement</td>
<td>29</td>
</tr>
<tr>
<td>Restitution</td>
<td>29</td>
</tr>
<tr>
<td>Nullification</td>
<td>30</td>
</tr>
<tr>
<td>Reformation</td>
<td>30</td>
</tr>
<tr>
<td>Vindication</td>
<td>30</td>
</tr>
<tr>
<td>What’s online?</td>
<td>31</td>
</tr>
<tr>
<td><strong>Chapter 3: Specific performance, injunctions and equitable damages</strong></td>
<td>32</td>
</tr>
<tr>
<td>Introduction</td>
<td>33</td>
</tr>
<tr>
<td>Specific performance</td>
<td>33</td>
</tr>
<tr>
<td>General considerations</td>
<td>33</td>
</tr>
<tr>
<td>Prerequisites to award</td>
<td>36</td>
</tr>
<tr>
<td>Specifically enforceable contracts</td>
<td>36</td>
</tr>
<tr>
<td>Valuable consideration</td>
<td>36</td>
</tr>
<tr>
<td>Inadequacy of damages</td>
<td>36</td>
</tr>
<tr>
<td>Bars to specific performance</td>
<td>38</td>
</tr>
<tr>
<td>Injunctions</td>
<td>38</td>
</tr>
<tr>
<td>The jurisdiction to award injunctions</td>
<td>40</td>
</tr>
<tr>
<td>The criteria for the award of an injunction</td>
<td>40</td>
</tr>
<tr>
<td>Interlocutory injunctions</td>
<td>41</td>
</tr>
<tr>
<td>Mandatory and prohibitory injunctions</td>
<td>42</td>
</tr>
<tr>
<td>Injunctions to restrain breach of contract: the correlation with specific performance</td>
<td>43</td>
</tr>
<tr>
<td>Injunctions to restrain the commission of a tort</td>
<td>44</td>
</tr>
<tr>
<td>Third party interests and the role of the public interest</td>
<td>46</td>
</tr>
<tr>
<td>The exercise of discretion</td>
<td>47</td>
</tr>
<tr>
<td>Plaintiff’s remedy if specific performance or injunction are denied</td>
<td>48</td>
</tr>
</tbody>
</table>
### Chapter 4: Monetary remedies in equity

**Introduction**

49

**Accounts of profits**

54

**How are accounts of profits calculated?**

55

**Allowances**

57

**Equitable compensation**

58

**Emergence of the jurisdiction to award equitable compensation**

58

**How is equitable compensation calculated?**

60

**Calculating equitable compensation for breach of trust**

61

**Calculating equitable compensation for breach of fiduciary duty**

63

**Common law adjustments to quantum**

66

**What’s online?**

68

### Chapter 5: Rescission, rectification and declarations

**Introduction**

70

**When can a voidable transaction be rescinded?**

70

**The aim of rescission**

70

**Rescission at common law and in equity**

71

**Total and partial rescission**

72

**The election to rescind**

72

**Restoring the parties to their pre-contractual position**

73

**The proprietary consequences of rescission**

74

**Bars to rescission and pecuniary restitution**

75

**Rectification**

76

**The elements of rectification**

76

**Rectification and construction**

78

**Effect of rectification**

78
<table>
<thead>
<tr>
<th>Declaration</th>
<th>78</th>
</tr>
</thead>
<tbody>
<tr>
<td>Criteria for the award of a declaration</td>
<td>79</td>
</tr>
<tr>
<td>Equitable bars to relief</td>
<td>80</td>
</tr>
<tr>
<td>What’s online?</td>
<td>81</td>
</tr>
</tbody>
</table>

**Chapter 6: Bars to relief**

<table>
<thead>
<tr>
<th>Introduction</th>
<th>82</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laches</td>
<td>83</td>
</tr>
<tr>
<td>Acquiescence</td>
<td>85</td>
</tr>
<tr>
<td>Unclean hands</td>
<td>86</td>
</tr>
<tr>
<td>Hardship</td>
<td>88</td>
</tr>
<tr>
<td>Effect of order on third parties</td>
<td>89</td>
</tr>
<tr>
<td>What’s online?</td>
<td>90</td>
</tr>
</tbody>
</table>

**PART C EQUITY, CONTRACT AND PROPERTY**

**Chapter 7: Equity in contract law**

<table>
<thead>
<tr>
<th>Introduction</th>
<th>93</th>
</tr>
</thead>
<tbody>
<tr>
<td>Estoppel and promise enforcement</td>
<td>94</td>
</tr>
<tr>
<td>Common law estoppel</td>
<td>94</td>
</tr>
<tr>
<td>Equitable (or promissory) estoppel</td>
<td>95</td>
</tr>
<tr>
<td>Equity and voidable transactions</td>
<td>99</td>
</tr>
<tr>
<td>Undue influence</td>
<td>100</td>
</tr>
<tr>
<td>Actual undue influence</td>
<td>101</td>
</tr>
<tr>
<td>Presumed undue influence</td>
<td>101</td>
</tr>
<tr>
<td>Presumed relationships of influence</td>
<td>102</td>
</tr>
<tr>
<td>Proven relationships of influence</td>
<td>103</td>
</tr>
<tr>
<td>Rebutting the presumption of undue influence</td>
<td>104</td>
</tr>
<tr>
<td>Undue influence and third parties</td>
<td>105</td>
</tr>
<tr>
<td>Unconscientious conduct</td>
<td>105</td>
</tr>
<tr>
<td>Special disability</td>
<td>106</td>
</tr>
<tr>
<td>Knowledge of the disability</td>
<td>107</td>
</tr>
<tr>
<td>Exploitation of special disability</td>
<td>108</td>
</tr>
<tr>
<td>Statutory unconscionability</td>
<td>108</td>
</tr>
<tr>
<td>The rule in <em>Yerkey v Jones</em> and the <em>Garcia</em> case</td>
<td>110</td>
</tr>
<tr>
<td>‘Wife’</td>
<td>110</td>
</tr>
</tbody>
</table>
Table of Contents

Chapter 8: Equitable proprietary interests
Introduction 120
Proprietary estoppel 122
The nature of equitable ownership 125
Priority disputes and the doctrine of notice 126
Equities and equitable interests 127
What’s online? 128

Chapter 9: Equitable assignments
Introduction 130
Property terminology 130
Assignment of legal property 131
Equity and legally ineffective assignments 132
The relevance of consideration 132
Gifts 133
Non-assignable rights 136
Future property 137
Assignment of equitable property 138
Statutory assignment 139
Legal property that can only be assigned in equity 141
Statutory formalities 141
Summary 143
What’s online? 145

PART D EQUITABLE OBLIGATIONS
Chapter 10: Fiduciary obligations
Introduction 150
### Chapter 11: Participants in a breach of fiduciary obligation

**Introduction**

172

- Third party liability: the rule in *Barnes v Addy*
  
  173
  - Knowing receipt
    
    174
  - What type of knowledge?
    
    176
  - Remedies for knowing receipt
    
    178
  - Liability for knowing assistance
    
    179
  - What type of knowledge?
    
    181
  - Remedies for knowing assistance
    
    182
- Other forms of participatory liability
  
  183
  - Claims based on tracing
    
    183
  - Inducing a breach of trust
    
    183
  - Trusteeship de son tort
    
    183
- What’s online?
  
  184

### Chapter 12: Breach of confidence

**Introduction**

186

- The equitable obligation of confidence
  
  186
  - Specificity
    
    187
  - Quality of confidentiality
    
    187
  - Circumstances importing an obligation of confidence
    
    189
  - Misuse of confidential information
    
    190
  - Does the plaintiff need to show a detriment will be suffered?
    
    191
- Defences to breach of confidence
  
  192
  - Public interest
    
    192
PART E EXPRESS TRUSTS

Chapter 13: The concept of the express trust

Introduction

Definition

Some essential characteristics of the express trust

The parties to a trust

Different types of trust

Trusts and powers

Trusts and related concepts

Trust and agency

Trust and equitable charge

Trust and condition

Trust and contract

Trust and debt

What’s online?

Chapter 14: Certainty requirements in the law of trusts

Introduction

Certainty of intention

Objective or subjective intention?

Sham trusts

What intention has to be proved?

Precatory trusts

Intention to create an immediate trust
# Table of Contents

**Chapter 15: Creating an express trust**  
233

- Introduction  
234
- Methods of creating a trust  
234
  - Self-declaration of trust  
234
  - Formalities for inter vivos trusts by declaration  
235
  - Trust created by transfer  
235
- Formalities for inter vivos trusts by transfer  
236
- Testamentary trusts  
237
- The doctrine of incorporation by reference  
238
- Secret trusts  
238
- Incompletely constituted trusts  
240
  - Non-simultaneous declaration and vesting  
240
- Trusts and public policy  
241
  - Trusts and bankruptcy  
242
  - Trusts and discrimination  
243
  - Trusts and perpetuity  
244
- What’s online?  
246

**Chapter 16: Trusts for charitable and non-charitable purposes**  
247

- Introduction  
248
- A valid trust for a purpose  
248
- Historical development of the charitable trust  
249
- Trusts for the aged, impotent and poor  
250
  - Poverty  
250
  - Age and impotence  
251
- Trusts for the advancement of education  
251
Trusts for the advancement of religion 252
Trusts for other purposes beneficial to the community 253
  Political purposes 253
  Sporting and recreational purposes 255
The ‘public benefit’ 256
  Benefit 256
  Public, or a section of the public 257
Trusts for multiple purposes 258
Administrative schemes 259
Trusts for non-charitable purposes 260
Problems with purpose trusts 260
  The Quistclose trust 261
  Gifts to unincorporated associations 262
What’s online? 262

PART F  PERFORMING THE TRUST 263

Chapter 17: Trustees’ duties and powers 265

Introduction 266
Sources of the trustee’s duties and powers 266
Duties on assumption of trusteeship 267
  Duty to adhere to the terms of the trust 267
  Duty to get in the trust assets 268
Ongoing management duties 268
  Investment of trust funds 268
  Duty to keep assets separate 269
  Keeping and rendering accounts 269
  Duty to give information to beneficiaries 270
Duties of performance 273
  Duty of care 273
  Duty to act impartially 274
  Duty to act personally 275
  Duty to consider exercise of powers 277
Particular aspects of the trustee’s fiduciary obligations 278
Duties on the winding up of a trust 280
Chapter 18: Investment of trust funds

Introduction 290
Sources of trustees’ investment powers 290
The statutory model 292
The power to invest 293
Investing prudently 293
Review of investments 295
Applying other duties of law and equity to investing 296
Duty to act in best interests of beneficiaries 297
Duty to invest in non-speculative investments 297
Duty to act impartially between beneficiaries 299
Duty to take advice 299
Matters to be considered by the trustee when investing 300
Exculpatory provisions 302
What’s online? 303

Chapter 19: Trustees’ rights and liabilities

Introduction 305
Trustees’ liabilities 305
Trustee’s right of indemnity 305
The status of the trustee’s right of indemnity 306
Calculating the value of the trustee’s right of indemnity 307
Can the trustee’s right to indemnity out of trust assets be excluded by the trust instrument? 309
Liability of directors of trustee companies 310
Third parties and the trustee’s right of indemnity 310
Indemnification by the beneficiaries 311
Creditor’s rights to be subrogated to the trustee’s personal indemnification by beneficiaries 313
Trustee’s right to impound beneficiary’s interest 314
Trustee’s right of contribution from co-trustees 314
PART G  BREACH OF TRUST

Chapter 20: Breach of trust: defences and remedies 321

Introduction 322
Exculpation and defences 322
Exculpation in the trust instrument 322
Statutory exculpation 325
  Wilful default 326
  The general statutory defence 326
Equitable defences 328
  Consent 329
  Acquiescence and release 329
Remedies in the context of breach of trust 330
Monetary remedies for breach of trust 331
  Unauthorised profits 331
  Prohibited breaches 331
  Negligence in performance 333
  Compensation for breach of the conflicts rule 334
  Statutory provisions 334
Non-monetary remedies for breach of trust 335
Standing to sue 336
What’s online? 337

Chapter 21: Tracing 338

Introduction 339
Tracing and claiming at common law and in equity 340
A fiduciary requirement? 341
The equitable tracing rules 341
  Mixing money in a bank account 341
Defences to equitable tracing claims 349
What’s online? 350
PART H  NON-CONSENSUAL TRUSTS  

Chapter 22:  Resulting trusts  

Introduction  

Why does equity recognise resulting trusts?  

The presumption of advancement  

Application of the presumptions to family property  

Voluntary transfers of property  

Resulting trusts arising on failure of an express trust  

Resulting trusts arising in other cases of failure of basis: the Quistclose trust  

What’s online?  

Chapter 23:  Constructive trusts  

Introduction  

The constructive trust compared with other trusts  

Express trust  

Resulting trust  

Categories and principles  

Constructive trusts and unjust enrichment  

Constructive trusts and unconscionability  

Constructive trusts and wrongdoing  

The ‘common intention’ constructive trust and family property disputes  

The Baumgartner constructive trust  

Assessing contributions  

Equitable adjustments  

Is the Baumgartner constructive trust an institution or a remedy?  

The impact of family law legislation on constructive trusts  

The constructive trust as a remedy for proprietary estoppel  

Constructive trusts imposed for breach of fiduciary obligation  

The constructive trust imposed over stolen money and its proceeds  

The constructive trust as a restitutionary remedy for unjust enrichment  

xvi  Contents
Table of Contents

Non-contractual transfers of property 386
Contractual transfers of property 388
The doctrine of mutual wills 388
Constructive trusts imposed over property transferred under specifically enforceable contracts 390
The principle of Holroyd v Marshall and assignments of future property 391
What’s online? 392

Index 393