## Index

```
Account of profits
    equitable compensation distinguished, 375-376
    exemplary damages, as, 436-439
    loss of opportunity/chance, 376
    onus of proof, 439
Administrative Appeals Tribunal (AAT)
    persona designata exception, 44
Airline alliance (Qantas and Air NZ)
    antitrust issues, 64-69, 305-311
Ambush marketing
    Ansett v Qantas, 399
    definition, 397-398
    Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005, 400
    remedies against, 398
    sponsorship cases, 399
    TPA remedies, 398-399
Anticompetitive conduct
    authorisation of see Authorisation proceedings
Antitrust assessments
    USA v Oracle Corporation see USA v Oracle Corporation
Arrest of surrogate ships
    ownership issues
        Admiralty Act 1988, 312-313, 316
        Arrest Convention, 313-314
        English legislation, 314-315
        Maria Luisa decisions, 316-319
        nexus, 312
Australian Competition and Consumer Commission (ACCC)
    authorisations in health care markets, 423-427
Australian Competition Tribunal (ACT)
    authorisations in health care markets, 423-427
    establishment, 36
    membership, 36
    role of, 36
    separation of powers, 41-43
Authorisation proceedings
    anticompetitive detriment, 308-310
        public benefit, 310
    health care markets, in, 423-427
        onus of proof, 423
    Qantas case, 305-311
        foreign shareholders, benefits to, 307
```

```
quantification of benefits, 307-308
        tests for, 305-306
        total welfare standard, 306-307
Bannerman, Ron
    TPC Chairman, 475, 477-478
Baxt, Bob
    TPC Chairman, 475
Biodiscovery legislation, 149
Biodiscovery Act 2004 (Qld)
    analysis, 148-149
    background, 146-147
    criticisms, 148
    operation, 147-148
Book reviews
   Australian Corporations Legislation series, 156
    Competition Law in Australia by SG Corones, 157
    Equity, Restitution and Fraud by J Glover, 158
    International Trade Law, Commentary and Materials by M Pryles, J Waincymer, and M Davies,
        159
Breach of contract
    exemplary damages, unavailability of, 443-444
Bundling
    ACCC v Baxter, 485-489
    advantages, 191
    anticompetitive effects of, 30, 194-195
    case law, 194
    competition, effects on, 32-34, 191-192
    consequences of, 30
    definition, 190
    economic theories on, 196-200
    entry barrier, as an, 33-34
    examples of, 191
    exclusionary, 196-200
    exclusive dealing, 193
    misuse of market power, 192-194
    mixed, 190
    predatory pricing, 33-34
    price discrimination, for, 32-33
    pure, 190
    regulation of, 35
    socially efficient, 31-32
```

soft drink market, in the, 195

```
telecommunications market, in the, 195
United Kingdom's position, 202-203
United States' position, 200-204
what is, 30-31, 190
```

### Carriage of goods

international, by sea see International carriage of goods by sea

### Causation

equitable compensation, 381-385

### Civil penalties

insider trading, for, 301-304

### Collective bargaining

health care markets, in, 424

#### **Commercial contracts**

good faith, obligations of see Good faith in commercial contracts

### **Commonwealth Games**

ambush marketing, 397-400 Melbourne 2006 legislation, 400

### Compensation

equitable see Equitable compensation

### Competition

anticompetitive detriment *Qantas case*, 308-310

book review, 157

bundling, anticompetitive effects of, 30-35, 191-192, 194-195

consumer protection and, 51-54

health care markets, 417-422

test, 417-418

Hilmer Committee report, 10-11

IPCR Committee review, 14-15

National Competition Council review, 12-14

policy review, 10-11

software industry, in *see* USA v Oracle Corporation

substantial lessening of

airline alliance (Qantas and Air NZ), 65

### **Competition Principles Agreement (CPA)**

unconscionability and, 113-115, 125-129

intellectual property review, 10-11 patent privileges, 8-9

### **Compliance committees**

centralisation, 179-181 costs, 185-187

```
establishment, 170-171
    functions, 171-176
    interaction with board, 178-179
    members, 176
        background and experience, 177-178
        tenure of, 177
    prevalence, 171
    reporting, 171-172
    research findings, 188-189
    role, 170
    size, 178
Consumer credit contracts
    disclosure obligations
        predatory lending, 235-237
        ordinarily prudent consumer test, 238-239
    regulation, 238
Consumer protection
    competition and, 51-54
    National Competition Policy, Productivity Commission report, 51-54
    regulation, 52-53
Contract
    breach of
        concurrent liability with s 52 TPA see Misleading or deceptive conduct
    good faith, obligation of see Good faith in commercial contracts
Contractual interference
   justification defence, 142-145
Contributory negligence
    equitable compensation, 386-388
Corporations
    legislation series, book review, 156
Crown immunity
    ACCC v Baxter, 486-489
Damages
    breach of fiduciary duty, for, 390-391
    equitable compensation distinguished, 379-380
    exemplary see Exemplary damages
    misleading or deceptive conduct, for, 251-252
Dawson Report
    taking advantage of market power, 340-341
Disclosure obligations
    consumer credit contracts
        predatory lending, 235-237
```

ordinarily prudent consumer test, 238-239 Uniform Consumer Credit Code, 235-237

### **Employment**

bargaining agent's fee, claim for, 56-57 certified agreements, validity of, 61-62 industrial action, legal status of, 62-63 relationship, what pertains to, *Electrolux case*, 55-63

### **Equity**

book review, 158

breach of fiduciary duty, exemplary damages for see Exemplary damages for breach of

### fiduciary duty

equitable compensation see Equitable compensation

### **Equitable compensation**

accessory liability, 377 account of profits distinguished, 375-376 advantages of remedy, 369 assessment, 378 availability, 370-371 Brickenden principle, 385-386 categories, 373-374 causation, 381-385 contributory negligence, 386-388 damages distinguished, 379-380 exemplary compensation, 390-391 fiduciary relationship, 370-371 flexibility of remedy, 380 interest awards, 390 limitation of actions, 391 loss of opportunity/chance, 376-377 material non-disclosure, 385-386 mitigation of loss, 388-389 object, 372 proprietary relief distinguished, 372-375 punitive damages, 390-391 remoteness, 381-384 reparative compensation, 371

solicitors, trust account obligations, 389-390 specific restitution distinguished, 373 substitutive compensation, 371 tracing distinguished, 373-374

types, 371-372

Youyang's case, 389-390

```
Exclusion clauses
    misleading or deceptive conduct, 250
        public policy considerations, 250-251
Exclusive dealing (s 47 TPA)
    ACCC v Baxter, 485-489
    legislative provisions, 193
Exemplary damages
    breach of fiduciary duty, for see Exemplary damages for breach of fiduciary duty
    contract, breach of, availability of remedy, 443-444
    deterrence element, 431-432
    objections to, 433-435
    private law, in, 433-435
    punishment, aim of, 431
    purposes of, 430-433
    tort, availability of remedy in, 444-445
    vindication, role of, 433
    what are, 429
Exemplary damages for breach of fiduciary duty
    account of profits, 436-439
        onus of proof, 439
    allowance for work and skill, 438-439
    availability of, 435-443, 446
    contract, breach of, availability of remedy, 443-444
    election of remedies, 441-442
    interest on awards, 439-440
    tort, availability of remedy in, 444-445
Evidence
    antitrust assessments, in see USA v Oracle Corporation
    misleading representations, of, 263-267
Fairness
    unconscionability and, 114-115, 123-124, 129-136
Fels, Allan
    TPC Chairman, 474
Fiduciary duties
    breach of
        account of profits, 436-439
        allowance for work and skill, 438-439
        election of remedies, 441-442
        exemplary damages see Exemplary damages for breach of fiduciary duty
        injunctions, 441
Fiduciary relationships
    equitable compensation, 370-371
```

```
Foreign organisations
    privacy protection for, 50
Franchise agreements
    business format, 208
    business judgment approach, 212-214
    disputes
        termination, 219-220
        territory, 220-222
        types of, 211-214
    Dymocks case, 292-293
        termination issues, 293-295, 297-298
    good faith obligations, 97, 296-297
        case law, 214-217
        implications for franchisors, 217-219
        termination disputes, 219-220
        territory disputes, 220-222
    increase in, 208
    relational contracts, 290, 295, 298-300
        influence of, 296-298
        model, 291-292
        termination, 297-298
    relationship between parties, 209-211, 295
    statistics, 208
    termination disputes, 219-220
        Dymocks case, 293-295, 297-298
    territory disputes, 220-222
Fraud
    book review, 158
Good faith in commercial contracts
```

exemplary damages for breach of duty see Exemplary damages for breach of fiduciary duty

common law obligation, concerns regarding, 88-89 franchise agreements see Franchise agreements implied obligation, 90 case studies, 90-92 requirements, 93-94 scope, 95-98 predatory lending, 238 relational contracts, 94

### Health care markets

agency relationships, 409 authorisations in, 423-427 onus of proof, 423

```
collective bargaining rights, 424
    competition analysis, 417-422
        test, 417-418
    market definition, 411-417
        geographic markets, 415-416
        product markets, 412-415
        public/private providers, 416-417
        purposive approach, 411-412
        SSNIP test, 412-414
    market failure, 408-411
    Medicare, 409-410
    mergers, authorisation of, 427
    misuse of market power, 422-423
    Pharmaceutical Benefits Scheme, 410
Hilmer Committee
    intellectual property review, 10-11
Injunctions
    criminal conduct, to restrain, 441
Insider trading
    civil penalties, imposition of, 301-304
    criminal offence, 301
Intellectual property
    compulsory licensing (s 46 TPA), 155
    Hilmer Committee review, 10-11
    IPCR Committee, review of legislation, 14-15
    National Competition Council review, 12-14
    patent privileges see Patent privileges
    review of legislation, 10-11
Intellectual Property and Competition Review (IPCR) Committee
    competition, review of, 14-15
    parallel import restrictions, 19-21
    patent privileges, 16-19
        prospect theory, 17
        reward theory, 17
    patents, review of, 15-17
    review of intellectual property legislation, 14-15
    TRIPs Agreement, 18
Interest
    equitable compensation claims, 390
International carriage of goods by sea
    conventions relating to, 70
```

```
UNCITRAL Draft Instrument, 70, 79-80
        aims and objectives, 71
        application, 72
        arbitration, 78-79
        Carriage of Goods by Sea Act 1991, comparison with, 71-79
        electronic communication, 77
        jurisdiction, 78
        liability regime, 74-77
        performing party, concept of, 74
        period of responsibility, 73-74
        scope of, 71-73
        transfer of rights, 77-78
    uniformity, need for, 70
International trade
    book review, 159
Limitation of actions
    equitable compensation, 391
McComas, Bob
    TPC Chairman, as, interview, 475-484
Managed investments
    compliance committees see Compliance committees
    industry, 167
        ABS data, 169
        ASIC data, 170
    outsourcing, 181-185
        custodial arrangements, 183-185
        investment management, 185
        key areas, 181
    prescribed investments regime, 181
    registered schemes, 167-168
    research, 168
    regulation, 167
    single responsible entity approach, 181
Market
    barriers to entry, 345-349
        behavioural, 348
        structural, 346-348
    definition see Market definition
    health care see Health care markets
Market definition, 345, 474
```

health care, in, 411-417

```
product markets, 412-415
        public/private providers, 416-417
        purposive approach, 411-412
        SSNIP test, 412-414
    SSNIP test, 412-414
        US Merger Guidelines, 450
    USA, in, 450
    USA v Oracle Corporation
        customer market, 454
        geographic area, 454-455
        product market, 453
        vendor market, 454
Market power
    behavioural indicators of, 352-353
    financial power, 350-351
    misuse of see Misuse of market power
    sources, 345-352
        barriers to entry, 345-349
        financial power, 350-351
        independent conduct, inhibiting, 350
        market share, 349
        vertical integration, 350
    substantial, 344-345
    vertical integration, 350
    what is, 192
Marketing
    ambush, 397-400
Medical practitioners
    training, regulation of, 426
Medicare
    operation of, 409-410
Mergers
    Guidelines, 450
    health care, in
        authorisation of, 427
    price elevation test, 450-451
    QCMA test, 450-451
    substantial lessening of competition, 452
        unilateral effects, 452-453
    US Merger Guidelines, 450-451
        efficiencies defence, 453
    USA v Oracle Corporation, 448-474
```

geographic markets, 415-416

### conduct, what constitutes contractual promises, 255-259 implied contractual provisions, 257 making a contract, 253-254 pre-contractual representations, 259 damages (s 82), 251-252 exclusion clauses, 250 public policy considerations, 250-251 legislative provisions, 249 liability for breach, 266-267 contractual liability compared, 253 new rule, 275-277 public policy concerns, 279-282 resolution, suggestions for, 282-287 s 68A, 277-278 remedies damages (s 82), 251-252 s 87, 252-253 representations as to future events (s 51A), 260 application, 267-268 consequences, 268 evidence required, 263-267 implied representations, 261, 265 prediction cases, 264, 265 present belief/ability/intent, representation of, 261-264 subjective intent, 265, 267, 273 time evidence to be judged, 263 Unisys v RACV, 272-274 Unisys v RACV alleged representations, 270, 272-274 conclusions to be drawn from, 274-275 contractually agreed delivery date, 271-272 decision, 271 facts, 269 Misleading representations (s 51A TPA) future events, as to, 260 application, 267-268 consequences, 268 evidence required, 263-267 implied representations, 261, 265 prediction cases, 264, 265 present belief/ability/intent, representation of, 261-264

Misleading or deceptive conduct (s 52 TPA)

```
subjective intent, 265, 267, 273
        time evidence to be judged, 263
        Unisys v RACV, 272-274
Misuse of market power (s 46 TPA)
    ACCC v Baxter, 485-489
    access regime, 154-155
    bundling, 192-194
    "carrying on a business", 151-152
    elements, 327
    health care markets, in, 422-423
    legislative provisions, 126-127, 192
    leveraging, 150
    NT Power Generation v PAWA, 150-155
    object of, 343
    taking advantage, 327-368
    ACCC v Baxter, 485-489
        Boral decisions, 334-336
        conterfactual approach, 355-367
        Dawson Report, 340-341
        Dowling v Dalgety, 362
        materially facilitate test, 332
        Melway cases, 330-334, 363
        objective test, 355
        PAWA, 339-340, 366-367
        Queensland Wire case, 329-230, 361-362
        rational business explanation, 333-336
        Rural Press, 336-337, 363-365
        Safeway case, 338-339
        Senate Report, 340-341
        use test, 330
    vertically integrated corporations, 150-155
Mitigation of loss
    equitable compensation, 388-389
National Competition Council (NCC)
    intellectual property review, 12-14
    Terms of Reference, 12
National Competition Policy
    Productivity Commission report, 51-54
National Privacy Principles
    breach, 46
        standing, 45, 47
    interpretation, 47-48
```

### airline alliance (Air NZ and Qantas) appeal, 64-65 authorisation proceedings, 305-311 background, 64 competition analysis, 65 domestic main-trunk market, 66 public benefit, 67 public detriment, 66-67 Parallel imports restrictions in copyright legislation, 19-21 Patent privileges benefit threshold, 21-25 Competition Principles Agreement, 8-9 IPCR Committee, 16-19 prospect theory, 17 reward theory, 17 National Competition Policy, 9 public interest test, 25-28 Regulatory Impact Statements, 22-24 Persona designata doctrine Australian Competition Tribunal, application to, 41-43 separation of powers, 39 incompatibility condition, 40 public confidence incompatibility, 40-41 Pharmaceutical Benefits Scheme (PBS) operation of, 410 **Predatory lending** Community Development Finance programs, 227 disclosure requirements, 235-237 ordinarily prudent consumer test, 238-239 effect of, 224 financial vulnerability, 225, 228-231 nature and experiences of, 231-234 policy responses to, 234-239 good faith obligations, 238 history, 225-228 responses to, 225-228, 234-239 Uniform Consumer Credit Code, disclosure requirements, 235-237 what is, 225 **Predatory pricing** bundling and, 33-34

New Zealand

```
what is, 191
Privacy
    enforcement procedure, 49
    foreign organisations, 50
    industry codes, 49
    Internet Industry Association code, 49
    National Privacy Principles
        breach, 46
        interpretation, 47-48
        standing, 45, 47
    Seven Network case, 45-50
        implications for business, 48
Queensland
    Biodiscovery Act 2004, 146-149
Quistclose trusts
    operation, 392
    resulting trusts, 392-396
        automatic, 392
        presumed, 393
Remoteness
    equitable compensation, 381-384
Restitution
    book review, 158
Resulting trusts, 392-396
Retail tenancies
    unconscionability, application to, 136-140
Senate Report
    taking advantage of market power, 340-341
Separation of powers
    Australian Competition Tribunal, 41-43
    Boilermakers' principle, 39
    general principles, 36-37
    persona designata exception, 39
        incompatibility condition, 40
        public confidence incompatibility, 40-41
    Tasmanian Breweries case, 37-38
Software industry
    competition in see USA v Oracle Corporation
Solicitors
    trust account obligations, equitable compensation, 389-390
```

### Special disadvantage

unconscionability, 103-107, 137-139

### Substantial lessening of competition

airline alliance (Qantas and Air NZ), 65 mergers, 452 unilateral effects, 452-453

### Surgeons

training, regulation of, 426-427

### Surrogate ships

arresting see Arrest of surrogate ships

#### Tort

exemplary damages, availability of remedy for breach, 444-445

### **Tracing**

equitable remedy, 373-374

### **Trade Practices Commission (TPC)**

Bannerman, Ron, 475, 477-478 Baxt, Bob, 475 Chairmen of, 475-484 Fels, Allan, 474 McComas, Bob, 475-484

### **TRIPs Agreement**

patent threshold requirements, 18

### **Trust accounts**

solicitors' obligations, equitable compensation, 389-390

#### **Tying**

what is, 31, 190

# UNCITRAL Draft Instrument on Transport Law see International carriage of goods by sea Unconscionability

ACCC v Berbatis, 102-107
competition and, 113-115, 125-129
concept of, 102-103, 119-122
economic efficiency, 129-136
fairness and, 114-115, 123-124, 129-136
legislative provisions (Pt IVA TPA), 100-101, 107, 122-124
consistency in interpretation, 115-119
matters court may consider, 120
misuse of market power, 126-127
relationship of trust and confidence, 125-129
retail tenancies, application to, 136-140
special disadvantage, 103-107, 137-139
unwritten law, 107-113, 122-124

### **Uniform Consumer Credit Code**

consumer credit contracts, regulation of, 238 disclosure requirements, 235-237

### **United Kingdom**

bundling case law, 202-203

### **United States**

bundling case law, 200-204 Merger Guidelines, 450-451 efficiencies defence, 453

### **USA v Oracle Corporation**, 448-474

consultant witnesses, 456-457
customer evidence, 455-456
difficulties with, 462-468
expert evidence, 458-461, 468-473
Elzinga, 458-460
Iansiti, 458
industry evidence and, 473-474
McAfee, 460-461
quantitative vs qualitative, 469-471
industry evidence, 455-458, 461-462

ndustry evidence, 455-458, 461-46 expert evidence and, 473-474

markets, establishment of customer market, 454 geographic area, 454-455 product market, 453 vendor market, 454 vendor witnesses, 456-457