

TOPIC 1 Introduction to Australian Contract Law

What is a contract?

- A promise or set of **promises** that is **legally binding**
- An agreement that a court will enforce

What is a promise?

- Undertaken by one ('promisor') to do something or refrain from doing something if the other ('promisee') does something or refrains from doing something or makes a promise in return

What does it mean to be legally binding?

- Enforceable in court – for the affected party – law will ensure promises are kept
- Law will compel its performance or award damages if it hasn't been performed
- A number of pre-conditions must be met if a contract or promise is to be legally binding

Central Nature of Contract Law

Contract forms the basis for

- Commercial transactions (ex, 2 businesses entering into a contract);
- Consumer transactions (ex, provider with Telstra); and
- Delivery of public services (ex, train services, hospitals, education)

From the point of view of business

- Free enterprise economy (buying, selling, leasing, hiring etc.)

From the point of view of consumers

- Purchase of goods or services

From the point of view of governments

- Most of what government do derives from statute

*IMPORTANT: With contracts there is: consistency, predictability

*Common law – parliament creates law

*Australia inherited British system – therefore, in commonwealth system, judges can create law as well not just the parliament

Composition of Contract Law

Judicial decisions on contract law

- **'judge made' law**
 - o Judicial decisions accumulated over the years
 - o Scholarly books played an important role – chitty, Pollock, anson
- The common law
- Equity

Statute

- Legislation, eg, the Australian Consumer Law contained in Schedule 2 of the *Competition and Consumer Act 2010*

Contractual Obligations are Self-Imposed

Generally parties are free to decide

- Whether or not to enter into a contract
- What the nature and content their respective rights
- Obligations they will undertake towards each other; and even,
- The consequences of the breach of their obligations (whether damages will be recoverable etc)
 - o The two pillars of contract law, 'Freedom' and 'Sanctity' (once contract is made, it should be enforced)

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This contrasts with most other areas of law

- Eg: the criminal law

*2 doctrines may not work in illegality or misleading conduct

There are limits to contractual freedom:

- Ex, third party personal injury insurance
- Inequality in bargaining position
- Associated use of standard form contracts – person wishes to enter into contract must do so on terms laid down by other party
- If dominant party's conduct constitutes duress or undue influence or unconscionable or terms in question are judged 'unfair', will contract be unenforceable
- Illegality
- Misleading conduct
- Fraud
- Unconscionable dealing
- Statutory restrictions
- Consumer protection
 - o Implied terms, prohibition of unfair terms
- Anti-discrimination legislation
- Bargaining power

Within such limits, contract law provides a framework for the parties to create their own law – people can create their own rights and obligations

Essential purpose: - both economic and moral ground

- **secure cooperation** in human behaviour – particularly in **exchange**
- Provides sanction
- **Remedy injustice** caused by defendant having infringed claimant's rights

The Law of Contract

Law of contract, not a law of contracts

Relationship with other branches of the law

- Contract and other branches of law are not mutually exclusive
- A particular event may give rise to rights or obligations under more than one regime
 - o Beware of compartmentalising the law

Ex, a contract in which John promises to pay Bill \$100 to assault Sam may be considered under the law of contract as well as the criminal law and in torts.

Contract Theory

Classical contract theory

- Freedom of contract – individuals best judges of what's in their own interests – should be 'free' to contract whatever terms
- sanctity of contract – a contract, once made, is 'sacred' and should be enforced according to its terms and not rewritten by courts b/c they think parties made bargain unsatisfactory
- limitations:
 - o couldn't accommodate sympathy developed for those who lacked bargaining power needed to protect own interests; or
 - o growing desire of courts to intervene in order to ensure just outcomes