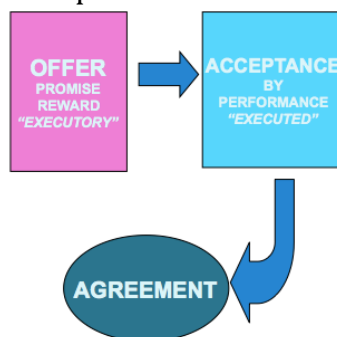
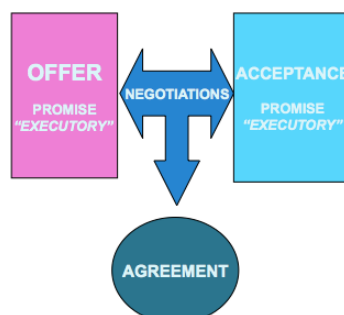


Offer

- **IS THERE AN OFFER? Objective test**
- *** Indication by one person to another of his/her *willingness* to enter into a contract with that other person on *certain terms* (Carter, Peden & Tolhurst, 2007)
 - If you can say 'I accept' → it is offer
- Clear statement of terms by which the person making the offer is prepared to be bound
- Manifestation by one party to the other (by words/conduct) of his/her *willingness* to be legally bound by *certain terms* if the other party, to whom that manifestation is directed will show his/her willingness to be bound to the offeror on those terms
- The word 'offer' isn't conclusive of existence of an offer
 - **Objective standard** – would it appear to a reasonable person in the offeree's position that an offer was intended?
 - Easier to prove, more universal, certain, consistent
 - Outwards manifestation – words/conduct
- Before contract:
 - Offeror: person making offer
 - Offeree: person to whom offer is made
- After contract:
 - Promisor
 - Promisee
- Unilateral contracts: offeree accepts the offer by performing his/her side of the bargain
 - Consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer
 - Conditional = unilateral



- Bilateral contracts: obligations of both parties remain to be executed at the time of formation (unilateral- offeree has already executed at formation)
 - Exchange of promises



Gibson v Manchester City Council [1979]

- Conservative Party controlled area → sent letter to council housing tenants saying 'if you would like to make a formal application... we may be prepared to sell' the house → Gibson filled out form, returned it
- Labour Party gained control, repealed policy → agreed to honour previous contracts → denied Gibson as it wasn't signed/completed

Acceptance

- Definition: unqualified assent to the terms of an offer
- Subjective approach: no contract is formed unless there was a real consensus between parties
- Objective approach (*Taylor v Johnson*): only considers external manifestations of consent, disregarding offeree's actual state of mind
 - Contract can be voidable, but not *void ad initio*
 - Would the reasonable person consider the parties to have reached agreement having regard to their external manifestations of conduct?
- Bilateral: use objective test
- Unilateral: use subjective test → must be performing on faith of the offer
 - Can't be coincidental or accidental

Conduct constituting an acceptance – bilateral

Smith v Hughes (1871)

- Smith gave Hughes sample of new oats, H thought they were old oats but they were new → sent part of the payment, new oats arrived but H wanted old oats, so he refused to pay S the rest of the money – S sued for breach of contract
- H argued no meeting of minds – no enforceable contract
 - Doesn't matter - they had communicated by their conduct & words
- Blackburn J: set out classic statement of **objective interpretation** of people's conduct when entering into a contract
- **Key legal principle:** use the objective test for bilateral contracts

Taylor v Johnson (1983)

- Johnson gave Taylor option to purchase 2 lots of land, around 5 acres, for \$15,000 → even though it was worth much more & T knew this
- J was under mistaken belief that agreement was \$15,000 per acre so \$150,000 → said T knew about mistake, and took advantage
- **Key legal principle:** objective test prevails
 - Subjective test: contract wasn't valid, no meeting of minds
 - *Objective test:* contract was valid, reasonable person → **PREVAILS**
→ Doctrine of mistake was used: contract is *void ad initio* if one party to the contract enters into it under a serious mistake as to the contract of a fundamental term & the other party has knowledge of that mistake

Fitness First (Australia) Pty Ltd v Chong [2008]

- C was unaware contract stipulated \$200 cancellation fee – didn't read it
- **Key legal principle:** by signing a legal document, parties manifest assent to the printed terms → irrelevant that there's no true consensus ad idem between parties (Harrison)

Consideration

- Detriment/liability voluntarily incurred by promisee... or benefit conferred on promisor at the instance of the promisee... in exchange for the promise (Jenks)
 - Promisee: person something is promised to
 - Promisor: person promising something
- It is required that something must be given in return for a promise in order to make it binding
 - Price paid by promisee for the promisor's promise
- When a contract is made by exchange of promises → each party's promise provides consideration to support promise made by the other
 - Eg. A & B enter contract for sale & purchase of car for \$1000
 - A = promisor to sell car, B = promisee
 - B = promisor to pay \$1000, A = promisee
- Don't need consideration for deeds
 - *Nudum pactum*: agreement that isn't supported by consideration on both sides → naked agreement → unenforceable
- 2 aspects to definition:
 - **Benefit/detriment requirement**: promisee must incur a detriment or confer a benefit (doesn't have to be on the promisor)
 - **Bargain requirement**: that benefit/detriment must be given in return for the promise (*quid pro quo*)
- Consideration must move from the promisee → doesn't have to move to the promisor
 - Eg. Offer to pay Jack \$100 to wash Alex's car → washing car doesn't give any benefit to me, but Jack still incurred detriment
- Consideration may be the performance/promise of an act
 - If performance: said to be *executed*
 - If promise: said to be *executor*
- Must not consist of illegal/immoral acts/objects
- If executor considerations become impossible → promisor will be wholly/partially released from obligations, may recover money back

→The essential elements

Australian Woollen Mills Pty Ltd v Commonwealth (1954)

- AWN claimed unilateral contract had arisen out of government's wool subsidy scheme → Commonwealth announced it would pay a subsidy on all wool purchased for domestic use
 - AWN then purchased a large amount of wool so they can get subsidy → government then discontinued scheme, wouldn't pay for wool as it exceeded the amount, AWN had to pay for it
 - AWN argued purchase of wool was acceptance of government's offer & also consideration for the promise to pay the subsidy
 - Unilateral contract
1. Dixon CJ: Benefit/detriment requirement was fulfilled
 2. Bargain requirement not fulfilled: AWN would be purchasing the wool anyway, so it wasn't good consideration – no express/implied request from government for AWN to actually purchase wool
 - Government letter was just statement of policy, not actual offer
- **Key legal principle**: for a unilateral contract, the promise must be made in return for the doing of the act
 - Must be relation of a *quid pro quo* (this for that)
 - Requesting someone to do something is suggestive there's a contract – if not a request, just an 'if you do this', then not necessarily an offer
 - Conditional gift

Intention to create legal relations

→ NO HIGH COURT AUTHORITY

→ The objective approach

- Would the reasonable person regard the agreement as intended to be binding? Look at following external manifestations:
 - Language used by parties
 - Subject matter of agreement
 - Status of parties to agreement
 - Relationship of parties with one another
 - Context in which agreement was made

Shahid v Australasian College of Dermatologists [2008]

- Shahid was GP who wanted to become specialist dermatologist → required status as a Fellow in College. This required period of supervised training, only attainable by recommendation of College. In WA, only one accredited post available each year. Shahid appealed to College about decisions. Eventually she sued them & said these appeals were contracts & College wasn't genuine & effective in appeal process. They engaged in misleading & deceptive conduct about attributes she should have, & about its selection process & appeal rights.
- Was college commercial organization, and was there an intention that its appeal processes constitute a contract? → yes
- College earned substantial revenues through teaching & maintained commercial relationships with professionals
 - As appeal process required such a large fee → suggests strong intention that exchange of monetary consideration for a service would be legally binding
- Jessup J: 'any professional activity' does not mean anything done by a professional
- **Key legal principle:** use objective test when considering intent
 - Court takes into account circumstances (amount of money) & relationship of parties

Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (receivers & managers appointed) (in liq) [2009]

- Conduct of parties after agreement can show intention, if it indicates objective intention of parties
- Subjective intentions are irrelevant
- Commercial dealings = intention

→ Presumptions

- Commercial agreements = presumed to intend legal relations
 - Onus of proof on party denying contract, to establish there wasn't intention
- Social & domestic agreements = presumed **not** to intend legal consequences
 - Onus of proof on party asserting contract, to establish there was intention
- Any other agreements = no presumptions
 - Onus of proof on party wanting to sue to prove intention

Certainty

- Cases concerning certainty reflect tension between principle of *pacta sunt servanda* (agreements must be kept) and courts' reluctance to make a bargain for parties
- Consequences of uncertainty:
 - Can *sever* them if they don't change whole agreement
 - Party who was getting benefit from term can *waive* the enforcement of term

→ Requirement that contract be certain has 3 aspects:

1. Sufficiently complete

- Parties must reach agreement on all essential terms
 - Can decide that an essential matter will be determined by future agreement
- Essential term: term without which the contract cannot be enforced
- Examples of essential terms:
 - Lease of land: commencement date, rental to be paid, parties, description of land
 - Sale of land: parties, description of land, price
 - Non-essential: settlement date – court can imply reasonable settlement date
 - Sale of goods: parties, description of goods
 - Non-essential: price

→ *Goods Act (Vic) 1958 s13: Ascertainment of price*

- S1: The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties
- S2: Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Milne v Attorney-General for the State of Tasmania (1956)

- Court had to decide whether certain documents contained terms of contract, however the law couldn't supply the terms the P wanted
- **Key legal principle:** no contract is concluded until parties negotiating are agreed upon all terms of their bargain – unless indeed the terms left outstanding are 'such as the law will supply' (implied terms)
 - The more complex a case, the less likely courts will fill in implied gaps

ANZ v Frost Holdings Pty Ltd [1989]

- Frost submitted proposal to ANZ about producing calendars with Australian paintings on them & ANZ would buy at least 50,000. Would have ANZ logo on it, but no other essential terms eg. Design, content, size etc. Frost upgraded price but ANZ said it didn't wish to proceed
- Found there was contract but then on appeal → no agreement on essential terms
- Teague J: there's no binding & enforceable obligation unless the terms of the bargain, or at least it's essential or critical terms, have been agreed upon
- **Key legal principle:** court will only imply a reasonable price for goods if all essential terms have been agreed, court will only interpret contract, not write contract

May & Butcher v The King (1934)

- **Key legal principle:** agreement to agree in future on essential term means it's missing from contract → courts won't imply the term, court's treat it as if it's not there, so an essential term is missing from the contract → incomplete contract (Viscount Dunedin)
- Agreement to agree is not enforceable, unless:

Privity

- Stipulates that only a person who is party to a contract can enforce the contract & incur obligations under it → 2 aspects:
 1. Contract can't confer an enforceable benefit on a non-party
 2. Contract can't impose an enforceable burden on a non-party
- 3 examples on how rule is unsatisfactory:
 - If A & B enter into contract under which A promises B to pay \$100 to C, but A doesn't do it, C has no right to sue A
 - If A & B enter into contract under which A promises B to perform building work for B, but A doesn't do it, C cannot sue A
 - If A & B enter into contract which includes a term that A cannot sue C if C incurs liability to A, C still has no defence if A sues C for any liabilities incurred
- Ways to get around these inconsistencies:
 - Contracting party can enforce contract eg. B can obtain specific performance to order A to pay C
 - Can argue privity doctrine has no application → C can claim they were in fact party to contract by virtue of doctrine of agency
 - C can establish that in respect of A & B's contract, B was trustee for C → C can compel B to enforce contract through equity
 - C can establish estoppel against B if B has led C to believe that:
 - C would have enforceable rights against B; or
 - B would perform a certain promise→ and C has relied on that assumption in a way that she will suffer detriment if B doesn't act in accordance with it
 - If C can establish B's conduct in making the contract was misleading/deceptive, can claim under Aus consumer law

Identifying the contracting parties

Coulls v Bagot's Executor & Trustee Co Ltd (1967)

- C entered into contract allowing O'Neil constructions to quarry part of his land. In exchange O'Neil would pay royalties to C. When C died, his executor (B) wanted to determine if O'Neil was required to pay royalties to C's wife or to executor
 - Heading of agreement was 'agreement between Arthur Coulls & O'Neil Construction' → no mention of wife
 - 'I authorize O'Neil to pay my wife' → not 'we authorise'
- Was C's wife party to agreement?
 - Windeyer (dissent): where promise is made to joint promisees, then either promisee can enforce even though consideration only moved from one
 - Majority found she was not party to contract, even though she signed
- If a party has suffered detriment simply by performing the contract → no estoppel, it's their legal obligation to perform
- **Key legal principle:** the intention of parties & wording of contract can show who the parties to a contract is

Non-application of the Privity rule

- Circumstances where it's possible to show that a party not directly involved in acts of contract formation is nevertheless party to contract:
 - Where one of the parties involved acts as **agent** for non-involved party; and
 - Where one of the parties involved transfers contractual benefits to non-involved party by way of **assignment or novation** of contract
 - Assignment: transfer of some/all contractual rights owed to one contractual party to a third party

Express terms

Identifying the express terms

- Terms actually expressed & agreed upon by the parties
- Objective test: would the person signing intend to be bound by that which he has signed

→ Written terms & the effect of signature

L'Estrange v F Graucob Ltd (1934)

- L'Estrange agreed to purchase cigarette vending machine from Graucob, so she signed form headed 'sales agreement'. Machine didn't work satisfactorily, L wanted damages, but contract had no warranty clause
 - Contained clause: 'the agreement contains all the terms and conditions under which I agree to purchase the machine specified above and any express or implied condition not stated herein is hereby excluded'
- L claimed she was induced by misrepresentation to sign contract without knowing its terms, so they weren't binding on her
 - G argued any implied warranty was excluded by express term → there wasn't fraud
- **Key legal principle:** when a document containing contractual terms is signed, then in the absence of fraud or misrepresentation, party signing it is bound → immaterial whether he's read it or not
 - (this would be decided differently today due to Aus Consumer Law)

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004)

- Toll (took over Finemores, original company) entered into contract with Richard Thomson Pty Ltd (acting for Alphapharm) that Finemores would store/transport influenza vaccine
 - Cl 5: Thomson enters into contract on own behalf & also as agent
 - Cl 6: provided carrier wouldn't be responsible for loss. Richard signed without reading
 - Vaccines were rejected by authority as temperature had dropped during transit, another rejected as temp dropped in storage
 - A tried to sue F for negligence, breach of duty, F relied on cl 6
 - A said it wasn't party to contract, R wasn't their agent
 - Found R was their agent as A required their services
- If a person signs a document without reading it → other party doesn't have to show due notice was given of its terms
 - Necessary to bind person to signature for commercial certainty
- **Key legal principle:** circumstances where signing document might not bind the person:
 - If document wasn't contract, but just memo of previous contract
 - Non est factum (mistake)
 - Misrepresentation/duress/fraud/undue influence/unconscionable dealing

→ Exception to signature rule

Curtis v Chemical Cleaning & Dyeing Co (1951)

- Curtis took white satin wedding dress to CC for cleaning, handed a receipt to sign. C asked why she needed to sign, worker said it's because shop won't accept liability for certain risks such as damage to beads/sequins
 - Receipt actually said they won't accept liability for 'any damage howsoever arising'
 - Dress returned with stain, C claimed damages
- Denning J: held there was innocent misrepresentation by shop assistant
 - Misrepresentation: any behaviour by words/conduct that misleads the other party about existence/extent of exemption