

WHAT IS A CONTRACT?

“Any promise (or set of promises) which the law enforces on the basis that is supported by consideration is a contract”

- A promise is enforceable if a court would grant a remedy for its breach.
- When a contract occurs through an exchange of promises, the fact that legal sanctions may be brought to bear for breach of contract promotes the confidence that promises will be honoured.
- Sanctions are an important part of contract law; a breach of contract is a wrongful act for which the law provides a remedy.
- Classical understanding; a contract is an expression of the joint will of parties engaged in a transaction- contractual obligations are voluntarily assumed and sharply distinguishable from obligations imposed by the law of tort.

FORMATION OF A CONTRACT

- The question *“Is there a contract?”* requires the establishment of **4 material elements**:
 - I. **AGREEMENT** between the parties (expressed as “offer” and “acceptance”);
 - II. **CONSIDERATION** (each party must give something for the other’s promise);
 - III. **INTENTION** to create legal relations between the parties;
 - IV. **CERTAINTY**- terms must be certain complete, and not illusory

Other aspects of formation:

- » **FORMALITIES** required for some types of contract
- » **PRIVITY** - only parties to the contract are bound
- » **CAPACITY** – only parties with capacity are bound

AGREEMENT

- The traditional approach to establishing Agreement is through Offer and Acceptance.
 - **Offer** made by one party- the “Offeror”
 - Offer **Accepted** by the other party- the “Offeree”
 - Agreement occurs when **acceptance** is **communicated** by Offeree to Offeror.
 - But there are limits to this approach and there may be Agreement without Offer and Acceptance.

BILATERAL CONTRACTS	UNILATERAL CONTRACTS
2+ parties <u>exchange</u> a promise or set of promises for each to do something in the future; - A promises to transfer ownership of his car in return, B promises to pay- - Both promises are executor - to be performed at in future after the contract is formed	- Typically reward scenarios; 2 parties to the contract but 1 promise - Only 1 promise is made; A promises to pay \$100 to B if B finds A’s lost puppy - B accepts A’s offer when B <u>performs</u> the stipulated task. Contract is formed at same time B performs her obligations under it. (No need to give notice of acceptance) - At time contract formed, A’s obligation/promise is executory and B obligation has been executed (ie already performed) – <i>(Carlill v Carbolic Smoke Ball; Mobil Oil v Wellcome)</i>

INTERNATIONALISATION OF CONTRACT LAW

United Nations Convention on Contracts for International Sale of Goods-

CISG (1980) Vienna Convention

- Enforced in Victoria (displaces domestic law) schedule to *Goods Act 1965 (Vic)*
- Applies to contracts between private business (B2B) for the international sale of goods:
 - Between parties with places of business in different countries that have ratified CISG; or
 - Where rules of private international law (conflict of law rules) would apply the law of a country that has ratified CISG as governing the contract; or
 - Where parties 'opt in' and choose CISG to apply
- 84 Countries including Aust, NZ, USA, China, Japan, Germany (NOT UK)
- » CISG is to be interpret with regard to its international character and the need to promote uniformity in its application and the observance of good faith in international trade

UNIDROIT Principles of International Commercial Contracts 2010 (UPICC)

- Principles developed under the auspices of the International Institute for the Unification of Private Law which is an inter-governmental organisation based in Rome.
- Uniform rules for contract law
- For international commercial contracts (not just sale of goods)
- Apply when parties agree that their contract will be governed by them (opt-in, express provisions in contract)

STATUTORY OBLIGATIONS AND REGULATION

- *Australian Consumer Law* {**ACL**} Schedule 2 of *Competition and Consumer Act 2010 (Cth)* {**CCA**}
- **ACL** is a comprehensive consumer protection legislation which applies uniformly across:
 - o Regulates misleading and deceptive conduct, unconscionable conduct, unfair contract terms, consumer guarantees, product liability and unsolicited consumer agreements.

AGREEMENT - OFFER

"An offer is an expression of willingness to contract on the terms stated"

OFFER AND ACCEPTANCE

- Traditional approach to establishing an agreement between two parties is to identify an offer made by one party and an acceptance of that offer by the other.
- A contract is said to have come into existence when acceptance of an offer had been communicated to the offeror
 - o Based on the C19th model of contracting; negotiations are conducted through written correspondence with a series of letters agreement.
 - o Classical contract theory; the offer & acceptance formula identifies 'a magic moment of formation' when the parties are ad idem - of one mind, and their individual wills come together to create binding obligations.

Must be:

- Of language that is sufficiently certain and promissory: *Gibson v MCC*

Must Not Be:

- Invitation to treat (below)
- Mere **Puff**: Refers to exaggerated sale talk. They are not intended by the speaker to be taken literally and a reasonable person would recognise this. As they do not constitute a 'representation' in law or a term, there is no remedy if they turn out to be false
- Unilateral contracts are generally not considered 'mere puffs' where language is sufficiently promissory: *Carhill v Carbolic Smokeball Company*
 - Not a mere puff where deposit is made
 - Objective test

NATURE OF AN OFFER

- In determining whether an offer has been made:
 - o Whether it would appear to a **reasonable person in the position of the offeree** that an offer was intended, and that a binding agreement would be made upon acceptance
 - o It does not matter whether the offeror in fact intend to make an offer; the court determines the offeror's **intention objectively**, according to **outward manifestations**.

UNILATERAL CONTRACTS

- One in which the offeree accepts the offer **performing** his or her side of the bargain.
 - *Australian Woollen Mills Pty Ltd v Commonwealth (1959) CLR*
 - o HCA explained "the consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer" - the offer is accepted by performing an act.
 - o HCA held that, for unilateral contract to arise, the promise must be made **in return for the doing of the act**. There must be a relation of **quid pro quo** (this for that) between the offeree's act and the offeror's promise.
- Accordingly, by the time the contract is formed, the offeree has already performed all his or her obligations.
- An offer is effective only if it identifies a valid consideration and manifests an intention to create a legal obligation.

INVITATION TO TREAT

- An invitation to treat is an invitation to others to make an offer or enter into negotiations. **Not an offer** because lacks sufficient indication of willingness to be bound; typical categories:

» MOST ADVERTISEMENTS (e.g. catalogues)

- NB. Adverts not binding non-contractual implications – eg misleading and deceptive conduct

» SHOP SALES –

- Items displayed in store and on shelves are considered invitations to treat - *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd*
- **Held** that customer make an offer when presenting items to the cashier, transaction is acceptances.
- **ACL s 35(2)**

» AUCTIONS –

- General rule is that:
 - the auction is an invitation to treat;
 - the bid is the offer; and
 - the offer is accepted by the auctioneer's "fall of the hammer".
- The general rule applies regardless if "without reserve" - *AGC v McWhirter (1977 NSWSC)*

