
70211 Contract Notes

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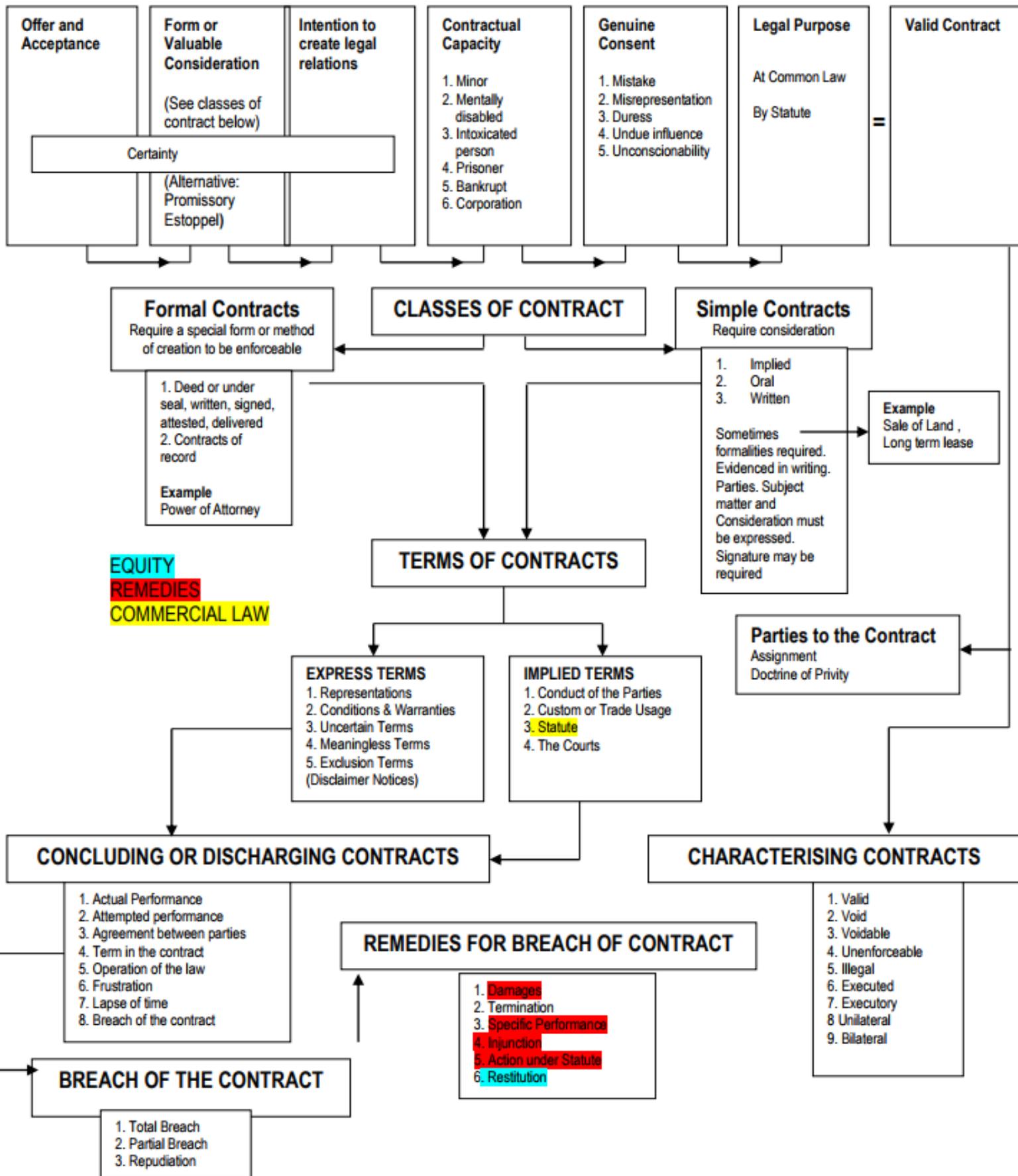
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A CONTRACT IS AN AGREEMENT BETWEEN TWO OR MORE PARTIES IN WHICH LEGAL OBLIGATIONS ARE CREATED WHICH ARE ENFORCEABLE BY LAW

Traditional approach: There are many different theories: See Lecture 1



1 Intro

1.1 Contract Definition

1. Is a legal expression of agreement between parties
2. The parties make the rules
3. Enforceable at law
4. A mechanism to define, arrange and regulate a transaction

1.1.1 Key elements of a contract

1. Promise
2. Capable persons - age, mental state
3. Obligation
4. Enforcement - key boundaries of the law

1.1.2 Formation Requirements

1. **Agreement** – offer and acceptance
 2. **Consideration** – exchange of promises
 3. **Intention** to be legally bound
- 
4. Legal **capacity** to enter
 5. Genuine **consent**
 6. **Legality**
 7. **Certainty**

1.1.3 Key definitions

- Validity/enforceability
 - ⇒ **Valid:** the essential elements present
 - ⇒ **Void:** no legal validity → one of the elements does not exist
 - ⇒ **Voidable:** validly formed but inherent defect through undue influence etc
 - It is only voidable on the behalf of the offeree
 - i.e. right to void a contract
 - ⇒ **Unenforceable:** validly formed à but with a technical defect
 - E.g. failure to pay stamp duty
 - ⇒ **Illegal:** “the court will not lend its aid to a man who founds his cause of action in an immoral or illegal act”
 - e.g. a contract to sell heroin
- Performance
 - ⇒ **Executed:** where one party has performed their promise
 - ⇒ **Executory:** where all the parties have done is exchange promises
 - Neither party has performed anything
- Content
 - ⇒ **Express:** by written or spoken word
 - ⇒ **Implied:** by conduct
- **Formal:** some must be in writing
- **Simple:** six essential elements (can be both written or oral or both)
- Unilateral/bilateral
 - ⇒ **Unilateral:** the offeree does not undertake to *perform* anything → but accepts the offer by performing their side of the bargain
 - E.g. Carlill (1983): the plaintiff accepted the offer by using the smoke ball
 - In a reward cases, the finder accepts the offer by returning the dog
 - In a unilateral contract à the obligation of the offeree is executed
 - ⇒ **Bilateral:** where at the formation there is an *exchange of promises* and the obligations of both parties remain to be performed
 - Executory

1.1.4 Relevance of equity

1. Used Where inadequate consideration → promissory estoppel
2. Some remedies such as equitable stop are so closely connected they are regarded as part of contract law
3. Remedies supplement common law damages → eg specific performance and injunction
4. A contract will be set aside or rescinded in equity where there has been unconscionable conduct
5. Equity will rectify where document mistakes have been made

1.1.5 Statutory obligations and regulation

- Key Legislation → Australian Consumer law (ACL → Competition and Consumer act 2010 (Cth) (CCA) schedule 2
- Financial services however → Australian Securities and Investments Commission act (2001) (Cth) (ASIC Act)
 1. Misleading or deceptive conduct
 2. Unconscionable conduct
 3. Unfair contract terms
 4. Consumer guarantees

<h2>2 Agreement</h2>	
<h3>2.1 Objective test of agreement</h3> <ul style="list-style-type: none"> ❖ Court will assess what has gone on between the parties objectively <ul style="list-style-type: none"> - Need an outward manifestation of intention to be bound ❖ All the circumstances will be assessed <ul style="list-style-type: none"> - traditional offer and acceptance is not always required. - In this case Brambles conduct showed it had accepted the council terms – even though it sent a letter back saying it didn't accept ❖ <i>"sometimes... having discussed the commercial essentials and having put in place necessary structural matters, the parties go about their commercial business on the clear basis of some manifested mutual assent, without ensuring the exhaustive completeness of documentations"</i> <ul style="list-style-type: none"> ⇒ essential question is whether the parties' conduct (including what was said and not said) reveals an understanding or agreement (mutual assent) which bespeaks an intention to be legally bound to the essential elements of a contract ❖ Need a meeting of the minds – consensus ad idem <ul style="list-style-type: none"> - Buyer thought he was getting old oats not new ❖ <i>"It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe"</i> ❖ <i>'The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.'</i> <p>However, the courts have tended towards objective standards because it is very difficult to investigate or rely upon private intentions:</p> <ul style="list-style-type: none"> ❖ Chong signed an application to join a gym on a 12-month contract without reading she was liable to pay a \$200 free if she cancelled within the first two months <ul style="list-style-type: none"> ⇒ Held: A valid contract does not require the parties to have consensus ad idem in that each full know and understand the terms of their agreement ⇒ By signing the form, Chong had manifested her assent to the printed terms. It was irrelevant that there was no true consensus ad idem between the parties she accepted through her conduct without a meeting of the mind à not necessary 	<p><i>Taylor v Johnson (1983) HCA</i></p> <p><i>Brambles v Bathurst City Council (2001) NSWCA</i></p> <p><i>Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001)</i></p> <p><i>Smith v Hughes (1871)</i></p> <p><i>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) HCA</i></p> <p><i><-- move this to terms</i></p> <p><i>Fitness first v Chong (2008)</i></p>

<h3>3 Offer Definition</h3> <p>Offer is an expression of willingness to enter into a contract on specified terms</p>	<p>Carter contract law in Australia 6th edition 2012 3 - 07</p>
<h4>3.1 Offer Rules: Summary</h4> <ol style="list-style-type: none"> 1. Must be definite <ol style="list-style-type: none"> a) An offer capable of being accepted/inviting acceptance → but not a command b) Definite proposal certain in terms c) Statement of present intention to be bound 2. Must be made to a single person or a class of persons 3. Must be communicated → cannot be accepted without knowledge of existence 4. All terms must be brought to the notice of the offeree (prior to acceptance) 5. May be revoked any time prior to acceptance <ol style="list-style-type: none"> a) Revocation can be express or implied. b) Revocation must be communicated – at least when to a specific person c) Offeree can be informed about the withdrawal from a reliable source d) Offers terminate upon rejection and cannot be accepted. e) A counter offer is a rejection of the offer to which it relates 6. May have conditions of acceptance 7. May lapse through non-acceptance 8. Must be distinguished from an invitation to treat <p>⇒ Reasonable person test: would it 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</p>	
<h4>3.1.1 Rule 1: Must be definite</h4> <p>Non-committal and ambiguous language likely only offer to treat</p> <ul style="list-style-type: none"> ❖ Notice to residents in council houses saying council may be interested in selling and inviting residents to complete and ‘application to buy a council house’ <ul style="list-style-type: none"> ⇒ Held not a contractual offer to sell → residents were making an offer that council could accept or reject 	<p><i>Gibson v Manchester City Council [1979] UK</i></p>
<h4>3.1.1.1 Rule 1 a): Inviting of acceptance</h4> <ul style="list-style-type: none"> ❖ Offer must take the form of a proposal for consideration which gives the offeree an opportunity to choose between acceptance or rejection (Orbiter) <ul style="list-style-type: none"> ⇒ Communication which uses “the language of command” and “peremptorily requests” the other party to adopt a particular course of action may not be regarded as an offer i.e. there needs to be a choice ❖ Given the context in which the documents arose there was no offer capable of acceptance by the act of purchase. The subsidy was not a request, invitation or an inducement to purchase wool... suggesting that ‘payment of subsidy and the purchase of wool were regarded as related in such a way that the one was a consideration for the other.’ There was no quid pro quo. 	<p><i>Brambles v Bathurst City Council (2001) NSWCA</i></p> <p><i>Australian Woollen Mills v Commonwealth (1954) HCA</i></p>
<h4>3.1.1.2 Rule 1 b): Definite proposal certain in its terms</h4>	<p><i>Australian Woollen Mills v Commonwealth (1954) HCA</i></p>
<h4>3.1.1.3 Rule 1 c): Voluntary assumption of legal intention</h4>	<p><i>Australian Woollen Mills v Commonwealth (1954) HCA</i></p>
<h4>3.1.2 Rule 2: Made to a single person or a class of persons</h4>	<p>Carlill [1893] 1 QB</p>

<p>3.1.3 Rule 3: Offers must be communicated</p> <ul style="list-style-type: none"> ❖ An offer must be communicated to the offeree before it can be accepted. A man arrested on suspicion of murder gave evidence that led to a conviction. Court held he was unable to claim the reward <ul style="list-style-type: none"> ⇒ Cannot accept an offer unless you know of its existence, → cannot accept it without intending to do so + cannot intend to accept an offer of which you are not aware. ❖ Must be some sort of quid pro quo and a correspondence between an offer and acceptance 	<p>Fitch v Snedaker (1886)</p> <p>Australian Woollen Mills v Commonwealth (1954) HCA</p>
<p>3.1.4 Rule 4: All terms must be brought to the notice of the offeree</p> <ul style="list-style-type: none"> ▪ prior to acceptance 	
<p>3.1.5 Rule 5: May be revoked any time prior to acceptance</p>	
<p>3.1.5.1 Rule 5 a): Revocation can be express or implied.</p>	
<p>3.1.5.2 Rule 5 b): Revocation must be communicated</p>	<p>Byrne v Van Tienhoven 1880</p>
<p>3.1.5.3 Rule 5 c): Offeree can be informed of withdrawal from reliable source.</p>	<p>Dickinson v Dodds 1876</p>
<p>3.1.5.4 Rule 5 d): Offers terminate upon rejection and cannot be accepted.</p> <ul style="list-style-type: none"> ❖ Plaintiffs (P) were iron merchants Defendant (D) was the holder of quantities of iron. By telegram D offered to sell iron to P for “40s., nett cash, open till Monday”. On Monday morning P sent telegram to D asking whether D would “accept forty for delivery over two months, or if not, longest limit you would allow”. <ul style="list-style-type: none"> ⇒ Held this was a request for information and not a counter offer so P was still able to accept the original offer. 	<p>Stevenson Jacques & Co v McLean (1880)</p>
<p>3.1.5.5 Rule 5 e) A counter offer is a rejection of the offer to which it relates</p> <ul style="list-style-type: none"> ❖ Seller in Wales negotiated with buyer in Canada for the sale of aircraft “Confirming sale of Grummond Mallard aircraft.. Please remit £5,000’ Buyer replies ‘This is to confirm your cable and my purchase of Grummond Mallard aircraft set out your cable...£5,000 sterling forwarded to our bank to be held in trust for your account pending delivery...Please confirm delivery to be made 30 days within this date’. Seller did not reply and sold aircraft to a 3rd party at a higher price. <ul style="list-style-type: none"> ⇒ Held, Buyer telegram was not an acceptance of offer because it introduced two new terms, one as to payment (payment in advance with this sum to be released by Bank on delivery) and the time of delivery. = Counter offer, original offer lapses 	<p>Hyde v Wrench (1840) UK</p> <p>Northland Airlines Ltd v Dennis Ferranti Meters Ltd, 1970. (Canadian)</p>
<p>3.1.6 Rule 6: May have conditions of acceptance</p> <p>Offer Condition Subsequent</p> <ul style="list-style-type: none"> ❖ Court held a car being in same condition as when sold was a condition subsequent and once stolen and damaged by a thief offer terminated <p>Offer condition precedent</p> <ul style="list-style-type: none"> ❖ held ‘Subject to approval by my solicitor’ offer not effectively made until condition was fulfilled 	<p>Financings Ltd v Stimson (1962) UK</p> <p>Buhrer v Tweedie [1973] NZ</p>

<p>3.1.7 Rule 7: May lapse through non-acceptance</p> <p>Effluxion of Time : If no time limit is set the offer expires after a reasonable time.</p> <ul style="list-style-type: none"> ❖ Offer was made at the beginning of a five day trial to settle the litigation on the basis the parties would discontinue their claims against each other <ul style="list-style-type: none"> ⇒ here and now offer could not be accepted on 5th and final day of trial ❖ 16 months too long to exercise an option to purchase deceased partners business interest. <ul style="list-style-type: none"> ⇒ What is reasonable varies with the nature of the contract per Dixon CJ <p>Death : Generally: Death of either party will terminate the offer BUT This can be unworkable and may not suit the parties.</p> <ul style="list-style-type: none"> ❖ Blackburn J urged avoidance of generalisations. <ul style="list-style-type: none"> ⇒ Depends on which of the parties has died and whether the death has any bearing on the continuation of the offer, the subject matter of the contract (personal services /property), ⇒ Knowledge of the death and whether there was an option (which can be exercised by the personal representatives). 	<p><i>Bartolo v Hancock (2010)</i></p> <p><i>Ballas v Theophilos (1957) HCA</i></p> <p><i>Fong v Cili (1968) (Aus)</i></p>
<p>3.1.8 Rule 8: Invitation to Treat v Offer</p> <p>3.1.8.1 Advertisements – generally offers to treat but depends on language</p> <ul style="list-style-type: none"> ❖ Advertisement of selling a fur coat for \$1 to first 3 customers held to be an offer <p>3.1.8.2 Brochure distribution</p> <p>3.1.8.3 Shop displays</p> <ul style="list-style-type: none"> ❖ Displaying drugs for customers to pick up and bring to counter an offer to treat not an offer ❖ Flick knives on display in window did not contravene prohibition on offering knives for sale <p>3.1.8.4 Auctions</p> <ul style="list-style-type: none"> ❖ Traditionally no legal relationship prior to fall of hammer – when you bid you make an offer. And Auctioneer is free to accept or reject ❖ Without Reserve: No difference whether there is or is not a reserve (however there may be a claim against the auctioneer <i>Warlow v Harrison (1859) UK</i>) ❖ Internet Auctions:;Ebay auction site is like the auctioneer with them acting as both the agent seller and buyer ❖ No Claim if the action is cancelled – although auctioneer may be at risk ⇒ Sale of Goods Act 1923 (NSW) s 60 <ul style="list-style-type: none"> - A sale of goods by auction is complete when the auctioneer announces its completion o Until such announcement, a bid may be retracted <p>3.1.8.5 Tenders</p> <ul style="list-style-type: none"> ❖ in general, an offer to treat and not an offer ❖ Wording important: Eg If the wording indicates the highest or lowest bid may be accepted could be interpreted as an offer ❖ Failure to comply with the agreed tendering process. The promise to give proper consideration to complying tenders. ❖ There is a preliminary process contract which includes an implied term to act in good faith and engage in fair dealing. 	<p><i>Partridge v Crittenden (1968) UK</i></p> <p><i>Lefkowitz v Great Minneapolis Surplus Stores (1957) US</i></p> <p><i>Grainger and Son v Gough (1896) UK</i></p> <p><i>Pharmaceutical Society v Boots Chemists (1953) QB</i></p> <p><i>Fisher v Bell (1961) QB</i></p> <p><i>Payne v Cave (1789) UK</i></p> <p><i>AGC (Advances) Ltd v McWhirter (1977) (Aus)</i></p> <p><i>Smythe v Thomas 2007 NSWCA</i></p> <p><i>Harris v Nickerson (1873) QB</i></p> <p><i>Spencer v Harding (1870) (NSW)</i></p> <p><i>Harvela .. v Royal Trust of Canada (Ci) Ltd (1986)</i></p> <p><i>Blackpool and Fylde v Blackpool Council (1990) UK</i></p> <p><i>Hughes Aircraft Systems ... Airservices Australia HCA (1997)</i></p>
<p>3.2 Mere Puff v Offer</p> <ul style="list-style-type: none"> ❖ Not enough 	<p><i>Leonard v Pepsico Supp Carlill [1893] 1 QB</i></p>

<h3>3.3 Mere supply of information v Offer</h3> <ul style="list-style-type: none"> ❖ Providing information on price he would sell property in Jamaica not amount an offer ❖ Plaintiffs (P) were iron merchants Defendant (D) was the holder of quantities of iron. By telegram D offered to sell iron to P for “40s., nett cash, open till Monday”. On Monday morning P sent telegram to D asking whether D would “accept forty for delivery over two months, or if not, longest limit you would allow”. <ul style="list-style-type: none"> ⇒ Held this was a request for information and not a counter offer so P was still able to accept the original offer. 	<p><i>Harvey v Facey 1893</i></p> <p><i>Stevenson Jacques & Co v McLean (1880)</i></p>
<h3>3.4 Options</h3> <ul style="list-style-type: none"> ▪ A form of offer which also contains a promise not to withdraw it for a certain time. <ul style="list-style-type: none"> ⇒ Have to pay / give additional consideration ⇒ Traditional interpretation you have 1 contract and 1 offer afoot ⇒ Technically if you revoke/breach an option → remedy in contract law would be for breaking the option contract → but this is pointless ❖ High court merged the two <ul style="list-style-type: none"> ⇒ Preferred Interpretation: A contract for sale of the property conditional upon the option being exercised. Remedy specific performance. Griffith CJ & O'Connor J 	<p><i>Goldsbrough Mort & Co Ltd v Quinn (1910) HCA</i></p>
<h3>3.5 Tickets</h3> <p>If ticket handed out by a person: ‘If the customer took it and retained it without objection, his act was regarded as an acceptance of the offer.’</p> <p>If from an automatic machine: ‘The offer is made when the proprietor of the machine holds it out as being ready to receive the money...The acceptance takes place when the customer puts his money into the slot. Denning MR</p> <p>Example of the difficulty of applying the offer /acceptance model Airline Tickets: Stephens J says <u>an offer</u> (3 High Court judges used entirely different reasoning concerning offer and acceptance in determining whether the ticket was an agreement. Ultimately not but at most a voucher.</p>	<p><i>Thornton v Shoe Lane Parking Company [1971]</i></p> <p><i>MacRobertson Miller Airline Services v Commissioner Of State Taxation (WA) 1975 HCA</i></p>
<h3>3.6 Unilateral contracts</h3> <p>Revocation in unilateral contract scenario</p> <ul style="list-style-type: none"> • <u>Prior to performance:</u> <ul style="list-style-type: none"> ⇒ May be withdrawn prior to performance so long as publicised as prominently as the original offer <ul style="list-style-type: none"> ❖ Reward for location of criminal revoked via newspaper ad in same way it was advertised. Months alter someone tried unsuccessfully to claim it • <u>Partly performed:</u> <ul style="list-style-type: none"> ⇒ It has been held a unilateral offer cannot be withdrawn once the offeree has partly performed the requested act. <p>BUT</p> <ul style="list-style-type: none"> ❖ The notion that there is a general principle preventing revocation of offers in exchange for acts (unilateral contracts) has been rejected by the Full Federal Court. <ul style="list-style-type: none"> ⇒ An offer made in return for performance of an act is, like any other offer, revocable at any time ⇒ The offeror will only be prevented from revoking the offer where there is an implied contract not to revoke or an estoppel ⇒ An estoppel will arise only where the offeree is induced to adopt the assumption that the offer will not be revoked and relies on that assumption in such a way that he or she will suffer determinant if the offer is revoked 	<p><i>Shuey v United States (1875)</i></p> <p><i>Daulia Ltd. v. Four Millbank Nominees Ltd (1978) UK,</i> <i>Veivers v Cordingly (1989 QLD)</i></p> <p><i>Mobil Oil Australia Ltd v Wellcome International Pty Ltd(1998).</i></p>

<h2>4 Acceptance</h2> <ul style="list-style-type: none"> ▪ Definition: unqualified assent to the terms of an offer à made in the manner specified or indicated by the offeror <ul style="list-style-type: none"> ⇒ Acceptance is the moment of contract ⇒ Acceptance determines when and possible where a contract comes into being 	
<h3>4.1 Acceptance Rules Summary</h3> <ol style="list-style-type: none"> 1. Must be response to an offer → consciousness of offer 2. Must correspond with the offer 3. Must generally be communicated - express or implied <ol style="list-style-type: none"> a) Generally, must be accepted in manner specified b) Communication Exception → Postal Rule c) Acceptance inferred by conduct 4. Can only be accepted by those person to whom offered (Generally) 	
<h4>4.1.1 Rule 1: Must be in response to an offer → consciousness of offer</h4> <ul style="list-style-type: none"> ▪ Usually only an issue with unilateral <ol style="list-style-type: none"> a) unilateral contract only arises if offeree performs requested act in reliance of offer b) offeree must be aware of the existence and terms of the offer before they can accept c) An act done in ignorance of the offer cannot be acceptance of the offer. d) The offer must be present in the mind of the acceptor when the acceptance occurs. ❖ Reward offered for information leading to the arrest and conviction of the murderer. <ul style="list-style-type: none"> - Clarke gave a statement leading to his own release and the arrest of another. Clarke therefore claimed the reward but the crown refused to pay it on the basis that he did not make the statement with a view of claiming the reward <ul style="list-style-type: none"> ⇒ held that while offeree’s conduct normally assessed by reference to external manifestations (objective) → performance of requested act will not give rise to a unilateral contract if evidence establishes offeree was not acting on faith of the offer 	<p><i>R v Clarke (1927) HCA</i></p>
<h4>4.1.2 Rule 2: Must correspond with the offer</h4> <p>See notes on 3.1.5.5 Rule 5 e) A counter offer is a rejection of the offer to which it relates</p> <p>Conditional acceptance is not acceptance</p> <p>Battle of the forms</p> <ul style="list-style-type: none"> ❖ Suggested two different approaches are available Conflict or synthesis. <ul style="list-style-type: none"> ⇒ Held: In this case the Conflict approach used : last shot (the counter offer of the buyer) prevails = on buyers terms ❖ Macready M stated that the Court looks to interpret the terms using the ‘global approach’ in such a manner[s]o as to give a “harmonious result” when construed with a “commonsense and practical approach” which takes account of the “realities of commerce” ... and reflects the general trend of modern contract law. 	<p><i>Butler Machine Tool Co. Ltd v Ex-Cell-O Corp (England) Ltd (1979)</i></p> <p><i>In Goodman v Cospak [2004] NSWSC 704 at [46]-[53],</i></p>
<h4>4.1.3 Rule 3: Must generally be communicated – express or implied</h4> <ul style="list-style-type: none"> ❖ Knight signed a hire-purchase agreement relating to a television. Company accepted and noted on the document but not communicated to Knight. Knight returned the TV set to the dealer before any instalments were paid → company sought to enforce the agreement <ul style="list-style-type: none"> ⇒ Held: no contract was formed . <ul style="list-style-type: none"> - Ordinarily, a contract is not made until acceptance is communicated. An offeror however, may expressly or impliedly decide to not actually communicate, as <ol style="list-style-type: none"> 1. The offeror may agree to treat the doing of an act as an effective acceptance 2. The offeror may treat the despatch of an acceptance by a particular method as effective, whether or not the acceptance is received by the offeror <ul style="list-style-type: none"> - Latex argued this fell into the first category → with the act of signing the document treated as an effective acceptance. Court disagreed 	<p><i>Latec Finance Pty Ltd v Knight (1969)</i></p>

<p>4.1.3.1 Rule 3a): Generally must be accepted in manner specified</p> <p>An objective test, failure to comply with the stipulation may not be fatal especially if it is to the advantage of the vendor.</p> <ul style="list-style-type: none"> ❖ <i>'I am of the opinion that acceptance communicated to the offeror by any other mode which is no less advantageous to him will conclude the contract.'</i> 	<p>Manchester Diocesan Council for Education v Commercial and General Investments (1970)</p>
<p>4.1.3.2 Rule 3 b): Acceptance inferred by conduct</p> <p>Silence – generally not good enough</p> <ul style="list-style-type: none"> ❖ <i>"If I hear no more about him, I consider the horse mine at £30 and 15s."</i> ⇒ Held: Silence cannot amount to acceptance. → nephew had not accepted sale of horse <p>BUT</p> <p>Acceptance can be implied by conduct</p> <ul style="list-style-type: none"> ⇒ There may be circumstances where it is incumbent on the party who has received an offer to reject it explicitly or be bound. Major modification to <i>Felthouse v Bindley</i>. ❖ A developer declined to sign an architects contract, but let the work proceed and received the benefit of the work. The offer made by the builder by proffering the contract had been accepted by the developer by its conduct, and that there had been an acceptance of the work on the terms and conditions offered by the builder. ⇒ McHugh J..... <i>"where an offeree takes the benefit of a contract in circumstances indicating that the offeror will be paid for his services in accordance with the offer, the inference is open that the offer was accepted according to its terms; and, in the present case, I find such an inference to be irresistible."</i> <p><i>PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd [2007]</i> <i>Waldorf Apartment Hotel, the Entrance Pty Ltd v Owners Corp SP71623 [2010]</i></p>	<p><i>Felthouse v Bindley (1862)</i></p> <p><i>Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd (1988)</i></p>
<p>4.1.3.3 Rule 3c): Communication Exception → Postal Rule</p> <ul style="list-style-type: none"> ❖ When offeree has placed his acceptance in the post there is a fictional meeting of minds which concludes offer and gives effect to acceptance ((even if received later/lost) ❖ "A finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act" ❖ 'option to be exercise by notice in writing addressed to me...on or before 20 December' Posted 18 December, received 21 December ⇒ HELD could be a concluded contract as Postal Rule could apply but in this case under the circumstances was that <u>actual notice</u> was required. "Highly contentious correspondence" ... under the circumstances "actual communication" Would be regarded as essential" Bowen. J ❖ Hedigan J held hat for the 'postal rule' to have effect, it <u>must be reasonably inferred that the offeror contemplated and intended</u> for acceptance to come about through the act of posting. ❖ Postal rule was extended to telegrams à as telegrams were given to the post office and delivered to the recipient in essentially the same way as posted letters ❖ The postal rule does not apply to instantaneous forms of communication (telephone or telex) ❖ facsimile are treated as instantaneous communication → therefore acceptances sent by fax are governed by the general rule that an acceptance is only effective when received by the offeror ❖ Buyer sought to enforce a contract made by an exchange of telex in the English courts between themselves and an Austrian seller. 	<p><i>Adams v Lindsell (1818)</i></p> <p><i>Tallerman v Nathan's merchandise (1957) Aus</i></p> <p><i>Bresson v Squires (1974) Aus</i></p> <p><i>Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994] Aus,</i></p> <p><i>Cowan v O'Connor (1888)</i></p> <p><i>Entores v Miles Far Eastern Corp (1955)</i></p> <p><i>Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd (1988) (Aus)</i></p> <p><i>Brinkibon Ltd v Stahag Stahl und Stahl (1983) UK</i></p>

<ul style="list-style-type: none"> ⇒ <u>Held: Contract was made in Vienna → as this is where the acceptance was received</u> ⇒ The postal rule does not apply because telex is considered instantaneous communication → therefore a contract is formed when acceptance is communicated to the offeror ⇒ The situation may differ where: <ul style="list-style-type: none"> ○ the message is sent or received through a third party ○ where it is sent out of office hours ○ where the message is not intended to be read immediately <ul style="list-style-type: none"> • Australian courts have maintained the distinction regardless of the limitations that have otherwise been placed on the 'postal rule'. Suggests communication over the internet should be treated the same as instantaneous communication. That would cover websites but what about email? • Statute now governs time of receipt. See text on discussion of 'designated address' p 81 <p>The postal rule Can be negated by requiring actual communication instead of constructive (postal) communication.</p> <ul style="list-style-type: none"> ❖ 'deemed duly served if mailed by registered or certified letter....'service deemed to occur...on the third business day next following on which it was posted.' ❖ Exchange by post but earlier correspondence clearly stated contract would be formed upon receipt. 	<p style="text-align: right;"><i>Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA (No 4) [2009]</i></p> <p>Electronic Transactions Act, 2000, (NSW), s13</p> <p style="text-align: right;"><i>Elizabeth City Centre v Corralyn (1994) AUs</i></p> <p style="text-align: right;"><i>Nunan Holdings Pty Ltd v Tullamarine Estates Pty Ltd [1994] Aus</i></p>
<p>4.1.4 Rule 4: Can only be accepted by those person to whom offered</p> <ul style="list-style-type: none"> ❖ Buyer unaware that business had been sold and bought goods thinking he was buying off old owner who owed him money (ie goods would not be charged) ⇒ Held o valid contract: '<i>where a contract is made, in which the personality of the contracting party is or may be of importance... not other person can interpose and adopt the contract</i>' <p>More than one person may accept an offer regardless of whether there is only one subject matter</p> <ul style="list-style-type: none"> ❖ Where the offer can be accepted by more than one (even though there can be only one contract) the liability will depend on the ways the terms are construed. 	<p style="text-align: right;"><i>Boulton v Jones (1857)</i></p> <p style="text-align: right;"><i>Patterson v Dolman (1908)</i></p>
<p>4.2 Conditional Acceptance</p> <ol style="list-style-type: none"> 1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound but wish to have their terms restated in a form that is more full or precise. 2. The parties have agreed to all the terms and plan no departure from the terms but have made performance conditional upon the execution of a formal document. 3. The intention of the parties is not to make a concluded bargain at all unless they execute a formal contract. ← Held Bound by this type 	<p style="text-align: right;"><i>Masters v Cameron (1954):</i></p>

4.3 Key Cases

4.3.1 *Carlill v Carbolic Smoke Ball Company (1893)*

○ Facts:

- § The defendants, owned a medical preparation called "The Carbolic Smoke Ball".
- § Advertisement offered to pay £100 to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period.
- § The plaintiff, Mrs Carlill (pictured left, at the age of 87), on the faith of the advertisement bought one of the balls, and used it in the manner and for the period specified à contracted the influenza.

- Procedural history: defence argued:
 - § No intention
 - § No offer or acceptance
 - § No consideration
 - § Too uncertain as no time stipulated
 - § Illegal as based on a wager
- Defense: refused to pay, claiming:
 1. No promise was **intended** à the advertisement was a 'mere puff'
 2. **No offer** had been made to **any particular person**
 3. The plaintiff had not notified her acceptance of any offer
 4. The agreement was uncertain because it failed to stipulate a period within which the disease might be contracted
 5. The plaintiff has supplied no consideration for the defendant's promise
- Held: rejected all defence arguments
 - § Claimed a contract had been formed
 - § First argument: the statement relating to the bank deposit à made it clear that a promise was intended
 - Court looked at the advertisement objectively, according to what an ordinary person reading the document would think was intended à rather than a reference to what the defendant actually intended

4.3.2 *Australian Woollen Mills Pty Ltd v Commonwealth*

- This case highlights the inextricable connection between the requirement of offer and acceptance, intention, consideration and certainty
- Facts:
 - § The plaintiff claimed that a unilateral had arisen out of the Commonwealth Government's wools subsidy scheme à wool scarce after WWII à therefore Commonwealth subsidised purchases of wool by manufacturers of woollen products to enable the manufacturers to supply the products at low prices
 - § Commonwealth sent the plaintiff a letter to subsidise the wool they purchased
 - § The stockpile of wool of the plaintiff exceeded the amount the Commonwealth claimed it would pay à requiring the plaintiff to repay the subsidy paid on that excess
- Procedural history:
 - § Plaintiffs claimed that each of the announcements by the govt. constituted a contractual offer to pay the subsidy in return for them purchasing wool à this is a unilateral contract
 - § Plaintiffs claimed that each purchase constituted acceptance of the offer and consideration for the promise to pay the subsidy
 - § **Unilateral contract because they accepted it on the basis of the offer**
- Held: no contract (no consideration or intention)
 - § **For a unilateral contract to arise à the promise must be made à in return for the doing of the act**
 - § *Consideration:* There must be a relation of quid pro quo (this for that) between the offeree's act and the offeror's promise à the doing of the act must be based upon the promise – not merely coinciding with it
 - Tests for determining this:
 - Whether the *offeror has expressly or impliedly requested* the doing of the act by the offeree
 - Whether the *offeror has stated a price* which the offeree must pay for the promise
 - Whether the offer was made in order to *induce the doing of the act*
 - This differs from a conditional gift à therefore an offeree must establish that money was to be paid by the offeror in return for the offeree travelling to Sydney
 - § *Intention:* It is government policy à not an offer
 - They needed to have said something much more contractually binding
 - **There must have been a voluntary assumption of a legally enforceable duty** à so that the offer would have given rise to a legal obligation
 - E.g. through statutory authority
- Commentary
 - § **An offer is effective only if it identifies a valid consideration and manifests intention to create a legal obligation**
 - § Second argument: the offer was made to the whole world à could be accepted by any person who performed the conditions on the faith of the advertisement

<h2>5 Consideration - Definition</h2> <p>Doctrine of Consideration: A promisor's promise must be paid for to be enforceable and the payment must proceed from the promisee.</p> <p>Definition: the promise, price, detriment or forbearance given as value for a promise</p> <p>An agreement without consideration is "nudum pactum" a naked agreement and unenforceable</p> <p><i>'A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'</i></p> <ul style="list-style-type: none"> ⇒ It must consist of a detriment to the promisor or a benefit to the promisee. ⇒ Bilateral contract involves an exchange of promises which is sufficient. ⇒ Unilateral contracts, consideration is provided for the promise of reward by an act, rather than a promise. <ul style="list-style-type: none"> • Promisor: the person making the promise sought to be enforced • Promisee: the person seeking to enforce the promise 	<p><i>Coolls v Bagot's Executor & Trustee Co Ltd (1967)</i></p> <p><i>Currie v Misa (1875) UK</i></p>
<h3>5.1 Consideration Rules Summary</h3> <ol style="list-style-type: none"> 1. Bargain requirement - must consist of detriment to promisor or benefit to promisee. <ol style="list-style-type: none"> a) Must have legal value b) Act in Return for a promise but not act in reliance c) Exchange of promises is good consideration in bilateral contracts d) In unilateral contracts provided by a requested act for the promise of a reward 2. Simple contracts without consideration are unenforceable 3. Not required for formal contracts sealed by deed 4. Must flow from promisee but Need not flow to the promisor 5. Must be sufficient but need not be adequate 6. Must be Lawful 7. Cannot be discretionary/illusory 8. Must be definite 9. May be executed, executory but cannot be past consideration 10. Part payment is not good consideration 11. Existing obligations are not good consideration <ol style="list-style-type: none"> a) Acts done before at promisor's request can be good consideration b) Termination of existing agreement may allow past consideration c) Bona-fide compromise may allow existing obligations d) Taking on greater burden even if technically existing burden e) Practical benefits bestowed on other party if existing obligations met f) Use of existing obligations as a promise to a third party 	
<h4>5.1.1 Rule 1: Bargain Requirement</h4> <ul style="list-style-type: none"> ❖ <i>'Quid pro quo'</i> In this case it was maintained that the necessary connection or relation between the announcement and the act is provided if the inference is drawn that the promisor has <u>requested</u> the promisee to do the act. <ul style="list-style-type: none"> ⇒ <i>'Consideration, offer and acceptance are an indivisible trinity, facets of one identical notion which is that of bargain.'</i> <p>The modern or bargain doctrine of consideration as opposed to a reliance approach. See:</p> <ul style="list-style-type: none"> ❖ ... <i>'The triumph of the bargain theory of consideration necessary for a contract amounts to a rejection of the theory of contractual obligation based on reliance.'</i> Kirby P 	<p><i>Australian Woollen Mills Pty Ltd v The Commonwealth (1954)</i></p> <p><i>Beaton v McDivitt (1987) HCA</i></p>
<h4>5.1.1.1 Rule a): Must have legal value</h4> <ul style="list-style-type: none"> ❖ Lord Somervell <i>'A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promise does not like pepper and will throw away the corn'</i> 	<p><i>Chappell & Co Ltd v Nestle Co Ltd [1960] UK</i></p>

7.4 Summary Rules Estoppel

1. Some form of pre-existing relationship

- Generally, some form of pre-existing legal relationship
- But it is not required → Can be an expectation that it would exist.. (Waltons (1988), W v G (1996), Acc v Gray (2003))

2. Inducement by the defendant for the plaintiff to adopt the assumption

- Need a direct link between inducement and action (*Varwayan*)
- *Waltons* stores gave no indication that they were going to withdraw

3. Plaintiff acted/abstained from acting in reliance on assumption / expectation

- Waltons knocked down existing building

4. Defendant knew of or ought to have known of plaintiff's actions or intended them to take the action

- Waltons current store across the road and the manager watched the demolition

5. An element of detriment

- It is probably safe to assume that in Australia the courts require detrimental reliance
- It need not consist of expenditure of money or other quantifiable financial disadvantage so long as it is something substantial. '*Such material disadvantage must be substantial, although it need not be quantifiable*'

6. Defendant failed to act to avoid detriment

- whether by fulfilling promise or otherwise

7. A promise by one party that they will not insist on their strict legal rights

- A person promised that contractual rights would not be enforced and that promise was relied upon by the promisee
- The effect of the estoppel was to prevent the promisor from asserting those rights.

8. An adopted assumption

- An adopted assumption (can be of fact or future conduct, may be of fact or law) (*Waltons; Silovi (1998)*), but note *Austol (1989)* can apply even if the precise terms of the agreement could not be ascertained.
- Assumption must be clear and unambiguous. Important information cannot be missing but does not necessarily need to be precise but has to be constrained by reasonableness (*ACC v Gray (2003)*).
- There is a failure to fulfil the assumption.

9. An actual reliance by the other party on the promise

- An actual reliance by P on the assumption (*Waltons; Austotel (1989)*).
- Wishful thinking is not good enough. Mere hope rather than a consequence of words or conduct will not create an estoppel (*Lorimer v State Bank NSW (1991)*).

10. Reasonable reliance

- Reliance needs to be reasonable (*Murphy v Overton (2001), Ausotel (1989)*).
- Wishful thinking is not enough. Mere hope rather than a consequence of words or conduct will not create an estoppel (*Lorimer v State Bank NSW (1991)*)

11. Unconscionability

- D of or intended the reliance (*Ampol v Mathews (1991)*).
- A degree of unconscionability by D – the behaviour must be unfair (*Waltons*).
- Departure would be unconscionable → needs to be unfair to move away from alleged promise (*Waltons*).
- ❖ *Ausotel (1989)* involved a 'fair fight' between two large corporations where there was no real risk of unfair advantage being taken by one over the other.

12. Representation needs to be sufficiently promissory in nature

- 'may be prepared to grant a further franchise' *Mobil Oil (1998)* (not sufficiently clear to find estoppel)

13. Unauthorized representations

- Representations that are not authorized generally do not create an estoppel but if the principle knew or should have known of the representation and fails to deny, may create an estoppel (*Corpers v NZI (1989)*)

14. Failure to fulfil assumption/promise

Legione v Hatley (1983) HCA

Brennan J's
6 Proba
*Walton Stores
(Interstate) Ltd v
Maher (1988)*

*Commonwealth v
Verwayen (1990) HCA*

Ashton v Pratt [2015]

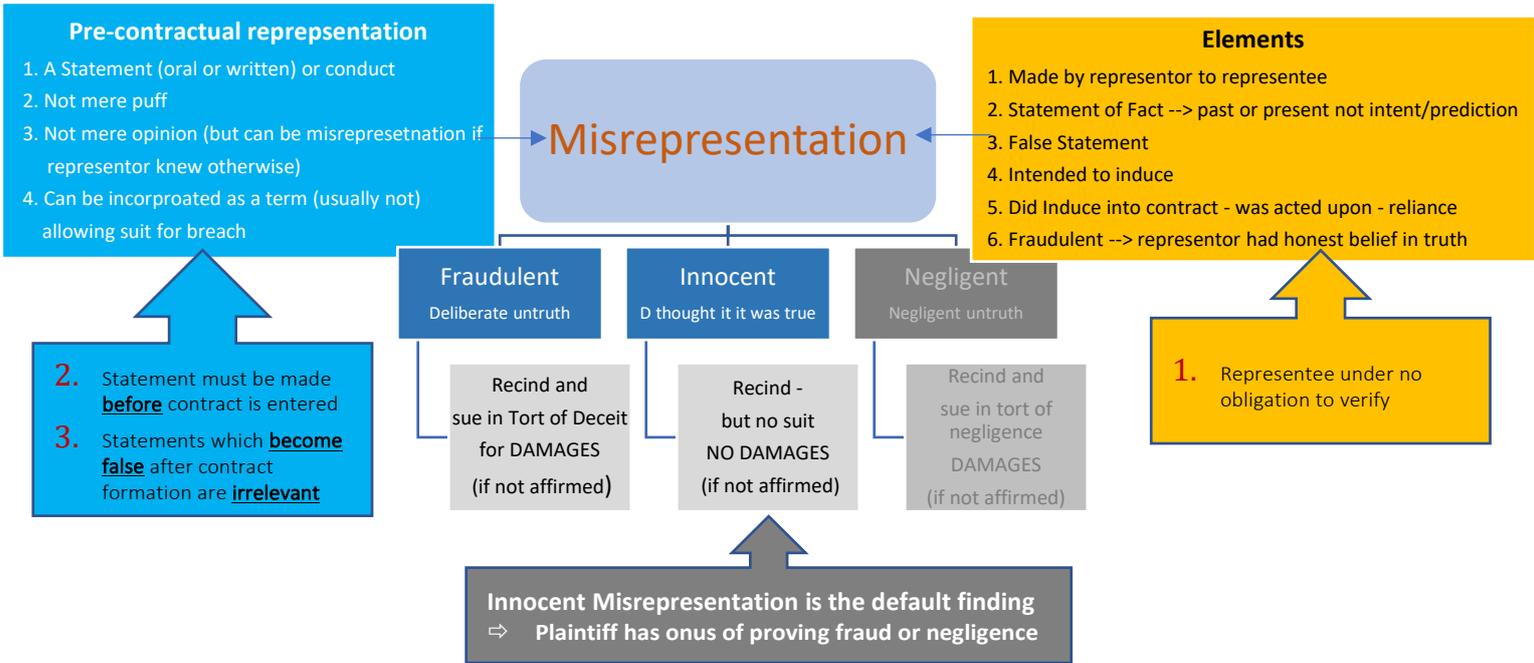
11 Terms

11.1 Resolving Disputes about Contract Terms: Overview



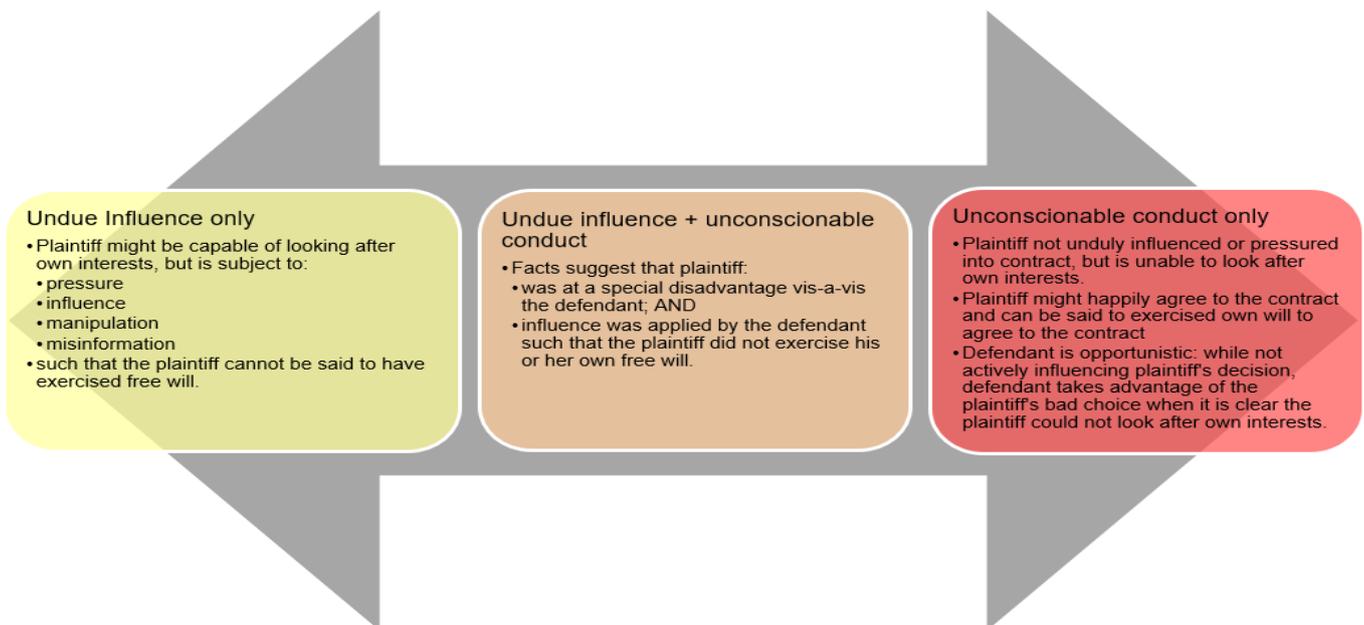
<h3>11.2 Express Terms</h3> <ul style="list-style-type: none"> Terms which the parties have expressly negotiated / agreed and intend to be bound May be found in any communication through which the contract was made (email, letters, telephone conversations) may be partly oral and partly written 	
<h4>11.2.1 Objective Approach to Intention</h4> <ul style="list-style-type: none"> Stated aim of courts to give effect to presumed intentions Objective not subjective approach: see <ul style="list-style-type: none"> Life Insurance Co of Australia Ltd v Phillips (1925) HCA; Codelfa Constructions Pty Ltd v State Rail Authority (1982) HCA; Taylor v Johnson (1983) HCA; <i>‘references to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement’</i> Intention – <i>‘the intention which reasonable persons would have had if placed in the situation of the parties’</i> Hospital Products Ltd v US Surgical Corp (1984) HCA [20]; per GIBBS C.J. citing <i>Reardon Smith Line v. Hansen-Tangen (1976) 1 WLR 989</i>, at p 996. Objective approach combined with PER means the subjective beliefs of parties are generally irrelevant. Pacific Carriers Ltd v BNP Paribas (2004) HCA + Brambles Holdings Ltd v Bathurst City Council (2001) NSWCA ← even sometimes if parties agree with each other 	<p>Fitzgerald v Masters (1956) HCA;</p> <p>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) HCA</p>
<h4>11.2.2 Signed documents/contracts are presumptively Binding</h4> <p>General rule: a person who signs a contractual document will be bound by the terms in that document, regardless of whether he or she has read or understood those terms - L’Estrange v Graucob [1934] KB + Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA</p> <ul style="list-style-type: none"> <i>‘The general rule ... is that where there is no suggested vitiating element, and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.’</i> Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA <p>It Shows Legal intent:</p> <ul style="list-style-type: none"> <i>‘To sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents... whatever they might be.’</i> Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 	<p>L’Estrange v Graucob [1934] KB</p> <p>Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA</p>

15 Misrepresentation



<h3>15.1 Summary Elements of Misrepresentation</h3> <ul style="list-style-type: none"> To establish misrepresentation, the representee must show that the representor made an untrue, statement of existing or past fact that misled them and induced them to enter contract These statements can be written, oral or implied by conduct <p>Representor – party making the representation Representee - party to whom representation is made</p> <p>When to argue misrepresentation → to get out of a contract when</p> <ul style="list-style-type: none"> statement a warranty not a condition → condition can terminate; warranty only damages if not fraudulent and damages are not required <p>Misrepresentation may be express or implied</p> <p>Misrepresentation is an equity issue rather than a common law contract issue per say</p>	<p>Krakovski v Eurolynx Properties Ltd (1995) HCA</p> <p>Given v Pryor (1979) 39 FLR 437).</p>
<h3>15.2 Steps</h3> <ol style="list-style-type: none"> Clearly identify the misrepresentation → if implied clearly state the implied misrepresentation and how it is implied from the circumstances Determine is Misrepresentation → prove 5 elements Determine Type of Misrepresentation → if fraudulent prove no honest belief 	
<h3>15.2.1 Element 1: <u>Precontractual</u> statements by representor to representee</h3> <ol style="list-style-type: none"> Pre-contractual <ul style="list-style-type: none"> False statements made after formation are irrelevant. Statements which become false after the contract is made are irrelevant. 	

17.6 Undue Influence v Unconscionable Conduct



18 Unconscionable Conduct

Unconscionability: an agreement entered into against the dictates of good conscience. An act that is so against conscience by the ordinary concepts of humanity that the court should intervene

⇒ **Conscious exploitation**

Will specifically arise when D knowingly “exploiting the P’s position of special disadvantage” . Such exploitation may involve “active conduct on the exploiter’s part or the passive acceptance of a benefit in unconscionable circumstances”

Zoneff v Elcom Credit Union [1990] UK

Kakavas v Crown Melbourne [2013] HCA

Commercial Bank v Amadio (1983).

18.1 Summary Elements of Unconscionable Conduct

- SPECIAL DISADVANTAGE**- weaker party under a special disadvantage vis a vis stronger
 - ⇒ Lead to **UNEQUAL BARGAINING POWER**- to the extent that there was no equality of bargaining power between them; and stronger **exploited** this and was predatory
- Affected the weaker party’s capacity to judge** their own best interest
Gives rise to a presumption of unconscionability, but is not, in isolation, sufficient to establish this vitiating factor; that is, it is essential, but not sufficient
- KNOWLEDGE OF DISABILITY**- the stronger party must have been aware to/had KNOWLEDGE of the disability,
 - ⇒ Must be actual knowledge OR wilful ignorance –, the court rebutted the suggestion that constructive knowledge (“ought to have known” standard) was sufficient
 - ⇒ Failure to take reasonable steps in the other party’s best interests
- UNCONSCIENTIOUS** - it must be unconscientious or unconscionable for the stronger party to secure assent to the agreement in the circumstances. - i.e. is against conscience to let title pass/contract stand ← Defendant must prove it was ‘fair, just and reasonable’
 - The relationships between the parties is key (Kakavas)

Amadio as in Kavas

5. Predatory mind required– Kakavas (at least

So In order to argue unconscionability, you need to prove:

1. Special disability, thus inequality of bargaining power exists.
2. Strong party knew (or ought to have known?) of the special disability
3. Unfair that stronger party procured or accepted weaker party’s assent.

To determine of unconscionable behaviour, look particularly at:

- Adequate consideration → good for evidence but not required → **Blomley v Ryan**
- Independent advice. → again not determinative but good evidence