

COMMERCIAL
TRANSACTIONS
LAW 1509

Semester One 2018

- 1) Statutory Provisions**
- 2) Explanatory Notes**

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COMMERCIAL REGULATION.

Commercial Transactions: An interaction between two or more parties in which goods, services or something of value is exchanged for some type of remuneration (business dictionary). More often these days, the remuneration is money.

Legal Structures for Doing Business

Different structures allow you to go it alone, collaborate/share, raise funds (including from strangers), protect your personal assets from failure, avoid or minimise tax, split ownership and management of assets

Legal Personality

A legal personality can hold property, sue and be sued

Death is a problem for humans but not for artificial legal personalities

Sole traders, partnerships, trusts, associations, joint ventures are not separate legal entities from participants

i.e. if you were to sue a trust, you would have to sue all the trustees

- Partnerships

Not a separate legal entity

Persons carrying on business in common 'with a view of profit'

Sharing of profits and management decisions; joint and several liabilities

Partners are in a fiduciary relationship to each other (Governed by the *Partnerships Act 1891* (SA))

Size limitations in the *Corporations Act 2001* (Cth) – up to 20 partners, with exceptions for certain professions (lawyers – 400, accountants – 1000)

A 'limited partnership' is where some partners put up capital and have limited liability, and others ('general partners') manage the business – may have as many *limited* partners as desired

Incorporated Limited Partnerships (ILPs) are not common – no more than 20 general partners exceptions (used mostly for venture capital transactions and have tax advantages)

Limited and ILPs have to be registered under state partnership legislation (consumer and businesses services department)

- Associations

People getting together for a common purpose may be unincorporated or incorporated

State legislation allows incorporation which gives advantages (for holding property, entering contracts, perpetual succession of committee e.g. *Associations Incorporation Act 1985* (SA)- association have to be non-profit to incorporate under this Act)

Larger non-profit or charitable organisations might wish to incorporate as a (national) public company limited by guarantee with ASIC (special status – charitable) to enable easier national fundraising

NB charitable status is separate and dependant on legal definition and has no tax advantages (must be registered with ACNC (Australian Charities and Non for-Profits Commission))

- Corporations and Incorporated associations are separate (artificial) persons

THE LAW OF COMMERCIAL TRANSACTIONS

Common Law

- Contract law, property rights
- Equity – unconscionable transactions, good faith in dealings, penalty doctrines and mortgages, fiduciary relationships

Statutory Protection

- Formalities in certain transactions- land, guarantees
- Sale of goods legislation-providing a framework and definition for private bargaining
- Consumer protection, credit contracts
- Increasingly statute has enshrined or expanded common law/equity protection

Regulation

- Of specific types of transaction either directly or by oversight
- Of participants
- 'Soft' law – Codes of conduct, professional self-regulation or some co-regulation with government agencies

None of these are exclusive – there is overlap and soft law can become enshrines as hard law

- International instruments (conventions, guidance of international bodies)

Regulatory Bodies

ACCC (Australian Competition and Consumer Commission) – Commonwealth

- Administers the Competition and Consumer Act 2010 (includes ACL- Australian Consumer Law)
- Regulates and enforces anti-competitive market behaviour including essential utilities
- Fair trading and product safety- consumer protection (not financial products-see ASIC)

Note there are State bodies that regulate in this area too, e.g. Essential Services Commission of SA (water, utilities, transport infrastructure); Consumer Affairs

ASIC (Australian Securities and Investments Commission)

- Reports to Treasury
- Administers the *Corporations Act 2001* (Cth)
- Derives its powers from the *ASIC Act 2001* (Cth)

Company directors, auditors, liquidators

Monitor and enforce non-compliance with CA provisions regarding formation and management of corporations and their winding up and dissolution

Regulation of financial markets and products- issuing financial services licences; securities issuance and disclosure regime

Extensive powers to penalise and disqualify actors

ASX (Australian Stock Exchange) is now a private company and largely self-regulates its Listing Rules, but with oversight mainly from ASIC

Names Registration for Companies and Business

Since 2011 there has been a Commonwealth Register of Business Names maintained by ASIC

- Unless you use your own name, you must register a unique name
- Australian Business Number (ABN) is required for tax purposes of trading and prior to registration of name
- NB Registration of a name does not protect you from intellectual property claims regarding the name (e.g. trade mark)- even using your own name will not necessarily protect you from that!- see IP Australia for register of trade marks

If you choose a corporation structure (company), the incorporation takes effect from registration by ASIC – *Corporations Act 2001* (Cth)

NB this is separate from registration of business name

- Most companies (approx. 99%) are Limited Proprietary Companies (PTY Ltd)
- As with business names, you cannot have a name already registered

Company registration by ASIC (incorporation) is national

- You still have to specify the state where you are registered and where the registered office is

There are some words which cannot be used in a company name or business name

Other Relevant Agencies

- AFSA (Australian Financial Security Authority) – administers bankruptcy law and reports to the Attorney-General
- ATO (Australian taxation Office) – collects as much tax as possible and monitors business compliance with their obligations (particularly employee deductions for tax and superannuation)
- APRA (Australian Prudential Regulation Authority) – more relevant for broader regulation of banking, insurance and superannuation sectors

CONTRACT LAW.

CONTRACTS AND THEIR REGULATION

All contracts are agreements, but not all agreements are contracts; it is dependent on the context of the agreement as there must be a 'reasonable expectation' that the law anticipates the action.

- Contracts are at the heart of most commercial transactions as they are essentially a mechanism for the exchange and the allocation of resources.
- o *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847
An agreement or set of promises made between parties which carry the force of law.

General principles of contract law underline *all* contracts. However, specific provisions have been developed for certain types of contracts e.g. *Insurance Contracts Act* 1984 (Cth)

- Unilateral = promise in return for act
- Bilateral = promise in return for promise
- Formal = contained in a deed (formal legal contract)
- Simple = not in deed form
- Executory = yet to be performed
- Executed = has been performed

Writing Requirement: The common belief that all contracts must be in writing to be legal is *incorrect*. Some contracts must be in writing such as credit contracts, consumer leases, contracts for the sale of land, deeds, cheques, contracts for the sale of second-hand vehicle by dealer, contracts for domestic building works (\$12000 or more). All other contracts need not be in writing.

Signature

- o *L'Estrange v Graucob* [1934] 2 KB 394
- o *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165
Once you sign a contract, you are deemed to have read and understood the terms, irrespective of whether you have actually done so.

Exceptions

- Misrepresentation: have been told it does *x* but it actually does *y*
- Document appears to be non-contractual: doesn't 'look' like a contract e.g. receipt with no mention of terms
- Promissory estoppel: when a promisor has made a promise to a promisee who then relies on that promise to his subsequent detriment

No Signature: Terms may be incorporated into a contract by notice (signs next to door in bars, airports, hotels etc.) Although this is a binding contractual form, it is not enough unless *both* conditions are satisfied.

- o *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989]
Onerous/ unusual terms require special notice i.e. you cannot automatically be bound if it is of an unusual nature

2 requirements to validly incorporate terms this way:

1. Display terms prior to contract being made
Is the notice provided before or at the time of contracting (e.g. sign at doorway)?
2. Take reasonable steps to bring the terms to the notice of the party
Is the sign/document etc. in which the terms are contained contractual in nature?
Is the font size as large as practicable?
Is the text noticeable (style, size, colour etc.)?

Terms and Conditions

A common expression, but the word 'condition' has a specific legal meaning. A condition is a term however, a term is not a condition.

3 types of terms (in order of significance):

1. Condition
2. Intermediate term
3. Warranty

Principles of Contract Information

4 things are required to make a contract

1. Offer and acceptance
2. Consideration
3. Intention
4. Certainty and completeness

Two ancillary requirements – capacity and legality

- Regardless of the format (e.g. a text message, 10 handwritten pieces of paper, 1 typed page and a signature on a napkin), if these four elements are present, there is a contract
- **Offer and Acceptance**

Offers are different from *invitations to treat* – these are invitations to make offers or enter negotiations e.g. shop sales, auctions, tenders: in these scenarios, the customer is making the offer.

May be in writing, oral, or implied from conduct

- o *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, 171
A proposal by one party to enter into a legally binding contract on certain terms with another, giving the offeree an opportunity to choose between acceptance or rejection
- o *Harvey v Facey* [1893] AC 552
Need to consider what a ‘reasonable person’ would think
- o *Dickinson v Dodds* [1876] 2 Ch D 463
Can revoke any offer any time, prior to acceptance
An offer will lapse after any specified time, or after a reasonable time if no period is given, e.g. ‘let me know soon,’ ‘soon’ would have to be defined reasonably in the circumstances
- o *Tinn v Hoffman & Co* (1873) 29 LT 271
Once an offer is rejected it is dead and cannot be accepted (i.e. you cannot ‘change your mind’)
But rejected offers may be reviewed
- o *Harris v Jenkins* [1922] SASR 59
Counter-offer = rejection
- o *Harvey v Facey* [1893] AC 552
- o *Stephenson, Jacques & Co v McLean* (1880) 5 QBD 346
But a mere enquiry or request for information is not a counter-offer and keeps the offer alive; be careful with wording when merely enquiring
- o *Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, (S.D.N.Y. 1999)
Commercial puffery must be distinguished from a legal offer
Puffs: bold or exaggerated statements or claims about a product/service which are *not* in the nature of legal offers and therefore unenforceable

Acceptance occurs when there is ‘meeting of the minds’ – offeree offers unqualified assent to the terms stipulated i.e. ‘yes’ with no strings attached

- o *R v Clarke* (1927) 40 CLR 227
You need to be conscious of the offer to accept it i.e. if you did not realise there was an award for an action, you cannot accept it
- o *Felthouse v Bindley* (1862) 11 CB (NS) 869; 142 ER 1037
So naturally, silence does not count as acceptance (e.g. ‘If I don’t hear from you, I’ll assume you’ve accepted the offer’)
- o *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61
But conduct may infer acceptance e.g. \$10 000 deposit needing to be paid to begin work – nothing said but money received; counts as acceptance.

- **Consideration**

The doctrine of consideration requires that something be given in return for a promise to make it legally binding. It is essentially whatever is exchanged between the parties to the agreement, normally money, goods or services.

- Consideration distinguishes *bargains* from *gifts* – a bargain (‘this for that’) involves a *quid pro quo* (mutual consideration that passes between two parties to a contractual agreement, thereby rendering the agreement valid and binding); whereas a gift does not

As such, a mere promise is not legally enforceable (note potential effects of promissory estoppel)

If a promise is made ‘under seal’ (put into a deed), then consideration is not necessary and it’s enforceable elements:

1. Benefit/detriment
 - *Currie v Misa* (1875) LR 10 Ex 153
‘A valuable consideration, in the sense of the law, may consist in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other’
2. Bargain
 - *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847
‘An act or forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable’

Related Rules:

Consideration must be legally *sufficient*, but need not be *adequate* (courts are not concerned with ‘fair deals,’ solely deals)

The actual/promised performance of an *existing legal duty* is *not* good consideration (‘existing legal duty rule’)

Consideration must be *current* (not past) e.g. must form part of the bargain

Consideration must *move from the promisee*

Essentially meaning you cannot give more for the same, as this is not a two-sided bargain

You have a contract e.g. you pay me \$400 000 to build you a house

Your consideration = money; mine = house

I realise I underquoted you and I cannot afford to pay my workers

You offer to pay me an extra \$20 000 so I promise to finish the house

Issue

Agreement 1: you = \$400 000 me = house

Agreement 2: you = \$20 000 me = SAME XX

Exceptions:

- Discard the original contract and make a new, fresh one
- Put the agreement to vary the original contract in a deed
- *Hartley v Ponsonby* (1857) 7 El. & Bl. 872
Give or do something extra (additional consideration)
- *Shadwell v Shadwell* (1860) 9 C.B. (N.S.) 159
Perform the promised duty for a third party
- *Wigan v Edwards* (1973) 1 ALR 497
Make the agreement one of compromise to end a dispute
- *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1
Establish that the variation gives practical benefits to promisor

- **Intention**

The parties must have *intended* their agreement to be legally enforceable, otherwise the law wouldn’t regard it as a contract

- *Merritt v Merritt* [1970] 1 WLR 1211

Objective test – ask what a reasonable person would have thought the parties intended

Actual intent is irrelevant

The law makes certain presumptions for types of commercial transactions:

Commercial Dealings	Private, social or domestic dealings
Strong presumption of intent, rebutted only with difficulty	Generally presumed that intention to create legal relations is lacking
<ul style="list-style-type: none"> ○ <i>Helmos Enterprises Pty Ltd v Jaylor Pty Ltd</i> [2005] NSWCA 235 	<ul style="list-style-type: none"> ○ <i>Balfour v Balfour</i> [1919] 2 KB 571 ○ <i>Cohen v Cohen</i> (1929) 42 CLR 91 Agreements between spouses ○ <i>Jones v Padavatton</i> [1969] 1 WLR 328 Agreements between family members ○ <i>Trevey v Grubb</i> (1982) 44 ALR 20 Agreements between friends

- *Roufos v Brewster* (1971) 2 SASR 218
Presumption against legal intent in private, social or domestic dealings may be rebutted where the agreement is essentially commercial in nature
- **Certainty and Completeness**

A contract must:

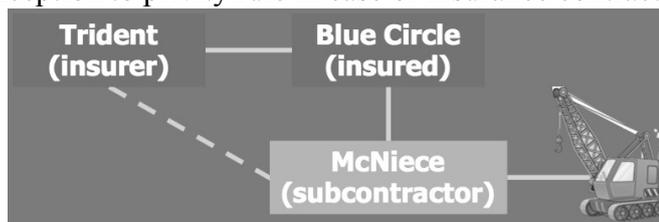
- *Thorby v Goldberg* (1964) 112 CLR 597
Be sufficiently complete
- *G Scammell and Nephew Ltd v Ouston* [1941] AC 251
Be sufficiently certain and clear on its terms

The courts tolerate some measure of inadequacy

- *Upper Hunter County District v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429
The courts will do all possible to give meaning to the language used by the parties and enforce the contract, unless it is impossible to do so

Privity

- *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460
Doctrine of privity stipulates that only parties to a contract can acquire rights and incur liabilities under that contract
Contracts are private arrangements between the individuals concerned – the law respects this, i.e. if you are not a party to the contract, you have nothing to do with it.
- The Insurance Exception
- *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107
Established important exception to privity rule in case of insurance contracts



Subcontractor can claim insurance under Blue Circle's insurance policy
HELD – McNiece entitled to claim benefit of the indemnity in Trident's insurance contract with Blue Circle

RATIONALE – Doctrine of privity should not apply in context of insurance contracts given the high likelihood of third parties seeking protection under these contracts

- *Insurance Contracts Act 1984* (Cth), s 48
While the case was being heard, the Federal Government passed the *Insurance Contracts Act 1984* (Cth), s 48 of which allows third party beneficiaries to a contract of insurance to recover compensation
- The Agency Exception

Where an agent (someone speaking/ making decisions on someone else's behalf), acting with appropriate legal authority, enters a contractual relationship on behalf of the principal, the contract will be between the principal and third party

Agent does not attain and rights nor incur any obligations under the contract, despite technically being the one who entered it

Sensible exception – commercial efficacy (e.g. large corporations), practical necessity (e.g. medical circumstances)

- The Land Covenant Exception

A restrictive covenant included in a contract between A (vendor) and B (purchaser), such as one for the sale of freehold land, will bind any subsequent purchasers e.g. if B sells to C then the covenant binds C

- The Cheques/ Bills Exception

Anyone who is in possession of the cheque can cash it in (aside from the fraud consequences) – to avoid this, simple cross out the words 'or bearer'

Agency

An agent is a person who has the authority of a principal to create legal relations between the principal and a third party

Agency can be created in several ways:

- Actual authority – typically express written authority
- Apparent/ostensible authority – arises from circumstances
- Ratification – where duly appointed agent's unauthorised acts are subsequently authorised by principal
- Undisclosed principal – Where agent acts without disclosing existence of principal (third party can sue principal for breach)
- Necessity – Where a party necessarily becomes an agent for a principal in circumstances of dire need, they may seek reimbursement/indemnity

Actual Authority

There is a difference between being an *agent* and merely *doing something for another person* – the latter is not a formal legal action

Signing an agency agreement will cover you, even when making a small decision for another person
e.g. signature required for someone else to collect a parcel from the post office for you

Ostensible Authority

- o *Tooth v Lays* (1888) 9 LR (NSW) 154
Sometimes an ostensible/apparent agency can arise from the circumstances in which the parties find themselves
- o *Pola v Commonwealth Bank of Australia* (Unreported, 19 December 1997, Sundberg J) 12
In general, no formality is necessary for the appointment of an agent to act on behalf of his principal ... It is only necessary that the principal and agent consent to that relationship ... The existence of agency may often be established from the words of the parties and the circumstances of the particular case, and may be implied from prior habits or from a course of dealing between the parties where the agent has repeatedly been permitted to perform similar acts in the past ... If the facts fairly disclose that one party is acting for or representing another by the latter's authority, the agency exists.

Types of Agent

1. Special agent
Agent is authorised to perform one specific task (not as part of their trade or profession) for the principal
2. General agent
Agent is authorised to act for the principal in a class of transactions of continuing nature, or authorised to perform one specific task (as part of their trade or profession)
3. Universal agent
Agent is authorised to act for the principal in all matters (most common example = power of attorney)

Duties of Agent

An agent owes several legal duties to his or her principal:

- o Follow instructions – *Mitor Investments v General Accident*
 - Act in person (no delegation unless allowed, necessary, or purely administrative)
- o Act in principal's interest (fiduciary duty) – *Hewson v Sydney Stock Exchange*
- o Confidentiality – *Consul Development v DPC Estates*
- o Full disclosure of interests – *Lunghi v Sinclair*
- o Avoid secret profits/commissions – *Regal (Hastings) Ltd v Gulliver*
 - Take care of principal's property
 - Keep separate and proper accounts

Duties of Principal

A principal owes several duties to his or her agent

- Pay remuneration
- Identify and reimburse agent for reasonable expenses
- o *Submit principal's goods/documents under lien pending payment* – *Campbell v Smith*
- o *Ahan v Haim Shakharoff*
Recent controversy surrounding the interpretation of contemporary emoji's in electronics communications (recent Israeli case)

