

# LAW1015 - CONTRACTS

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## INTRODUCTION TO NEOCLASSICAL CONTRACT: THEORY AND BASIC APPROACHES

AUTHORITIES: N/A (N.B – The theories are not tested in final which consists of problem Qs- theories place understanding in context).

### INTRODUCTION

**Defined:** A contract is a promise/agreement or set of promises/agreements supported by consideration which the law will enforce. The agreement, at will theory (contracts must be consensual ad idem) i.e. is formed when two minds “meet in agreement and this is recognised.” To meet in agreement, the parties must negotiate towards consensus and symmetry (However this is subj). A promise carries additional moral weight as a self-imposed obligation but is generally serious, not always binding. It is the promise which forms the basis of the discrete exchange. This agreement must be binding i.e. legal recourse/remedies follow if the agreement is not properly carried out by either party. Further, the agreement must be supported by specific consideration. Consideration is the price someone pays for the promise – the transactional purpose for both parties. As a general principle, proceed from broad rules to specific rules before caveats e.g. Offer → Specific caveats around revocation which can permute the offer ab initio such as a counter offer which kills the original offer and returns the process to the initial stage.

**An example of a contractual exchange:** I enter Taste and order a Small Flat White for \$3.60 by offering my debit card. The Taste employee makes the Flat White and gives it to me. In actively initiating the exchange of promises, I am the promisor (made a promise to Taste/the business entity/Promisee). I voluntarily consented (Contract law assumes free and voluntary consent in all contracts, generally). in this process and assume contractual liability (not imposed). That process illustrated the conditional formation of the contract (with consideration evident in the price), there was no counter-offer and there was a mutual and objective intention to create legal relations. This objective intention is imputed on standards of reasonableness and creates a higher threshold than casual “contracts” with friends and family – subjective intentions of parties mean nothing. Every contract has nuanced and detailed terms of performance. Above, it meant the order was (1) I paid. (2) I received my purchased coffee. This may differ between contracts e.g. sit down in Taste. The terms of performance should fulfil the reasonable expectations of either party and ensure both party’s reliance on the other does not collapse resulting in detriment. At the performance stage; apply objective theory of contract.

**Objective theory of contract:** In interpreting contracts at all stages: Obj intention/Offer/Acceptance=Formation, construction, interpretation etc: the contract is construed by asking what a reasonable person with reasonable expectations would think of the contractual words and the party’s actions to satisfy objective criterion of reasonableness. Where there are gaps, terms can be implied. More specific, the better. E.g. “I will give you cookies if you get A in your next Maths test on [date]” → What happens if they get A+? Does this mean more cookies? No contract? Space for interpretation. Contracts allocate recourse and risk. *Atiyah: Paradigm of Modern Contract Law* dictates that there is a bilateral executory agreement (execution in future, agreement at present). Query whether consideration (Specific price paid for other party’s promise is necessary) is necessary or whether mutual exchange of promises can bind parties. In lieu of contract executing, parties remain liable and wilfully bound, accepting performance and damages if performance has issues. Within bounds, contract law aims to give effect to promises insofar as they match the obj intentions of the parties.

**Exclusions:** Neoclassical contract is a market mechanism to encourage free bargaining and enterprise. The law does not interfere when someone buys a \$10,000 watch and sells for \$2. That is, the buyer’s consideration (promise to give \$2 for the watch) needs to be sufficient (bar set at \$2) but not necessarily adequate (the market value or original purchase value). Frankly, the law does not care about the particulars of bargaining including recourse for people who make plainly erroneous bargains. It merely enforces the framework and bargaining outcome. As a matter of principle and public policy, seemingly unfair contracts that carry through may be vitiated by equity or consumer law. Unconscionable or improper (malice, exploitation) motives in contracts victimise parties. These parties have no recourse in contract law. Remedies usually lie in equity (‘courts of conscience’) or consumer law e.g. CACA 2010 (Cth). If contract endorses something illegal – contract is illegal. Otherwise may simply be unenforceable e.g. a restraint of trade (2017 HSF and W&C) Essentially, contract law is recourse for reconciling asymmetrical (e.g. buy black shoes, receive red shoes – applying obj theory/picture of black shoes/reasonable person expects black shoes). promises to put the aggrieved where they would have reasonably expected to be had the contract been performed, put forward, not restore backwards. As a general rule, the doctrine of privity applies to exclude 3<sup>rd</sup> party abilities to enforce contracts to which they are party (Trident General Insurance v McNiece Bros Pty Ltd – HCA).

➤ **Toll v Alphapharm:** Alphapharm was sub-distributor of vaccine for carrier Toll. Alphapharm (resp) had delivery roles. Appellant gave cover letter with quote stating services subject to conditions of consignment note. There was no consignment note. Alphapharm’s corporate distributor signed conditions, conditions not read. Alphapharm accidentally froze vaccine and rendered valueless. Toll sued. Was there a contract for liability purposes to execute clauses allowing recovery of costs for damage to goods? Decision: No contract. One, Alphapharm’s corporate distributor signed the conditions, not Alphapharm. Two, a person who signs a contractual document without reading the conditions is bound by terms only if the other party has done what is reasonably sufficient to give notice to those terms. This might include a plainly accessible TOCs link. However, there was NO consignment conditions notice at all here.

#### Stylised process:

1. Formation (Negotiations → Agreement) Q: Is there a contract? → Intention, Agreement, Certainty, Consideration. Affected by privity, capacity, formalities etc.
2. Performance (Performance begins → ends) Q: Has the contract been performed? (Involves construction issues). Damages may be assessed as a remedy (e.g. expectation damages → Reliance damages: Cth v Amann Aviation)

**Bilateral contract:** reciprocal arrangement (A mows lawn for \$500, B pays A \$500 – A is bound by obligation to mow lawn and B to pay \$500)

**Unilateral contract:** A chooses to find lost dog for K for \$500 reward (A is not bound by obligation unless they want to be)

### CRITICAL PERSPECTIVES

Realist (Courts should focus on policy objectives to favour legal rules), Critical Legal Studies (Contract law is indeterminate, reinforces legitimacy and power holders), Contract as promise (promise alone is the basis of enforcement), Feminist approach (gender issues should be considered in critically evaluating existing legal doctrine), relational approach (contract is too discrete, hyperfocussed on formation rather than relational interests and social conditions which are better attuned to resolving contract disputes), law and economics approach (the law is incomplete without an economic perspective/inter-disciplinary hybrid given contract’s economic background), sociological approach (business people do not generally consult lawyers when planning their contractual relationships or even when a dispute arises). Companies like Telstra use standard form contracts for TOCs that often disclaim liability.

## AGREEMENT; OFFER AND ACCEPTANCE

Authorities: PBS v Boots Cash Chemists (display is not offer, offer supported by consideration by customer); Waltons Stores v Maher (Estoppel as a COA in contract); Carlill v Carbolic Smoke Ball (contracts can be made to the whole world); Aus Woolen Mills v Cth (govt subsidy promise but stopped); B Seppelt v Commission for Main Roads (govt negotiates price but no willingness to be bound so even if offer made, no consensus in contract from conduct)

### OFFER + ACCEPTANCE = AGREEMENT SYNTHESIS

#### AGREEMENT → CERTAINTY → CONSIDERATION → INTENTION/ITCLR (Apply in all types of contract)

**Defined:** (1) Offer (An expression of willingness to enter into a contract with the other party on certain terms without further negotiation upon acceptance); (2) Acceptance (Unqualified assent to the terms of an offer within reasonable time of offer; Empirnall Holdings). Objective theory applies to both. Agreement exists when offer by one party is accepted unequivocally by another party or alternatively, can be inferred from the circumstances that the parties have reached agreement. Exceptions arise in the form of revocation, communication rules for offer and acceptance. Within this framework, fairness is not pivotal. Certainty is. As agreements are voluntarily assumed, liability exists automatically upon formation. Remedies are in equity, not contract. Offer: Ask the following Qs: 1. Has objective intent to create legal relations been established? (would the reasonable putative offeree reach the same conclusions) 2. Has there been an offer made by one party to be bound by terms of a contract accepted by another? 3. When was the contract entered into? 4. Where is the contract formed (Jurisdictional and applicable laws) 5. What are the terms/express and implied? [offeror makes offer/ offeree accepts offer]

### OFFER

- Offer is a statement of willingness by one party to be bound by terms immediately on acceptance by the other party without further negotiation; judged objectively from a reasonable putative offeree and whether they would consider an offer that is made.
  - An offer is distinguished from an invitation to treat (e.g. tenders invite offers, standing offers), provision of information, desire to negotiate, declaration of intention etc. Offers must be communicated by offeror or an authorised agent of offeror to offeree: Henthorn v Fraser [An offer is determined with respect to what a reasonable person in the position of the offeree would interpret the statement to be]
- An invitation to treat is an invitation to make offers (or an offer to receive offers which is not itself an offer) or negotiate without intention to be bound; includes advertisements for goods for sale, auctions and shop displays whereby a reply to invitation may be an offer or merely an indication of willingness to negotiate.
- When the offer is made the term/s of the proposed contract should be communicated to the offeree: Thornton v Shoe Lane Parking or made in general terms for precise terms to be settled later; Master v Cameron
- Offers can be made, not just to individuals but to the whole world or a limited group in which case the offeree is regarded as any member of the general public who comes forward with acceptance or an offer backed by consideration; Carlill v Carbolic Smoke Ball; R v Clark. Plainly Qualms with offer and rejections constitute counter offers and kill the original offer/may leave open for further offers; Brambles (Ipp JA at p 194 of 53 NSWLR 153) and Butler Machine Tool v Ex Cell O Corp.
- PBS v Boots Cash Chemists: If display is an offer, then acceptance is removing from shelf but there is no consideration at that stage so acceptance is not possible because there is no possibility for revocation: Further, no acceptance can be communicated in reply. Invitation to treat instead.
- Offer may be withdrawn at any time prior to acceptance if withdrawal is communicated to the offeree. This applies even if offer was stated to be open for a certain time unless offeree has already produced consideration for that promise (Option contract).
- No express words; revocation can be implied from conduct so long as it is communicated before performance completed (e.g. run away without product before paying at Target) but must be plain else contract subsists. Rules permuted by ACL e.g. traders who 'offer' priced G&S required to have reasonable supplies. Acceptance can also be implied from conduct but still needs to be communicated (Dickinson)
- Special issues do arise if withdrawing from a unilateral contract (where offeror withdraws after offeree accepts)
- Waltons Stores v Maher: Promissory estoppel as a cause of action can preclude a party from asserting anything contrary to what was implied by a previous action or statement of that person e.g. prevent people going back on offers or acceptances.
- The following generally do not constitute an offer;
  - Display of goods in a shop (PBS v Boots Cash Chemists: offer to be made by customer to purchase thus supported by consideration at the checkout, the placement of goods displayed is merely an invitation to treat i.e. any part of the negotiation process that invites further bargaining, not an offer but a willingness to negotiate or an invitation to make an offer); If the price display on shelf was an offer, then difficult to ever return a good once removed (as that would constitute binding acceptance + agreement – absurd outcome and no supervision)
    - An agreement on price generally doesn't constitute agreement without essential terms. Replies to inquiries not offers.
  - Statements of government policy; (Aus Woolen Mills v Cth: no consideration in government's offer thus no quid pro quo relationship, no K, buying the wool was merely a condition precedent, not a consideration to pay for subsidy – govt policy was not a corporate promise); A contract only exists if the unilateral statement is really offered as condition for doing the act and that act was really done in consideration of a potential promise inherent in the agreement. In this case, no promise/offer and no consideration given to keep offer open. Commonwealth never induced Mills to buy the wool, only that if domestic wool was bought, subsidy would be paid. This amounts to a gift subject to conditional precedent. Offerors can be revoked where time period open not backed by consideration. Best course for offeree is "I will pay you \$ to keep your offer open for \_\_\_\_"
  - Auctions; AGC Ltd v McWhirter: auctioneer listing for sale is an invitation to treat, not an offer. The bids are the offer. Contract formed when auctioneer accepts bid at fall of hammer. Auctions without reserve are a general exception; Barry v Davies
  - Providing information/recording partial consensus does not amount to an offer, nevertheless acceptance (B Seppelt v Commissioner of Main Roads: Using the word 'offer' or 'accept' does not make conclusive offer or acceptance, still an objective test)
  - Tickets (including exclusion clauses). Furthermore, simultaneous cross-offers do not amount to acceptance. No contract.
- An offer to the whole world only applies if the reasonable person believes the offer; see Leonard v Pepsico (US). Generally apply objective theory on a case by case basis (In Leonard, unbelievable → puff, in Carbolic, offer). Consider whether it is offer or puff (statements which induce contracts but are so far fetched or exaggerated that no reasonable person would believe them to be fact on which they could rely.) Subsequently not binding on party making offer) Puff and invitation to treat and offer differs because applying obj theory – the obj intention to create legal relations from the perspective of the putative offeree must be established.
- Carlill v Carbolic Smoke Ball: "Offers to the whole world" (Held: Carlill on appeal - LJ Lindley); Defence raised that no promise was intended (but this is subjective), no offer made to a particular person (e.g. it is immaterial when an offer is to the whole world e.g. lost pet reward poster), plaintiff had not notified her acceptance of own offer; agreement was uncertain because it failed to stipulate with precision period disease needed to be contracted; plaintiff had not supplied any consideration for the defendant's promise (but Carlill carbolic smoke ball cost, detriment of usage as prescribed in notice = the consideration, not the monetary cost/consideration can be specified in offer – use of the smoke ball gives the company confidence in product, increases sales etc. constituting consideration from Ms Carlill who further inconvenienced herself = ample consideration) Further, inconvenience sustained by one party at the request of the other is enough to create a consideration. Contract is made with limited portion of public who come forward, person making the offer may dispense with notice to themselves if desirable to do so – offeror may expressly or impliedly intimate that acting on the proposal without communicating acceptance (acceptance is conduct is performance) is sufficient e.g. (Lost and found reward poster – person coming forward need not communicate acceptance, simply perform).

## REVOCATION AND LAPSE OF OFFER

- Offeror may revoke offer at any time prior to acceptance of agreement by way of communication unless consideration is given by the offeree to keep the offer open for a certain time period, thus transforming the contract into an option contract; Goldsborough Mort & Co Ltd v Quinn – creating an option K makes an irrevocable offer and the person receiving the option gives consideration for the promise of the other party to sell to them)
  - Even firm or unilateral offers given with a set time period and stated to remain open for a definite period of time can be revoked without consideration: Mobil Oil Australia v Lyndel
  - Revocation, express or implied, must be communicated to the offeree and the postal acceptance rule doesn't apply to revocations; Stevenson Jacques & Co v McLean. If acceptance or offer is not explicitly revoked, revocation of an offer can still be inferred from conduct (even unauthorised conduct by third parties) which shows a clear intention to revoke and notice has reached the offeree/offoror (actual means of communication are generally immaterial) – noting that inquiries are not rejections or revocations;
  - Dickinson v Dodds. If not specified, offer closes at reasonable time, with regard to all circumstances. If stipulated, offer lapses at expiry of stated period.
- No universal rule stating unilateral contracts cannot be revoked even after performance commences (Wellcome). Offeree is the beneficiary of performance may result in damages. (Lyndel); Mobil Oil Australia v Wellcome International Ltd; Mobil Oil Aus v Lyndel
- If no time specified for keeping the offer open, offer lapses after a reasonable time from basis of putative offeree.
- Making of a counter-offer extinguishes original offer; Butler Machine Tool Co Ltd v Ex Cell O Corps however mere inquiry e.g. for clarification does not amount to rejection or acceptance of offer-entirely neutral effect; Stevenson, Jacques & Co v Maclean
- Heydon JA in Brambles v Bathurst City Council; “Even if an offer is rejected it may not come to an end...it might be repeated, otherwise revived or remain available for acceptance or adoption as the basis of mutual assent manifested by conduct”
- Goldsborough Mort & Co Ltd v Quinn: If Offeree pays to keep offer open for a week (collateral contract) revocation by offeror impossible during that period..
- Mobil Oil Australia v Wellcome Intl: Was there an objective willingness to be bound on specified terms (factually at a conference). “If you achieve 90% each year for the next six years then we'll guarantee you another 9 years as of right, no fees, just a renewal, now we've got a lot more work to do...consistently achieve 90% or better” However, stopped promise after 4 years whilst other party continued towards this target. Revocation without renewal is possible for the following reasons; 1) the above did not constitute an offer ab initio 2) even if offer, there was no detriment in the consideration of working towards the targets 3) unilateral contracts can be revoked even by the performance stage if no consideration given per Goldsborough). Objective intention to be bound must be found however. Language uncertain. No ancillary contract to allow COA in estoppel on basis of unconscionable conduct based on representation of renewal on which Wellcome relied.

## ACCEPTANCE

- Unqualified *assent* to the terms of the offer (however not rejecting an offer does not constitute acceptance) *communicated* to the offeror. Offers can only be accepted by the person to whom offer is made. Under objective theory, an external manifestation of contract to an offer; Empirnall Holdings v Machon Paul Partners (Acceptance by conduct). Offer can specify how to accept in order to make bargain binding and if this is the case, the offeree must comply with the means of acceptance for it to be effective.
  - (e.g. performance by language or words by the nature of the transaction or common sense may be sufficient although offerors can stipulate whether or not acceptance must be communicated – unilateral contracts e.g. Carlill v Carbolic Smoke Ball)
- Dickinson v Dodds provides that revocation can be inferred from conduct but must be communicated/shown to the promisee and only upon receipt and comprehension by offeree, is there revocation: (e.g. sell u land, sells to somebody else but you hear of this at a party, revoked) Applying obj theory, the reasonable offeree must still infer an implied revocation. Revocation can be communicated by a third party, need not be personally by offeree. *There is no formal language to effect revocation as such.*
  - Acceptance can also be inferred by a reasonable bystander as to conduct: Empirnall
- Silence cannot be specified as a means of acceptance and communication is generally required; Felthouse v Bindley (n.b silence can be conduct in which case it could manifest as one means of acceptance if specified and complemented by further positive action- Empirnall) Felthouse also is authority for action as constituting acceptance insofar as not revoked. Exceptions to the communication requirement:
  - Empirnall Holdings v Machon Paul Partners: Where offeree with reasonable opportunity to reject offer of goods/services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer (infer A)
  - Carlill v Carbolic Smoke Ball: Offer may dispense with need for communication or acceptance takes form of performance;
- Acceptance must correspond with offer (mirror image rule). If no mirror image, then there is a counter offer generally and the original offer is nullified; Butler Machine Tool Co Ltd v Ex Cell O Corporation. Inquiries do not amount to counter offers
  - An acceptance which accepts different terms to that purported in the offer still constitutes a counter offer.
  - Further, Australian/British contractual system is the “last shot wins” rule in the battle of the forms. Last standard terms proposed before acceptance take effect and apply. Cf UN Sales Convention which applies to Aus international transactions and US model which looks to effect common standard terms and imply rest on basis of law and extrapolation.
- Thornton v Shoe Lane Parking Ltd (parking ticket machine); Customers are only bound by terms of the offer if notice is brought before acceptance. Customer is not bound by terms of offer if notice is not brought or brought after acceptance.
- Knowledge of and reliance on offer (at time of acceptance, offeree must know existence of offer and agreement acceptance must be based on offer made) is required for acceptance; R v Clarke & AWB – unilateral contract is only binding if person's performance is reliant on or in faith of offer given to them (give u \$10 to walk to Brisbane, man walking to Bris anyway-does not constitute acceptance) That is, the acceptance must be referable to an offer. Knowledge of the offer before acceptance is necessary for the existence of the K.
  - Any person who has knowledge of an offer and then performs its conditions before communicating it establishes prima facie acceptance– this is necessary for consensus ad idem.
- Acceptance must be communicated and received by offeror for formation generally; Stephenson, Jacques & Co v McLean
- Exception is Postal acceptance rule: Henthorn v Fraser. When it must be within the reasonable contemplation of the parties in light of the circumstances, the post may be used as a means of communicating acceptance of an offer which is complete as soon as it is posted (as soon as posted, agreement point)
  - “Reasonable contemplation of the parties” is where parties contemplate the post as a possible or permitted mode to conclude K not that posting should conclude the K (Bowen CJ in Bressan v Squires) e.g. offer sent in letter by post with express instructions or implied e.g. through attached reply envelope or; requirement of written notice for acceptance)
- If wrongly addressed or documented, postal acceptance rule does not apply. (Korbetis v Transgrain)