

CONTRACT LAW EXAM NOTES

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What is a contract?

- Legally enforceable agreement that involves one or more promises, given for something in return
 - Assume a contract has two parties
 - Party = People or entities that enter into a legal agreement
 - Can be more than 2
- Some agreements that are not contracts:
 - Social arrangements:
 - These are not considered contracts as they are not legally enforceable as there was no intention for it to be legally enforceable
 - Potentially consideration is present as there was a promise to do something for one another
 - Gifts:
 - Not a contract as don't have an agreement because haven't considered a bargain
 - Wording is very important
 - Must be an element of bargain or *quid pro quo*
 - Integral to the document of consideration - requirement that the agreement have the parties doing something for one another

Why enforce promises?

- Moral arguments
 - In a human society a special significance attaches to promises
 - When you make a promise you should keep it
 - Doesn't explain why some promises are so significant that they attach legal enforceability
 - Concept of reliance - if reliance is had on a promise then the promise should be kept and the party held to their agreement
 - Not sufficient in itself to create a contract
 - Nor is it necessary
- Economic arguments
 - Trade and commerce (concept integral to the operation of society)
 - How would trade and commerce work without enforceability

Contract law or contracts law?

- Different rules for different types of contract
 - Contract law or common law
- But a common core of principles
 - Applies to any type of contract

Relevance of the common law:

- Increasing statutory regulation
 - Increased dramatically in the 20th century with no sign of slowing down
- But common law is still important
 - Types of contract with little statutory regulation
 - Filling the gaps left by statute
 - Interpreting statutory provisions by reference to the common law

The common law - a digression:

'Common law' has two distinct meanings:

- Common law (ie, judge made law) can be distinguished from legislation or statutory law
 - No authoritative decision
 - Based on an accumulation of decisions which date back years, decades and centuries
 - Cannot look up 'the common law'
 - Nature is that there cannot be an authoritative state of it
 - What the common law says on any given point is inherently contestable
 - Rely on courts who are dealing with contested issues based on what the common law says
 - Rely on expert writers who set out what the common law is
- But judge-made law has two main categories:
 - **Equity** (rules and principles deriving from the old Chancery Court)
 - **Common law** (rules deriving from the other courts)
- So the same term can mean *all* judge-made law, and one type of judge-made law
 - (Those types of judge made law that is not equity)

Some perspectives

- The practical context
- Importance of contract law
- The international dimension

The practical context

- Parties are frequently unequal in terms of (most contracts are unequal when entered into)
 - Bargaining power
 - Bargaining skill
 - Access to relevant information
- Some contracts are freely negotiated, but more are contracts of adhesion ('take it or leave it'), often in standard form

Importance of contract law

- Contract law is irrelevant to the resolution of most contract disputes
 - Most contract disputes are resolved relationally rather than under the law
- But some disputes *are* resolved legally, or at least under the shadow of the law
 - Note increasing use of ADR, often reflected in pre-agreed arbitration, mediation, etc
 - Particularly if there is a lot of money involved or a degree of personality
- And most written contracts are drafted by lawyers, or with reference to the law

The international dimension

- Focus in course on domestic Australian law, while sometimes noting approaches overseas
- How Australian contract law differs from other common law countries

- The push to reform/harmonise
 - 2012 review by federal government
 - Emphasis on international trade
 - Consistent law for this area
 - No significant initiative at the moment
 - Continue to develop a contract law that departs from English law
 - The codification option?
 - Lots of things to suggest could happen however seems unlikely at the moment

Topic 2: Contractual Remedies

Types of remedies:

Self Help:

- Withholding performance - can only do so in certain circumstances (sometimes available and sometimes not - depends on order of the performance)
 - Eg. Employed to do some work - not happy with how you are being treated - simply don't show up to work
 - Eg. Employ someone else to do work - not happy with the quality of their work - simply refuse to pay them
 - Eg. Bought some goods - don't think the goods are of acceptable quality - may return the goods and refuse to pay for them/get refund
- Termination - may not be lawfully available as a remedy
 - If not happy with performance of contract - may seek to end it
 - Eg. Employed to do some work - not happy with how you are being treated - simply resign
 - Eg. Employ someone else to do work - not happy with the quality of their work - simply fire them
 - Eg. Bought some goods - don't think the goods are of acceptable quality - terminate contract
 - One company may purport to terminate a contract and the other may go to court to challenge the validity of the termination
- Deposits and advance payments
 - Securing a deposit prior to goods being provided - can purport to retain the deposit

Enforcement: - **order from a court on one party by requirement of another party to do what they have promised or been promised**

1. Specific performance (order that contract be performed)
 - Almost never available
 - Granted at discretion of court, but only rarely (except contracts for sale of land)
 - Specific performance is an equitable remedy (has its origins in the old chancery courts)
 - Means it is discretionary - court has a choice in whether to make it available
 - Must show an actual breach of contract and also persuade court to side in your favour
 - Common reasons for refusal:
 - Damages would be an adequate remedy
 - Action for damages usually an award of money to compensate not receiving the goods from someone else
 - Goods are almost never unique and can almost always be received from somewhere else
 - So specific performance not necessary