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Week 3: Contract Formation

A contract is a legally enforceable agreement between two parties. The effect of its formation is that both parties have rights and obligations.

Why are contracts important?

- Allow parties to make legally enforceable commitments to each other
- Allows businesses to plan

Objective approach

To determine whether a contract has been formed, an objective approach is taken. Would a reasonable person have entered the contract and found it legally binding?

Executory/Bilateral vs Unilateral Contracts

- Executory/Bilateral
 - Both parties have outstanding obligations after acceptance of the offer
- Unilateral
 - One party has an outstanding obligation - the other party has already performed their act

Capacity to Contract

- Adult (18+)
- Of sound mind
- Exception: some minors allowed for necessities or if the (overall) contract is beneficial for them
 - Necessity, Scarborough v Sturzaker
 - Beneficial, Hamilton v Lethbridge

Formation Requirements

- Agreement
 - One party offers, the second party has unqualified acceptance
 - An offer must be
 - Promissory
 - Must have a promise, going to do/not do something
 - Placer Development v Commonwealth
 - Sufficiently certain
 - Intended to result in a contract if accepted
 - Invitation to treat

Week Six: Remedies for Breaches

Sometimes a combination of remedies; or alternative remedies “ideally I want specific performance, alternatively I want damages”

Common Law remedies

- Damage to compensate for loss
 - Compensatory, not punitive
 - Where would the parties be if the contract had been performed
 - Types of loss
 - Direct loss
 - Arises naturally from breach
 - Koufos
 - Consequential loss
 - More remote
 - Reasonable contemplation of both parties
 - Wasted expenses
 - Expenses incurred in anticipation of the other party performing their obligations
 - Stress and disappointment
 - Only if the contract was meant to provide enjoyment/relaxation/entertainment
 - Duty to mitigate
 - Owed by party that hasn't breached
 - Cannot claim loss for reasonably avoidable losses, try alternates
 - Agreed penalty clauses
 - Liquidated damages clause, must not penalise
- Terminating the contract
 - Depends on
 - Type of term breached
 - Condition
 - Tramways test
 - Was the promise a dealbreaker?
 - Warranty
 - Breach will not cause substantial loss
 - innominate/intermediate
 - Breach may cause substantial loss
 - If the breach deprives the non-breaching party of the substantial benefit contracted for, the non-breaching party can terminate
 - Nature of the breach
 - Non-performance
 - Partial performance

Week One: Organisation of Law, Sources of Law (Legislation)

- **Non-legal** peer pressure, goodwill, convenience, moral/religious beliefs, social values, rules customary in society
- **Law making bodies** elected legislatures (parliament, council), courts
- **Legislatures** types Commonwealth, State/Territory *category* bicameral (two houses – e.g. Comm) or unicameral (only Qld, ACT, NT)
- **Levels of power** *Exclusive* Comm only, s90 constitution *Concurrent* Comm & S/T s51; *Residual* only S/T, not in the constitution. *if inconsistent concurrent*, Comm law prevails to the extent of the inconsistency, s109
- **Court authority** high court → intermediate/appellate court → trial courts
- **Types of law** *Public*, b/w State & Individuals. a) Constitutional b) Administrative c) Criminal. *Private*, b/w Individuals. a) Tort b) Contract c) Agency d) Consumer Protection e) Corporations f) Property
- **Legislative process** *Before the Bill identify need for new law → political process/lobbying → develop specific proposals, draft Bill. *Once the Bill is Created passed by legislature → introduced to House of Origin → seconded by House of Review
- **Procedure in HoO** Initiation clerk lists Bill → 1st Reading long title read out → 2nd Reading Minister speech, Explanatory Memo, debate, vote to continue → Committee optional, bipartisan, for more contentious → 3rd Reading votes
- **Procedure in HoR** same as HoO. Either passed through, or amended & sent back to HoO, accepts/rejects amendments through same steps
- **From Bill to Act** *Royal Assent* Governor-General approval, Bill becomes law. Also *Publication* Government Gazette, *Commencement*
- **Interpreting legislation** *Guidance within statute* definitions, purpose provisions, surrounding provisions; *External sources of guidance* principles of interpretation/presumptions, previous considerations (precedent), extrinsic materials (explanatory memo, Minister’s speech)
- **Presumptions** are rebuttable! Include: statutes don’t operate retrospectively; don’t intend to interfere w/ fundamental rights, penal provisions strictly construed, intend to legislate in conformity w/ international law.

Week Two: Case Law

Sample

Week Three: Contract Formation

Sample

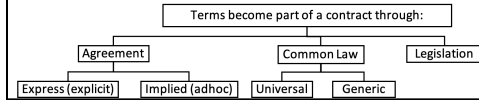
FORMATION REQUIREMENTS:

- **Capacity to contract** *Adult*, 18+, *Of sound mind*, able to understand the agreement, or unable but other party couldn’t have known, *Corporations*
 - minors can also be bound for necessities, or if overall contract is beneficial
- **Agreement** one party offers, other party gives unqualified acceptance
 - Offer must be: *promissory* be a promise (Placer); *sufficiently certain*; *intended to result in a contract* if *accepted* not invitation to treat, commonly ads, invite other to make an offer (Partridge, Pharm)
 - Acceptance must be *unqualified*; *not subject to a condition* (Masters); *offer not expired*; *comply with requirements in terms of offer*.
 - *Effective* when acceptance communicated to the offeror; *EXCEPT post* is when sent (Henthorn), *email* is when hits inbox if designated, otherwise when read (s13A Electronic Transactions Act Victoria)
 - **Certainty** must be sufficiently clear and precise. Can have multiple meanings, only issue if the language is meaningless
- **Consideration/deed** unless deed, must be some form of exchange, 2-sided
 - Deed written; headed deed; signed, sealed delivered; external witness
 - Consideration promise (bilateral); actually perform conduct (unilateral). Sufficient but doesn’t need to be adequate (Thomas), can’t be past consideration (Stilk) unless practical benefit (Musumeci)
- **Intention** did they intend for the agreement to be legally binding, no presumptions from relationships post Ermogenous.
- **Doctrine of Privity** only enforceable by contract parties who gave consideration

Sample

Week Four: Terms of a Contract

- **Term** undertaking or promise that defines the R&O of parties



Sample

Week Five: Terms Implied by Goods Act / Performance & Breach

- **Section 61** parties by express language can exclude any term in the Goods Act
- SALE BY DESCRIPTION**
- **Section 18** if sold by description, goods should correspond to the des (Varley)
- **Section 19b** if sold by description **AND** seller normally sells this item, implied term that goods are of a *Merchantable Quality*
 - other buyers would buy, even if they knew the defect, for ~ same \$ (AKM)
 - NOT MQ if no use for the good’s normal purpose (David Jones)
 - reasonable person would accept delivery after examining (George Wills) unless buyer examined the goods, and should have identified the defect.
- SALE BY SAMPLE**
- **Section 20** bulk of goods must correspond w/ the sample, no defects not reasonably apparent in the sample
- FIT FOR PURPOSE**
- **Section 19a** if buyer makes known purpose, relies on the seller’s skill, and seller deals in good; implied term goods will be fit for that purpose. (Expo)
 - Proviso – no implied condition if bought because of brand/patent, and not relying on staff judgement (Baldray still implied)

Week Six: Remedies for Breaches

Sample

	Condition	Innominate	Warranty
Non-performance	D&T (Associated)	if the breach deprives the	D
Partial, substantial	D (Hoening)	non-breaching party of the	D
Partial, <subs	D&T (Connor, Steele)	substantial benefit	D
Late performance	D&T if timely perform a condition (Holland)	contracted for, non-breaching party can	D
Anticipatory breach	D&T (Hochster)	terminate (Bettini, Cehave)	D

- *Electing to terminate* **Affirmation** Non-breaching party can elect whether to exercise the right to terminate. Must communicate decision to party in breach. If the party affirms the breach, they lose the right to terminate. (Holland)
- Equitable remedies**
- **Specific performance** only available if common law remedies inadequate. Not given if *damages give adequate relief*; performance involves a *close personal relationship, goodwill or cooperation*; *continuous supervision* would be necessary.
- **Injunction** court order to *do/not do something*. Usually to prevent threatened or stop continuing breach. Not given if indirectly same effect as specific perform.

Week Seven: Vitiating factors

Sample

- **Illegality** transaction set aside on:
 - **Public policy grounds (common law approach)** Unreasonable restraint of trade Must be a restraint; Relate to a protectable interest; The person seeking to enforce the restraint must demonstrate the restraint is reasonable between parties; Can be released from restraint if it unreasonable relating to the public interest E.g. if skills are in demand, better for the public to allow work (Lindner)
 - **Expressly or implicitly prohibited by the statute** Express: act prohibit/bans a certain type of conduct; Implied: intention of statute (Fitzgerald)

Week Nine: Consumer Law

Sample

Week Ten: Tort Law

Sample

- **Remedies** *Damages* Put injured party where they would be had the tort not been committed; *Punitive damages* can only be awarded if deliberate misconduct, *Injunction* Order to stop continuing/threatened conduct involving breach of DoC

- Week Eleven: Agency** A person (A) can authorise another person (B) to act in their place. A is the principal B is the agent.
- **Authority**
 - Express actual authority Directly telling someone to act on your behalf. Can be: *General*, represent in any legal matter; *Specific*, only for this transaction.
 - **How it is given?** Orally or writing But must be in writing for buy/sell land, Be agent for a period > a year, Do an act that will take longer than a year
 - Implied actual authority Person has already been expressly authorised as an agent, & there is an implied additional actual authority.
 - **Do anything:** normally or necessarily incidental to the authorised acts; that a person so appointed would normally have authority to do; by custom the agent would have the authority to do UNLESS principal makes it clear the agent can’t do any of the above
 - Apparent (ostensible) authority Principal acts in a way that makes it appear to a third-party that the agent has authority - Third-party didn’t know they weren’t an agent. No actual authority. **Three points** 1) Representation (express or implied) was made to the third-party that the agent had authority to enter the

types of transactions in question. 2) Representation was made by a person with actual authority to manage the relevant aspects of the company's business. 3) Third-party was induced to enter the transaction by the representation and relied on it.

Principal who doesn't want to be bound by apparent authority must make third-parties aware that despite the circumstances, the agent is not in fact authorised to do the acts in question.

- **Duties of the agent** Must carry out instructions; Carry out tasks with due care and skill; Act in good faith; Not have a conflict of interest; Keep proper accounts, should not normally mix the principal's money with their own
- **Duties of the principal** Must pay the agent agreed fee; Reimburse the agent for properly incurred expenses; Must indemnify the agent against losses or liability, provided agent was acting lawfully within the authority given
- **Ending an agency relationship** Completion of task; Expiry of term; Revocation- Principal withdraws the agent's authority by notifying the agent; Renunciation - Agent can renounce their authority by notifying the principal; Mental incapacity Unless "enduring power of attorney", agency is terminated if principal is mentally incapacitated; Death

ACCC v CG Berbatis Holdings Rs lease store from C 1) C overcharging, all tenants suing C. 2) Rs want to sell, need C to extend lease. C only grant if Rs stop action. NOT UNCONSCIONABLE, no special disadvantage, could choose to not extend

ACCC v Coles Supermarkets Coles say fresh baked bread, actually partially baked, frozen, warm up instore. MISLEADING

ACCC v TPG Internet TPG ad promote cheap ADSL, small disclosure bundle phone. Looked like \$59, actually \$89. MISLEADING fine print contradict dominant msg

Sample

Sample

Hamilton v Lethbridge L <18, contract 5-year article clerk for H, include can't practice w/in 50km of Toowoomba. 6th year, L practice in T, claim restraint clause not beneficial. ENFORCEABLE, holistic contract beneficial

Handbury v Nolan Auctioneer sold cow @ auction saying it was pregnant, tested. Actually infertile, buyer sued. Buyer couldn't verify pre-sale, STATEMENT EXPRESS TERM OF CONTRACT, LEGALLY BINDING promise

Sample

Sample

Expo Aluminium (NSW) Pty Ltd v WR Pateman Pty Ltd GOODS ACT s19A WR supply aluminium windows to EA (ordinary course), EA told WR nothing b/w house & north pole (purpose), WR recommended (reliance). Window leaked IMPLIED TERM BREACHED

Fitzgerald v FJ Leonhardt FJ drill bores on F's property; with no permit - \$5000 penalty. ENFORCEABLE, act penalises, but doesn't prohibit.

Freeman & Lockyer v Buckhurst Park Properties (Mangal) K, director of B, did managerial acts like employing F. When F asked for pmt, B said K didn't have authority. BINDING, no express actual authority, but apparent authority

Garcia v National Australia Bank Mr G asked Mrs G to sign a guarantee to his business, told her it would be invested in gold, Mrs G didn't know it was secured by their mortgage. Mr G misrepresented (wasn't buying gold), couldn't repay debt, NAB enforced guarantee. UNCONSCIONABLE - NAB aware of relationship, risk of misrep/undue influence, should make effort to explain to wife

George Wills & Co Ltd v Davids Pty Ltd GOODS ACT s19B D bought canned beetroot from GW, after a year cans leaked + bacteria, unsaleable. MERCHANTABILITY, at PoS acceptable

Government of Newfoundland v Newfoundland Railway NR construct railway, Gov give 25k acres for each 5miles section constructed. Project stopped after 7 sections, DIVISIBLE, ENTITLED TO 25K ACRES x 7

Great Peace Shipping v Tsavlis G and T thought G was closest to save a sinking ship, actually another ship closer. Bilateral mistake, but not radically different; still a ship, could still perform some rescue work. CONTRACT NOT SET ASIDE

Hadley v Baxendale H paid B to courier broken to manufacturer for replacement, B said would do next day, but waited several days. During delay, mill idle. NOT ENTITLED, not consequential since B didn't know mill no spares/wouldn't run

Van den Esschert v Chappell pre-sale of V's house, V told C orally no white ants (not in written contract). Had ants, C sued V – contract partly-written partly-oral, CONTRACT BREACHED. Promise important, so included

Varley v Whipp GOODS ACT s18 V sold reaping machine to W, unseen, claimed 1yo barely used. Actually old + broken & repaired NON-PERFORMANCE breach

Woods v Multi-Sport Holdings W batting in indoor cricket match org by M.

Mistimed, hit his eye lost sight. M provided equipment but no helmets NO BREACH of DoC, risk obvious, M didn't have to warn players or provide helmets

Yates v Jones Y injured in car crash caused by J's negligence. In recover, Y in pain, Y's friend gave Y heroin to cope. Y became addicted to heroin. J NOT THE CAUSE

Yorke v Lucas Y bought store from T, through L (T's agent). Some info T told L (who then told Y) was wrong. L AND T BOTH MISLEADING, even tho L didn't know