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SAMPLE

Acceptance

Red flags:

- What if the offeree says he/she didn't intend to accept, or misunderstood, the offer?
- What if an offeree appeared to be assenting to the offer but was mistaken as to the terms of the offer?
- What if the offeree did not familiarise himself or herself with the full terms of the offer?
- What if acceptance was a coincidence, and not in response to the offer?
- Acceptance must generally be communicated. But at what time does communication of acceptance occur in the different modes of communication?
 - o General rule
 - o Postal acceptance rule
 - o Electronic communications
- Silence and acceptance inferred from conduct
- Can an offeror prescribe silence as acceptance?
- Can silence and conduct amount to an acceptance?
- What if the terms of the offer and terms of acceptance are not the same?

1. Definition

"Unqualified assent and willingness to be bound by the terms of the offer made in a manner invited or required by the offeror." This is measured objectively (**Fitness First**) No meeting of the minds required (**Smith v Hughes**)

2. Objective Test

Whether the reasonable person would consider the parties to have reached agreement having regard to their external manifestations (**Fitness First**). No meeting of the minds required (**Smith v Hughes**)

Exception: Unilateral contracts = the acceptance must be in response to the offer (**Crown v Clarke**). The subjective intention of the offeree is relevant in unilateral contracts

3. Communication of Acceptance

General Rule: Acceptance must be **communicated** to the offeror by the offeree (**Latec Finance**), in any reasonable way unless a particular method of acceptance is prescribed by the offeror. Acceptance is effective when and where it is received by the offeror (**Latec Finance Brinkibon**)

Exceptions:

- Acceptance can be inferred from conduct (**Empirnall; Brambles**)
 - o E.g. where an offeree with reasonable opportunity to reject the offer takes the benefit of it, which indicate that they were to be paid, it can be held the offer was accepted according to its terms (**Empirnall**)
- Offeror may, expressly or impliedly, dispense with the need for actual communication of acceptance (**Carlill**)
 - o In bilateral contracts, clear language needed to dispense requirement (**Latec**)

Consideration

Red flags:

- unilateral contracts look at the bargain requirement as may seem as a gratuitous gift
- subsequent promises to pay for services think about past consideration
- 'begrudgingly' agree, doesn't want to agree but does

SAMPLE

1. Definition

Consideration requires that a detriment or liability be voluntarily incurred by the promisee or a benefit be conferred on the promisor in exchange for the promise.

- Distinguish between consideration and conditional gift (**Australian Woollen Mills**)
 - o In the absence of an express/implied request from the promisor, the promise is likely to be a conditional gift
- In unilateral contracts consideration is the performance of the act in accordance with the terms of the offer
- Consideration is required for any promise not made in a deed (under seal)
- Agreement not supported by consideration (and not made in a deed) is called nudum pactum (i.e. naked agreement), and is unenforceable

2. Benefit / Detriment requirement

- Must be:
 - o a detriment incurred by the promisee or
 - o A person seeking to enforce a promise must confer a benefit (**Beaton**)
- Consideration must move from the promisee but need not move to the promisor
- Where two parties are joint promisees, consideration may be provided by one of them on behalf of the other (**Coulls**)
 - o A, B, C are parties to a contract. A promises B and C that he will pay C \$100 if B will build him a gate, C cannot compel A to carry out his promise, because, though a party to the contract, C is a stranger to the consideration (**Trident**)
- Benefit / detriment must be a direct result of the contract

3. Bargain requirement

Bargain requires a "quid pro quo" relationship (**Beaton**), where consideration is 'exchanged' (**Australian Woollen Mills**) "in return for the promise" (**AWM**)

- The benefit or detriment must be given in return for the promise (**AWM**)
 - o Note: distinction between conditional gift and quid pro quo (**AWM; Beaton**)
 - o Request from the promisor is relevant but not conclusive to establish quid pro quo, it may be express or implied (**AWM**)
- Acts performed in reliance on a promise will not satisfy the bargain requirement (**Beaton**), unless those acts can be regarded as having been performed in return for the promise (**Beaton**)

SAMPLE

Privity

Red flags:

- contract conferring benefit on a third party
- contract "risk clauses"
 - o Indemnity clauses (promise to compensate loss)
 - o Exclusion of liability clauses (promise not to sue)

1. Define

The doctrine of privity states that only a party to a contract can be directly affected by rights and obligations under that contract. This doctrine has two implications:

- A contract cannot impose a burden on a third party without that party's consent.
- Where a contract confers a benefit on a third party, that party cannot sue to enforce the contract (**Coulls v Baggot**)

Generally: a person will be regarded as being 'privity' to a contract if:

- that person entered into the agreement (e.g. that person made a promise in exchange for another party's promise); and
- that person provided consideration in support of the agreement

2. Circumventing the Privity Rule

Enforcement by a party

a party can enforce the promise benefitting a non-party

- Promisee can sue promisor to enforce promise on behalf of benefitting third party
- However, the remedies available may not be sufficient to ensure that the third party obtains the promised benefit.
- Damages are based on loss suffered by contracting party, therefore only nominal damages may be available, which will be insufficient to cover the third party's loss
- Specific performance is only ordered in limited circumstances

Agency

a party not directly involved in formation (C) can still be privity to a contract if one party directly involved acts as C's agent when the contract was entered into (**New York Star**)

- An agent has the power to enter a contract on behalf of another (the principal).
- The principal is party to the contract and the agent is not

Test for Agency (**Barwick CJ in New York Star**)

1. The contract makes it clear that a benefit is to be conferred on a third party;
2. The contract makes it clear that the promisee is acting as agent of the third party;
3. The promisee was authorised to enter the contract on the third party's behalf (or the contract was subsequently ratified)
4. The third party provided consideration for the promise.
 - o Moving cargo is enough to satisfy consideration (**New York Star case**)

Assignment

Capacity

Red flags:

- Minor
- Mentally incapable
- Intoxicated

1. Define

Contracts made with persons lacking capacity are generally voidable at the option of the person who lacks capacity (except for 'necessaries'). Minors, mentally incapable persons and intoxicated persons are deemed to be incapable of entering into contracts.

Why → To protect them from the consequences of acts which they may not be competent to assess properly.

2. Binding Contracts: Necessaries

A minor is someone below the age of 18 (**s.3(1) Age of Majority Act**)

S.7 Goods Act: dictates that contracts for necessaries are binding on a minor.

- Necessaries in this section mean goods suitable to the condition in life of such minor or other person and to his actual requirements at time of sale and delivery
 - o Note: services covered by the same concept under common law
- Minor required to pay "reasonable price" (may be different to contract price).
- Only applies to goods sold and delivered – this is different for services
 - o Unperformed (executory) contract for goods do not impose an obligation
 - o Unperformed (executory) contract for services may impose an obligation

Two stage test

(a) "suitable to the condition in life of such minor"

- o Examples from [old] cases: food and drink to maintain life; services of a lawyer; medical services; education / apprenticeship; transportation (bicycle)
- o Today consider iPad, car, mobile phone or computer or internet services

(b) "and to his actual requirements"

- o If the minor already has an adequate supply, it is not a necessary

Even if goods are necessaries, the contract will not exist if harsh or unjust on the minor.

3. Contracts Binding Unless Repudiated (Opt-Out)

Some contracts made by a minor are binding unless repudiated (disavowed/denied) by the minor during minority or within a reasonable time after turning 18.

- This includes contract with a continuous obligation (e.g. a leasehold, buying shares).
- Repudiation means the minor denies or disavows the contract by word or conduct.
- Effect of repudiation: The minor will generally not be bound by future obligations, but will be bound by obligations accrued before repudiation (e.g. rent due on lease) and will only be able to recover goods or money transferred if there has been a total failure of consideration

Consumer and Small Business Contracts

Red flags – unfair contract terms:

- Exclusion clause
- Broad termination clause
- Unilateral variation clause
- Penalty clause
- Entire agreement clause

SAMPLE

1. Unfair Terms

Consumer contract	Small business contract
<p style="text-align: center;">s23(3)</p> <p>s.23(3): A consumer contract is a contract for:</p> <ul style="list-style-type: none"> (a) a supply of goods or services; or (b) a sale or grant of an interest in land; to an individual whose acquisition of the goods, services or interest is <u>wholly or predominantly</u> for personal, domestic or household use or consumption (PDHUC) <p>Focus on individual's purpose of acquisition. The actual purpose of the individual is what matters, not what most other people would acquire the good/service for (subjective use)</p> <ul style="list-style-type: none"> - Will exclude any supplies to a business for business purposes. 	<p style="text-align: center;">s23(4)</p> <p>s.23(4): a contract is a small business contract if:</p> <ul style="list-style-type: none"> (a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and (b) the business employs fewer than 20 persons; and (c) either of the following applies: <ul style="list-style-type: none"> (i) the upfront price payable under the contract does not exceed \$300,000; or (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed \$1,000,000. <p>s26(2) Upfront price is consideration that</p> <ul style="list-style-type: none"> (a) is or needs to be provided (b) is disclosed at or before contract is entered into
<h3>Standard form contract</h3>	
<p style="text-align: center;"><u>No clear definition</u></p> <p>s.27(1): presumption that the contract is a standard form contract therefore onus of proof is on party claiming it is not a standard form contract</p> <p>s.27(2): compulsory court considerations (however may take consider further relevant facts)</p> <ul style="list-style-type: none"> (a) whether <u>one of the parties</u> has all or most of the bargaining power relating to the transaction; 	