

**PART 0: INTRO TO CONTRACTS** \_\_\_\_\_ **9**

**Overview of Contracts** \_\_\_\_\_ **9**

- 1. Contract formation \_\_\_\_\_ 9
- 2. Contents of contracts \_\_\_\_\_ 9
- 3. Vitiating factors \_\_\_\_\_ 9
- 4. Discharge of contract \_\_\_\_\_ 9
- 5. Illegality \_\_\_\_\_ 9
- 6. Privity of contract \_\_\_\_\_ 9
- 7. Contract theory and Contracts in context \_\_\_\_\_ 9

**Significance & sources of Contract law** \_\_\_\_\_ **10**

**Definition of Contract** \_\_\_\_\_ **10**

**Elements of contract Formation** \_\_\_\_\_ **10**

- 1. Agreement \_\_\_\_\_ 10
- 2. Promise (consideration) \_\_\_\_\_ 10

**Classes of contract** \_\_\_\_\_ **10**

- 1. Formal contract \_\_\_\_\_ 10
- 2. Simple/informal contract \_\_\_\_\_ 11
  - Express contract \_\_\_\_\_ 11
  - Implied contracts \_\_\_\_\_ 11

**Characterising contracts** \_\_\_\_\_ **11**

- 1. Valid \_\_\_\_\_ 11
- 2. Void \_\_\_\_\_ 11
- 3. Voidable \_\_\_\_\_ 11
- 4. Unenforceable \_\_\_\_\_ 12
- 5. Illegal \_\_\_\_\_ 12
- 6. Executed \_\_\_\_\_ 12
- 7. Executory \_\_\_\_\_ 12
- 8. Bilateral contract \_\_\_\_\_ 12
- 9. Unilateral contract (One-way contract) \_\_\_\_\_ 12

**Remedies** \_\_\_\_\_ **12**

- Common law remedies \_\_\_\_\_ 12
- Equity Remedies \_\_\_\_\_ 13
- Specific performance \_\_\_\_\_ 13
- Injunction \_\_\_\_\_ 13
- Rescission \_\_\_\_\_ 13
- Restitution, Rectification, Estoppel \_\_\_\_\_ 13

**PART 1: CONTRACT FORMATION** \_\_\_\_\_ **14**

**1) Agreement** \_\_\_\_\_ **14**

- 1. Offer \_\_\_\_\_ 14
  - Existences of offers in different contexts \_\_\_\_\_ 14
  - Range of offerees \_\_\_\_\_ 16
  - Termination of offers \_\_\_\_\_ 16
    - 1. Lapse of time \_\_\_\_\_ 16
    - 2. Rejection \_\_\_\_\_ 16
    - 3. By failure of a condition \_\_\_\_\_ 16
    - 4. Death of offeree \_\_\_\_\_ 16
  - Revocation \_\_\_\_\_ 16
- 2. Acceptance \_\_\_\_\_ 17
  - Rules of acceptance \_\_\_\_\_ 17
    - 1. Acceptance must be unequivocal \_\_\_\_\_ 17
    - 2. Must be in reliance on the offer \_\_\_\_\_ 17
    - 3. Acceptance must correspond with the offer \_\_\_\_\_ 17
    - 4. May be express or implied \_\_\_\_\_ 17
    - 5. Communicated \_\_\_\_\_ 17
  - Alternatives to Offer and Acceptance analysis \_\_\_\_\_ 18

**2) Consideration** \_\_\_\_\_ **19**

1. Consideration	19
Rules of consideration	19
1. Consideration must be bargained for	19
2. Consideration must move from the promisee	20
3. Consideration cannot be illusory	20
4. Past considerations is not good consideration	21
5. Consideration must be sufficient but not need be adequate	21
1. A promise to perform an existing public duty is insufficient	22
2. A promise to perform an existing contractual duty is insufficient	22
3. Performance of an existing contractual duty already owed to a third person	23
6. Forbearance (giving something up) to sue can be good consideration	23
7. Part payment of a debt is not good consideration	23
2. Equitable Estoppel (chapter)	24
Introduction	24
Common law estoppel	24
1. Estoppel by deed	24
2. Estoppel by judgment	24
3. Estoppel by conduct/ <i>pais</i>	24
4. Estoppel by representation	24
5. Estoppel by convention	24
Development of equitable estoppel	24
1. Promissory estoppel	24
2. Proprietary estoppel	25
Elements of equitable estoppel	26
Relief based upon equitable Estoppel	28
<b>3) Intention to create legal relations</b>	<b>29</b>
Intention- Objective approach	29
Implied Intention	29
Express intention	29
Factors suggesting intention	29
Legal Presumptions	29
1. Family, social or domestic presumption	29
<b>Rationale of the presumption</b>	29
Rebuttal of presumption	29
2. Commercial Contracts	30
<b>Rationale of the presumption</b>	30
Rebuttal of presumption	30
1. Express exclusion of intent	30
2. Letters of comfort	30
3. Contracts with government	30
<b>Rationale of the presumption</b>	30
4. Voluntary Organisations	30
The future of the presumptions	30
<b>4) Capacity</b>	<b>31</b>
1. Minors	31
Presumptively binding categories	31
Minors (Property & contracts) Act 1970	31
2. Minors and the Common law	32
1. Contracts for necessities	32
Educational needs	32
Employment agreements	32
2. Beneficial contracts of service	33
3. Other categories	33
- s 20: For disposition of property (Buying or selling) and consideration 'ok'	33
- s 21: Minor makes a reasonable gift	33
- s 23: Investment in government securities	33
- s 27: Local court says yes (<10k) + minor's benefit	33
- s 28, 29: Solicitor/public trustee certifies minor	33
- s 30: Court affirms contract	33
Application to problem questions	33
2. Mentally unsound	33

3. Intoxicated persons	34
<b>5) Certainty and Completeness</b>	<b>35</b>
Introduction	35
1. Incompleteness/Completeness	35
2. Certainty	36
Results of uncertainty	36
1. May Give effect to the agreement	36
2. Divisible obligations	36
3. Severance of clauses	36
4. Waiver of removal of the uncertainty	36
5. Contract void if severance not possible	36
<b>6) Requirement of writing</b>	<b>37</b>
Introduction	37
General principles relating to written contracts	37
Contracts for sale of land	37
Transfer of land in NSW	37
Equitable Relief	38
<b>PART 2: CONTENTS OF A CONTRACT- What constitutes the contract</b>	<b>39</b>
<b>1. Express Terms</b>	<b>39</b>
Introduction	39
Content of a contract	39
<b>Types of Express terms: Incorporated into the contract</b>	<b>39</b>
1. Simple oral contract	39
2. Terms	40
3. Representations	41
4. Incorporation by signature- Signature rule	41
5. Incorporation by notice	42
1. Timing	42
2. Reasonableness	43
1. Contractual	43
2. Non-contractual	43
6. Incorporation by prior dealings	44
Parol evidence rule	45
Introduction	45
Circumventing/Avoiding the parol rule	45
Collateral contracts	46
Exceptions to the parol evidence rule	46
Elements of a collateral contract	46
1. Promissory nature of the statement	46
2. Must not be inconsistent	47
Collateral contract with a third party	48
<b>2. Implied Terms</b>	<b>49</b>
Introduction	49
Implication of terms of the facts	49
Elements of implied terms	50
1. reasonable and equitable	50
2. Necessary to give business efficacy to the contract	50
3. Obvious	50
4. Capable of clear expression	50
5. Not contradict or be inconsistent with any express term in the contract	51
Informal contracts	52
Implication of terms of law	52
1. Statute	52
2. Common law	52
Implications of terms by custom and usage	53
Implied terms in good faith	54
1. To what contracts does it apply: The application of the implied faith	54
2. What is the meaning of the term: The meaning of the term	54
3. The exclusion of the term: Can a duty of good faith be excluded?	55

<b>3. Construction of terms- Principles of construction (interpretation) of contractual terms</b>	<b>56</b>
Introduction	56
The importance of intention	56
The objective determination of intention	56
1. Ambiguity	57
2. Surrounding circumstances	57
Principles of construction	57
1. Presumption that unreasonable results are not intended	57
2. Avoidance of inconsistencies	57
3. Presumption in favour of business common sense	58
The use of dictionaries	58
Parol evidence rule	58
1. Prior negotiations	59
2. Post-contract conduct	59
Exceptions to the parol evidence rule	59
Exclusion clauses and extrinsic evidence	59
Legal drafting and the construction of legal documents	59
Classification of terms	60
Conditions	60
Warranties	61

<b>4. Construction of exclusion clauses- The use of contractual terms to exclude or limit the liability of the parties</b>	<b>61</b>
Introduction	61
Contemporary approach to the construction of exclusion clauses	62
1. Ordinary and natural meaning rule	62
2. Contra Proferentum rule/principle	62
Exclusion clauses and negligence	62
Other relevant principles of construction	63
Deviation cases	63
Four corners rule	63
Exclusion clauses and Legislation	63

### **PART 3: VITIATING FACTORS** **65**

<b>Vitiating factors</b>	<b>65</b>
Rescission: Remedy for vitiating factor	66
Termination verses Rescission	66
Process/Requirements to rescind	67
1. Innocent party must elect to rescind or affirm	67
2. Actual communication <b>usually</b> required	67
3. Establish that the party knew of the vitiating factor that gave rise to that right	67
4. Consider the bars to recession which could eliminate the party's right's to rescind	67
Partial recession	67
Key Cases	68

<b>1. Misrepresentation</b>	<b>69</b>
Summary elements of Misrepresentations	69
Elements of Misrepresentation	70
1. Made by representor to representee	70
2. The representation must be a statement of fact (past or present) not intent/prediction	70
1. Opinions	70
2. Mere Puffs	71
3. Promises/assurances as to the future/statements of future intent	71
4. Predictions that something will occur	72
5. Representations of law	72
3. The representation must be false	72
1. Contracts uberrimae fidei (contracts of utmost good faith)	72
2. Representation by conduct	72
4. Half truth	72
5. Statements that become untrue (or the representor discovers are untrue) before the contract is formed	72
6. Active concealment	73
7. Special relationships	73
4. Representation Intended to induce and did induce the into the contract- was acted upon-reliance	73

Principles of inducement- <b>Dadourian Group International v Simms [2009]</b>	73
Rebuttal/Ways to disprove reliance	73
5. Fraudulent- representor had no honest belief	74
Remedy	74
Alternatives to rescission	75
The issue of Materiality	75
Exclusion clauses and misrepresentation	75
<b>2. Misleading or Deceptive Conduct</b>	<b>76</b>
Introduction	76
Section 18 (1) of the Australian Consumer Law	76
Elements that breaches s 18 of the Australian Consumer Law to obtain remedy	76
1. The statement must be made 'in trade and commerce'	76
2. The statement must amount/engage to 'conduct'	76
1. Puff	76
2. Opinions	76
3. Silence	76
5. Statements about the future	77
6. False statements during negotiations	77
3. The statement must be misleading or deceptive (or likely to mislead or deceive)	77
1. Conduct directed at specific individuals	77
2. Conduct directed at the public generally	77
Exclusion clauses and disclaimers	78
Remedies under the ALC for breach of s 18	78
Injunction	78
Damages	78
Ancillary orders	78
<b>3. Mistake</b>	<b>79</b>
Introduction	79
Four mistakes effecting enforceability and validity of the contract	79
1. Common mistake	79
Exception	79
Common mistake in equity	80
2. Mutual mistake	80
3. Unilateral mistake	80
1. Unilateral mistake as to identity	80
2. Unilateral mistake as to the terms of a contract	81
Exception	81
4. Mistake as to the nature of the document (non est factum)	81
<b>4. Duress</b>	<b>83</b>
Introduction	83
Duress elements	83
Duress Remedies	83
Three types of duress	84
1. Duress to person	84
2. Duress to goods	84
3. Economic Duress	84
<b>5: Undue Influence</b>	<b>85</b>
Introduction	85
Undue influence v Duress	85
Categories of undue influence	85
1. Actual/express undue influence	85
Elements of actual undue influence	85
Rebuttal of Actual Undue influence	86
2. Presumed undue influence	86
Class 2A- Fiduciary/Special relationships	86
Class 2B Undue Influence- Relationships of trust and confidence	86
Rebuttal of undue influence	86
Equitable defences	87
Undue influence and third parties	87
Undue influence and third party guarantees	87

Remedies	87
<b>6. Unconscionable Conduct</b>	<b>88</b>
Introduction (Under general/common law)	88
1. Special disadvantage or disability	88
2. Knowledge	89
3. Unconscientious exploitation of the disadvantage	89
Defences	89
Remedies	89
<b>7. Unconscionable Conduct (Under Statute)</b>	<b>90</b>
Unconscionability under statute	90
<b>1. Australian Consumer Law Part 2.2- (Unconscionable conduct)</b>	<b>90</b>
Section 20- Unconscionable conduct pursuant to the unwritten law	90
Section 21- Unconscionable conduct in connection with goods and services	90
Section 22	90
<b>2. Australian consumer law part 2.3 (Unfair contract terms)</b>	<b>90</b>
Section 27	91
Section 24	91
Section 25	91
Section 23	91
Extension of unfair contract terms to small business	91
Remedies	91
<b>3. Contracts Review Act 1980 (NSW)</b>	<b>91</b>
Section 7	91
Relief under the contracts review act	92
Contributing factors	92
<b>PART 4: DISCHARGE OF CONTRACT</b>	<b>94</b>
<b>1. Discharge by agreement</b>	<b>94</b>
Introduction	94
Three types of discharge by agreement:	94
1. Discharge by abonnement	94
2. Discharge to a term of the original contract	95
Conditions precedent	95
Conditions subsequent	95
3. Discharge by subsequent agreement	95
1. Termination of original contract (Discharge simpliciter)	95
2. Novation	95
3. Variation of the original contract	95
Discharge or executory contracts	96
Discharge of executed contracts	96
Waiver	96
<b>2. Discharge by performance</b>	<b>97</b>
Introduction	97
1. Time for the performance of obligations	97
2. The order of performance of contractual obligations	98
3. Level of performance/Standard of performance required to discharge a contract	98
Exceptions to Exact performance rule	98
1. Severable or Divisible contracts	98
2. The de minimus non curat lex rule-	98
3. Substantial performance	98
4. Acceptance of partial performance	99
5. Obstruction of performance	99
6. Co-operation, good faith and performance	99
<b>3. Discharge by breach</b>	<b>100</b>
Introduction	100
Types of breach	100
<b>1. Actual Breach of contract</b>	<b>100</b>
2. Repudiatory breach → Anticipatory	100
Conditions, warranties & Intermediate terms	100
Failure to perform contractual obligations	100

1. Breach of condition _____	100
2. Breach of intermediate term _____	101
3. Breach of Warranty _____	101
Terminate for a breach of time stipulation _____	102
Termination and its effects _____	102
Restrictions on a party's ability to terminate a contract _____	102
1. Party not ready, willing and able or in breach _____	102
2. Election _____	102
3. Termination not in good faith _____	102
4. Relief against forfeiture _____	103
<b>4. Discharge by frustration _____</b>	<b>104</b>
Introduction _____	104
Elements of frustration _____	104
<b>1. Intervening event amounting to frustration _____</b>	<b>104</b>
1. Subject matter destroyed _____	104
2. Court order prohibits performance _____	104
3. Change of Law _____	104
4. Incapacity or death _____	105
5. Failure of a condition _____	105
6. Government intervention _____	105
2. Not caused by the party _____	105
3. Not contemplated by the parties _____	106
4. Unjust- It would be unjust _____	106
Non-frustrating event _____	106
Fault _____	106
Foreseeability of the supervening event _____	106
The relationship between frustration and common mistake _____	106
The effect of frustration _____	106
Common law _____	106
Frustrated Contracts Act 1979 (NSW) _____	107
<b>PART 5: ILLGALITY _____</b>	<b>108</b>
<b>Statutory illegality _____</b>	<b>108</b>
Introduction _____	108
Contracts prohibited by statute _____	109
Contracts <b>expressly</b> prohibited by statute _____	109
Contracts <b>Impliedly</b> prohibited by statute _____	109
Public policy of a statute rendering a contract illegal _____	110
<b>Common law illegality _____</b>	<b>111</b>
Introduction _____	111
Categories against public interest and illegal _____	111
0. Contracts to commit crime, tort of fraud _____	111
1. Contracts made with the intention of acting unlawfully _____	111
2. Contracts aimed at defrauding the commonwealth or the states of tax revenue _____	111
3. Contracts prejudicial to the administration of justice _____	111
4. Contracts to oust(overthrow) the jurisdiction of the courts _____	111
5. Contracts promoting or causing conflict between ones public duty and private interest _____	111
6. Contracts that promote immorality and or prejudice the status of marriage _____	111
7. Contracts that impose a restraint on trade _____	112
8. Contracts with enemy aliens _____	113
<b>Effect of illegality _____</b>	<b>114</b>
Introduction _____	114
Independent cause of action _____	114
Parties not equally at fault _____	114
Severance _____	115
<b>PART 6: PRIVACY OF CONTRACT _____</b>	<b>116</b>
<b>Chapter 39- Privity of contract (WEEK 12) _____</b>	<b>117</b>
<b>PART 7: CONTRACT THEORY AND CONTRACTS IN CONTEXT _____</b>	<b>119</b>

<b>Contracts in context</b>	<b>119</b>
Textbook	121
<b>Contract theory</b>	<b>123</b>
Textbook	125



## PART 0: INTRO TO CONTRACTS

**Legal problem solving model-** Four step process (ILAC)

- **Issue:** identify the issue to be resolved
- **Law:** identify the law to be used to solve the issue
- **Application:** apply the law to the facts in the problem
- **Conclusion:** provide the concluding advice to the problem

### Overview of Contracts

#### 1. Contract formation

- 1. Agreement:
  - Offer and Acceptance analysis
- 2. Consideration
  - Consideration
  - Equitable Estoppel
- 3. Intention to create legal relations
- 4. Certainty & Completeness, and the role of formal requirements such as writing
- 5. Capacity

#### 2. Contents of contracts

- **What constitutes the contract**
- classify statements parties make during negotiations
- Express Terms and Implied Terms
- Principles of construction (interpretation) of contractual terms
- The use of contractual terms to exclude or limit the liability of the parties

#### 3. Vitiating factors

- **Duress** (putting a gun to your head)
- **Misrepresentation** (and Misleading or Deceptive Conduct under statute)
- **Mistake** and **undue influence**
  - **Undue influence:** is where the parties going into a contract have an existing relationship between themselves, but one party takes advantage over the other in terms of breach of trust
- **Unconscionability** (under the general law and statute)
  - Breach of power. One party takes advantage of another party because of the imbalance in the power relationship
    - **Courts can set aside or change terms etc.**

#### 4. Discharge of contract

- Need to understand the circumstances by which parties of a contract are released from their contractual obligations. Best way to get released is to perform the contract. How do we decide when a contract has been performed as agreed,
  - When will parties to a contract be released from their contractual obligations?
  - How do we know when and whether a contract has been discharged?
  - Can be discharged by:
    - Discharge by **agreement**
    - Discharge by **Performance**
    - Discharge by **Breach**
    - Discharge by **Frustration**

#### 5. Illegality

**Ways in which contracts been deemed illegal or unenforceable, whole or partially unenforceable both at common law and statute.**

- When may a contract may be doomed illegal or unenforceable
- In what circumstances could a contract be against public policy or interest
- **Common law** illegality or **statutory** illegality

#### 6. Privity of contract

Here we look at the rights that certain persons may have under contracts to which they are not parties.

- What rights may persons have under contracts to which they are not parties
- How does a non-party expecting a benefit under a contract obtain their benefit
  - What rights does that other person has?
- The **Privity rule** and its expectations
  - **Privity rule stops them, and exceptions to the privity rule through statute and stepping outside for the third party to get benefit**

#### 7. Contract theory and Contracts in context

**Look and reflect on theoretical questions and empirical evidence of contracts in context to understand the main competing philosophies of contract law and how people have tried to understand in a conceptual sense and why we should recognize it and why there should be a law... how it developed historically over time, adapting to social circumstances, as commercial and economic changes and as technology changes occur.**

- Analytical and normative theories of contract
- Understanding the historical place of contract
- How do non-lawyers look at contract in a commercial context?

## Significance & sources of Contract law

- **Significance:** Contract Law is fundamental to the study of other core and elective law units. It is fundamental to many aspects of social and commercial reality
- **Sources:** the rules and principles that form the totality of contract law have their origins in one of the following three bodies of legal principle:
  - The common law (general Law)
    - Of the common law, equity and legislation- legislation prevails over any conflicting rules of common law, and equity and equitable rules prevail over any conflicting common law rules
  - Equity (general Law)
  - Legislation (statute)
    - **Statute:** Legislation affects areas of contract law e.g. Australian consumer law etc. affecting common law principles. Some relevance E.g. Australian Consumer Law 2010 in force
  - International law (where domestic law allows) has two dimensions
    - The production of 'non-binding statements of principle or model of contracts'
    - The attempt to impose mandatory uniform rules of the international community
      - Vienna Convention, most notable example of the latter

## Definition of Contract

- Contract law is one of the two great areas of private law, the other being torts. Private law is governing the law between people. Both contracts and Torts were known as the law of obligations.
- These two areas of laws are concerned with obligations. The difference between the obligation lies in the source
- Legal definitions of contract are two broad types
  - First: sees contract in terms of a promise or set of promises- Pollock defines contract as 'a promise or set of promises which the law enforces'
  - Second: this sees a contract in terms of an agreement. A contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor that distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties

## Elements of contract Formation

The key elements of a contract relate to the **fact of agreement** and the **requirement of consideration** (promise). A contract may be seen as an agreement between two or more parties that a court will enforce

### 1. Agreement

- For a contract to exist there must be an agreement between the parties
- **A contract is an agreement giving rise to obligations which are enforced or recognized by the law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties. The concept of a promise is essential too**

### 2. Promise (consideration)

- Have at their heart the notion of promise, in that the agreement reached between the parties must generally be one that involves the parties promising something of some value to each other.
- **Sometimes courts will enforce an obligation as part of a contract even though a party to the contract may argue that they did not make such promise or even though have a written and signed agreement in which that promise does not appear.**
- **Whether parties have actually agreed is decided by an objective test**
  - Reasonable person test, reasonable bystander test: what would a reasonable person conclude from an agreement/actually mean. It is always an objective test that is used, not only in contract law but most private and civil law subjects.
  - Both concepts of agreement and promise are fundamental to the elements of contract formulation.

## Classes of contract

**Contracts can be looked at in terms of their promissory intent, formation, enforceability and performance.**

Bilateral or unilateral reflects a distinction as to which of the parties to it has obligations to perform at the time the contract comes into existence.

### 1. Formal contract

- The agreement between the parties is entered into a particular form of writing known as a deed. Contract entered into a deed form is also known as an agreement **under seal or specialty contract**
- Representations a unilateral solemn promise
- Must be in writing/special written form
- Form takes the place of consideration
- Typically in the form of deeds
  - **A deed is a formal written document that must comply with particular form and that form is prescribed by the law/statute. It does not have to have consideration because the form takes the place of consideration**