

# Obligations Exam Notes

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# Contract formation

## 1. Agreement

### 1.1 Approaches to agreement

Classical approach – offer + acceptance (Gibson; Empirnall)

Global approach – assess parties' overall conduct and performance to infer if there is agreement (Brambles)

- Justify use of this approach based on convoluted communications?

### 1.2 Offer

Offer requirements:

- Offeror prepared to be bound immediately upon acceptance
  - Judged objectively
- Clear terms
- Proposal, not command (Brambles)

Offer can be revoked any time before acceptance (Mobil Oil 'we have more work to do', 'maybe')

- Revocation is valid when it has been communicated to the offeree

Not an offer:

- Invitation to treat (Gibson 'may be prepared to sell')
- Puff (Cf Carlill bc 1,000-pound deposit)
- Announcement of policy (AWM)

### 1.3 Acceptance

Acceptance requirements:

- Unequivocal assent to the terms
  - If qualified assent – counter offer
- Acceptance is only effective when it has been received by the offeror
  - Exception: postal acceptance rule, acceptance is valid when posted IF offeror has indicated that they will receive acceptance by post (Telex in Brinkibon)

Acceptance is judged objectively based on external manifestation (Brambles)

Silence is not acceptance unless: (McHugh J in Empirnall)

- Offeree had reasonable opportunity to reject offer
- Offeree has taken benefit of the offeror
- Offeror indicates they were to be paid in accordance with offer
- A reasonable bystander would regard it as acceptance

Unilateral contract – performance can be acceptance (Carlill)

## *Electronic Transactions Act (Vic) 2000*

### Section 3 – Definitions

**addressee** of an electronic communication means a person who is intended by the originator to receive the electronic communication, but does not include a person acting as an intermediary with respect to the electronic communication;

**electronic communication** means—

- a. a communication of information in the form of data, text or images by means of guided or unguided electromagnetic energy, or both; or
- b. a communication of information in the form of sound by means of guided or unguided electromagnetic energy, or both, where the sound is processed at its destination by an automated voice recognition system;

**information system** means a system for generating, sending, receiving, storing or otherwise processing electronic communications

**transaction** includes—

- a. any transaction in the nature of a contract, agreement or other arrangement; and
- b. any statement, declaration, demand, notice or request, including an offer and the acceptance of an offer, that the parties are required to make or choose to make in connection with the formation or performance of a contract, agreement or other arrangement; and
- c. any transaction of a non-commercial nature

### Section 13 – Time of dispatch

1. For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication, the time of dispatch of the electronic communication is—
  - a. the time when the electronic communication leaves an information system under the control of the originator or of the party who sent it on behalf of the originator; or
  - b. if the electronic communication has not left an information system under the control of the originator or of the party who sent it on behalf of the originator—the time when the electronic communication is received by the addressee.
2. Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been dispatched under section 13B.

### Section 13A – Time of receipt

1. For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication—
  - a. the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee; or
  - b. the time of receipt of the electronic communication at another electronic address of the addressee is the time when both—
    - (i) the electronic communication has become capable of being retrieved by the addressee at that address; and
    - (ii) the addressee has become aware that the electronic communication has been sent to that address.

2. For the purposes of subsection (1), unless otherwise agreed between the originator and the addressee of the electronic communication, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address.
3. Subsection (1) applies even though the place where the information system supporting an electronic address is located may be different from the place where the electronic communication is taken to have been received under section 13B.

#### Section 13B – Place of dispatch and place of receipt

1. For the purposes of a law of this jurisdiction, unless otherwise agreed between the originator and the addressee of an electronic communication—
  - a. the electronic communication is taken to have been dispatched at the place where the originator has its place of business; and
  - b. the electronic communication is taken to have been received at the place where the
  - c. addressee has its place of business.
2. For the purposes of the application of subsection (1) to an electronic communication—
  - a. a party's place of business is assumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location; and
  - b. if a party has not indicated a place of business and has only one place of business,
  - c. it is to be assumed that that place is the party's place of business; and
  - d. if a party has not indicated a place of business and has more than one place of
  - e. business, the place of business is that which has the closest relationship to the underlying transaction, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the transaction; and
  - f. if a party has not indicated a place of business and has more than one place of
  - g. business, but paragraph (c) does not apply— it is to be assumed that the party's principal place of business is the party's only place of business; and
  - h. if a party is a natural person and does not have a place of business—it is to be assumed that the party's place of business is the place of the party's habitual residence.
3. A location is not a place of business merely because that is—
  - a. where equipment and technology supporting an information system used by a party are located; or
  - b. where the information system may be accessed by other parties.
4. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

**UNCITRAL** (*good to cite as aid to statutory interpretation*): Mere indication of e-mail/telecopy address in letterhead/other doc should not be regarded as express designation of one or more info systems

## 2. Consideration

"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."

- Lush J in *Currie v Misa*

Consideration requirements:

- Bargain/exchange (*Beaton*: person cannot benefit from their provided consideration)
- Benefit/detriment (*Australian Woollen Mills*)
- Sufficient but not proportionate (*Woolworths v Kelly*)

Types of insufficient consideration:

- Past consideration (*Roscorla*)
  - If A performs services for B under implication that B will pay A, then that performance constitutes good consideration for the promise to pay
- Promise to perform an existing legal duty or performance of an existing legal duty (*Wigan*)
  - This does not apply in the following circumstances:
    - a) Promisor provides fresh consideration
    - b) Practical benefit exception (*Musumeci*); (*Brambles*)
    - c) Promise is made to a third party
    - d) The bona fide compromise (*Wigan*)
    - e) Contract where both parties owe obligations to each other is terminated and replaced by another contract

Issues with consideration may be remedied by deeds or estoppel

## 3. Certainty

Only the essential terms of a contract need to be certain

- A term is essential if without it, the contract can no longer be enforced

Uncertainty can be caused by:

- Incompleteness as a result of omission
- Incompleteness as a result of an 'agreement to agree'
- Unclear language
- Illusory promises

### 3.1 Incompleteness as a result of omission

No stipulated time – not fatal

- If a contract does not determine when obligations have to be performed, the Court will find an implied term to impose a reasonable timeframe

No stipulated price – may be fatal

- The Court may determine a reasonable sum to be paid (s 13(2)), or the contract may be void
- No price for sale of goods is not fatal (see *Goods Act*)

- No price for sale of land
  - Void, even if there is a reference to 'a reasonable sum' (Hall v Busst)

<i>Goods Act 1958 (Vic)</i>	
Section 13 – Ascertainment of price	
1.	The price in a contract of sale may be fixed by the contract or <b>may be left to be fixed in manner thereby agreed</b> or may be determined by the course of dealing between the parties.
2.	Where the price is not determined in accordance with the foregoing provisions the buyer must pay a <b>reasonable price</b> . What is a reasonable price is a <b>question of fact dependent on the circumstances</b> of each particular case.
Section 14 – Agreement to sell at valuation	
1.	Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party, and such <b>third party cannot or does not make such valuation</b> , the <b>agreement is avoided</b> : Provided that if the goods or any part thereof have been delivered to and appropriated by the buyer, he must pay a <b>reasonable price</b> therefor.
2.	Where such third party is prevented from making the valuation by <b>the fault of the seller or buyer</b> the party not in fault may maintain an action for damages against the party in fault.

### 3.2 Incompleteness as a result of an agreement to agree

If parties leave a term to be settled by future agreement between the parties, that is generally seen as unenforceable

If parties leave a term to be fixed in the future by a third party, that is generally sufficiently certain (Godecke)

- If the third party is unwilling or unable to act, the Courts tend to arrange for or act as a substitute of the third party

If the contract includes a term that the parties agree to undertake future negotiations in good faith, that term needs to be certain in order to be enforceable (United Group Rail Services Ltd v Rail Corporation NSW)

### 3.3 Incompleteness as a result of unclear language

If the language is devoid of meaning:

- Courts will choose and supply a meaning to a word 'as long as it is capable of meaning' (Barwick J in Upper Hunter County)

Contract will be void if:

- Language is so vague that the clause cannot be enforced and this clause is not severable from rest of contract (Whitlock)
- Clause cannot be given meaning by an external standard (Biotechnology)

### 3.4 Illusory promises

Illusory promise – a promise where the promisor reserves the right as to whether or not they will carry out that promise (Kitto J in Placer)

- Not enforceable

Illusory promises differ from vital components left to one party's determination

- Vital component – one party can determine a key component like price and time
- Illusory promise – one party can determine whether or not to perform key component

In Placer, no basis of calculating the subsidy amount, not even a commitment to 'reasonable amount', left to sole discretion of commonwealth, therefore wholly unenforceable

- Menzies J: dissent because the language is that of legal obligation
- Windeyer J: dissent because commonwealth has to determine *some* amount according to clause

Per Meehan v Jones, subject to finance clauses are not illusory

### 3.5 Options for uncertain contracts

Recognise implied terms

- Cannot imply a price

Sever a non-essential term

Party that benefits from non-essential term can waive compliance

## 4. Intention

Requirement: parties objectively intend to be legally bound

If intention is not expressed explicitly, then infer it objectively from parties' conduct (Todd v Nicols)

Ermogenous rejected presumptions about intention in commercial or non-commercial contracts

AWM and Placer: in order to determine government intention, the Courts take into account:

- Specificity of agreement
  - Not illusory - at the discretion of one party
  - Consider the document as a whole to derive intention
- An agreement to agree is not binding if parties intended to add new terms to the contract

(Masters v Cameron)

4 interpretations of a subject to contract clause: (Masters v Cameron)

1. Reached finality on all essential terms, contemplate a 'fuller' agreement – binding
2. Performance conditional for formation – binding
3. No intention for binding agreement until formal contract
4. Expect renegotiation in the future but firm commitment to one another – binding

(Baulkham Hills v GR Securities)

## 5. Formalities

### 5.1 Formality requirements

Oral agreements are generally enforceable