CONSIDERATION

- Consideration is the idea that something of value must be given in exchange for a promise. It is necessary in order to render a contract enforceable.
- This reflects the idea of a *quid pro quo* - a person makes a promise and someone gives something of value in return.
- The consideration may exist in various forms
    - It could be providing an act or promising to refrain from doing an act
    - Within bilateral contracts, parties make mutual promises to each other and possess contractual obligations.
- ***Currie v Misa* (1875) LR 10 Ex 153**
    - Definition of consideration
        - "… a valuable consideration, in the sense of the law, may consist in some right, interest, profits or benefit accruing to the one party or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other…"
        - IMPORTANT NOTE: The promisee needs to provide the consideration, but it does not have to go back to the promisor.
            - Instead, it may be communicated through a third party.
            - There is no legal requirement that consideration must move to the promisor.

- **REQUIRED ELEMENTS**
    1. **A benefit or detriment**
        - Where the promisee confers a benefit or suffers a detriment in exchange for a promise.
    2. **Bargain/Quid Pro Quo element**
        - The benefit or detriment must be given in return for the promise

KEY CASES:

***Beaton v McDivitt* (1987) 13 NSWLR 162**

Facts	The respondent promised to transfer a portion of his land to the appellant when a proposed rezoning occurred if, in the meantime the appellant worked the land in a specified way. Beaton moved onto the land and worked it as required (including building a house). Seven years later, a dispute arose and Beaton was ordered off the land. Beaton claimed the land was his as he provided consideration.
Issue	Had Beaton provided valuable consideration? (The Court also had to consider whether the contract had been frustrated as a result of the rezoning not taking place).
Judgement	Beaton had provided consideration for the respondent's promise to transfer the property by working on the land in the manner stipulated; this constituted a detriment sufficient for consideration. **Kirby P:** Consideration, in theory, has arisen from the idea that a

	contract is a bargain struck between the parties by an exchange' - it is not based on the notions of reliance. The 'price' for a promise can be an act, forbearance or a promise. Here, there was no consideration, as the promises given (in relation to the land transfer) were not provided as a 'quid pro quo' for anything by Beaton. ● There was no detriment suffered by Beato by going on the land and living there rent free. There was no quid pro quo between what Beaton was doing and the promise that M had provided. ● The High Court in this case cited *Australian Woollen Mills,* which stated that consideration requires the *Quid Pro Quo* element and that a contract cannot be based on just the reliance on a promise on that basis. ○ Therefore, **no contract was formed** and Beaton lost. **McHugh JA:** The bargain theory of consideration applies in Australia (amounting to rejection of the 'reliance' theory); that theory requires a quid pro quo between the parties. In this case there was such consideration - consideration for the promise to transfer was the act of Beaton coming and working on the land as requested. This is considered as a 'detriment' suffered by Beaton and that is sufficient for consideration. ● States that *Australian Woollen Mills* is good law and that a contract was formed because a detriment was suffered and there was a quid pro quo in what was established. ● Found that there was no frustration as there was still the chance of performance. **Mahoney JA:** A contract was formed because Beaton did suffer a detriment by going on the property. However, frustration arose as the rezoning did not occur and was unlikely to happen in the future.
Ratio	A contract must involve a quid pro quo (something for something) to be legally enforceable. An act performed in reliance on a promise, but not in exchange for it, is not good consideration.

Australian Woollen Mills v Commonwealth **(1954) 92 CLR 424**

<table>
<tr><td>Facts</td><td>The Commonwealth government introduced a subsidy scheme for manufacturers purchasing wool for use in local manufacture. The plaintiff purchased wool and used it for this purpose and received some payments. The government subsequently stopped payments. The plaintiff sued the Government for subsidies it claimed it was due.</td></tr>
<tr><td>Issue</td><td>1. Did a unilateral contract exist between AWM and the government?
2. Is the purchasing of wool valid consideration for the government's promise of the subsidy?</td></tr>
<tr><td>Judgement</td><td>No contract existed. There was no consideration and no intention to create legal relations.
Consideration
● The statement offered by the Commonwealth was not considered as proper consideration as there must be a relationship of quid pro quo between the statement and the Act.
● Here, there was no promise offered in consideration of doing an act. Buying the wool was merely a condition precedent to entitlement to the subsidy. It was not intended as the consideration for a promise to pay the subsidy.
● There was also an offer or request or invitation to purchase the wool.
● The purchase of wool and the payment of the subsidy was not related in a way that the one was a consideration for the other.

Intent on creating legal relations
● There was no intent to create legal relations on the part of the government; it was a government scheme to promote industry.
● The Court noted that the essence of a contract is that there is a voluntary assumption of a legally enforceable duty.
● What is alleged to be an offer should have intended to give rise to an obligation.</td></tr>
<tr><td>Ratio</td><td>Quid Pro Quo Requirement: There must be a direct, intended connection between the promise and the act relied upon as consideration

Condition v Consideration: An act done merely to satisfy a condition to receive a promised benefit does not constitute legal consideration.

Intention to create Legal Relations: Government schemes and policy announcements are considered administrative, rather than contractual, lacking the necessary intent to create legal relations.

Unilateral Contract Context
While a promise can be accepted by an act, that act must be done in consideration of the promise.</td></tr>
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Sufficiency of Consideration

- Whether the item promised or detriment that given by the Promisee can be considered as consideration by the law
- The item that was exchanged must be seen as something of value in the eyes of the law
- ***Woolworths Ltd v Kelly* (1991) 22 NSWLR 189**
  - Consideration must be sufficient but it does not have to be adequate
- Many items are not considered as good consideration by the law
  - **Discretion as to performance**
    - A promise will not constitute good consideration if the promisor retains an unfettered discretion as to performance.
    - If the promisor is not bound to perform, then the promise will constitute an illusory consideration.
    - A contract does not exist when consideration is at the promisor's discretion.
      - ***Placer Development Ltd v Commonwealth* (1969)**
  - **Past consideration**
    - Refers to an act or service performed before a contract is made
    - Invalid 'good consideration' as the action was not done in exchange for the promise
      - ***Roscorla v Thomas* (1842) 3 QB 234**
        - The defendant sold a horse to the plaintiff for 30 pounds. Later, at the plaintiff's request, the defendant promised the horse was "sound and free from vice". The plaintiff sought damages for breach of contract when the horse turned out to be "very vicious, restive, ungovernable and ferocious.
        - The promise was not enforceable because the plaintiff had given no consideration. The payment of the purchase price was a past consideration which did not support the later promise.
    - **Past consideration v Executed consideration**
      - Past consideration refers to an act or service performed before a contract promise is made.
      - Executed consideration occurs when the promisee actually completes their promise.
        - E.g. A offers $50 to whoever finds their dog. B finds the dog and returns it B's consideration is executed but A's promise remains executory (as A has not provided the money yet).
    - EXCEPTION: PROMISE TO PAY FOR PAST SERVICES
      - The exception to the past consideration rule is made in the case of a promise to pay for past services.
      - When services are performed at the request of the promisor, in circumstances in which the services are to be paid for, the performance of the services by the promisee will constitute good consideration for a subsequent promise to pay for them.
        - ***Re Casey's Patents; Stewart v Casey***

            - The plaintiff had worked to promote the defendant's patents and was subsequently promised a third share of the patents. The English Court of Appeal held that the plaintiff had provided good consideration for the plaintiff's promise.
            - Past services **can constitute valid consideration if there was an implied promise of payment** at the time the services were rendered.
            - <u>A later promise is viewed in two ways</u>
                1. An admission of a pre-existing debt
                2. A positive bargain definitively setting the payment for work that was understood to be paid for at the time.
                - **KEY TAKEAWAY:** Even if consideration appears to be in the past, it can still be valid it is satisfies these conditions:
                    1. The services were performed on the understanding that they would be paid for.
                    2. The subsequent promise merely fixes the amount of payment.
    - **Illusory consideration**
        - A statement that appears to be a promise in a contract but imposes no real binding obligation on the promisor, making it unenforceable.
        - The promisor has not actually promised anything and it exists 'in form only'.
    - **Pre-existing legal duty**
        - When the promisee is already contractually bound by the promisor, the general rule is that performance of an existing contractual obligation will not be good consideration unless some additional benefit is conferred.
        - However, if a promisee does anything beyond your existing duty, then that additional aspect can be used as consideration to make another promise enforceable.
        - EXCEPTION: Financial Benefit

***Williams v Roeffry Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1**

Facts	The contract involved refurbishing a block of flats and a subcontract to carry out carpentry work. There is a promise that is made to refurbish 27 flats, but the subcontractor believes it will not be enough money. The carpenter goes back and says for an increased rate of 10 000 pounds, they will be able to complete the apartments. D does not pay the amount and the P claims for the balance of what they were owed.
Issue	Whether the promise to pay the extra 10 000 pounds by Roeffry Brothers was enforceable by Williams.
Judgement	**LJ Glidewell:** Although the plaintiff did not undertake any work additional to that which he had originally undertaken, but the terms in which he was to carry them out had changed, this change was supported by consideration which a pragmatic approach to the true relationship between the parties readily demonstrates. ● Stilk v Myrick states that a gratuitous promise, pure and simple, remains unenforceable unless given under seal. ○ However, where a party undertakes to make a payment by reason that they gain an advantage arising from the continuing relationship with the promisee, the new bargain will not fail for want of consideration. **LJ Purchas:** Questioned what consideration moved from the plaintiff to support the promise to pay the extra 10 000 pounds. ● The consideration was that Roeffry Brothers received a commercial advantage. ● If both parties benefit to a contract of variation even though one did not suffer a detriment, this would not be fatal to the establishing of sufficient consideration. **If both parties benefit from an agreement it is *not* necessary that each also suffers a detriment.**
Ratio	If a party receives a benefit or substantial benefit or a practical benefit as a result of this higher payment, then the payment can be the consideration that makes the second promise binding.

■ EXCEPTION: BONA FIDE COMPROMISE

Facts	Edwards agreed to buy a house from Wigan, who built it. The original contract of sale did not contain an express term or warranty that the house was free from defects or properly constructed. Before settlement/completion, the purchasers noticed defects and said they would not proceed unless they were fixed. Wigan gave a written promise to fix certain minor defects and remedy any major faults in construction for 5 years after purchase. Settlement went ahead but Wigan failed to carry out the promised repairs.
Issue	Was Wigan's promise contractually enforceable? Was there any consideration since Edwards was merely performing an existing

	contractual obligation by purchasing the house?
Judgement	A promise to perform or to continue with one's contractual obligation can amount to good consideration if it is part of a bona fide compromise.
Ratio	Doing what you are legally bound to do is usually not a valid consideration. However, it can be consideration if: 1. There is a genuine dispute or asserted right 2. The promise is made as part of a bona fide compromise ● Giving up your forbearance is valid consideration

- **Part Payment of a debt**
  - Part payment of a debt is not good consideration for the creditor's promise to forgo the balance.
  - In paying part of the debt, the promisee is doing no more than performing an existing contractual duty owed to the promisor.
    - ***Foakes v Beer* (UK CA 1884)**

Facts	The plaintiff owed the defendant $2000. They agreed in writing that B would give F time to pay, accepting $500 immediately and the rest in instalments, promising not to take "any proceedings whatsoever" to enforce the judgement. The agreement made no mention of interest , which B was entitled to by law on the judgement debt. After Foakes paid the principal sum, Beer sued for the accrued interest.
Issue	Was there consideration for her promise to forgive the interest?
Judgement/Ratio	No, as Foakes provided no new consideration for Beer's promise to forgo the interest. He simply was paying a debt he was legally obligated to pay. ● Court reaffirmed Pinnel's Case, part payment of a debt cannot satisfy a larger debt, even if the creditor agrees to it. ○ ***Pinnel's Case* (1602) 5 Co Rep 117a**

- **Compromise/Forbearance**
  - Refraining from doing something you have the legal right to do, such as suing a debtor.