

## **LECTURE 1: INTRODUCTION**

### **What is contract law?**

A contract is a legally binding promise of agreement. The person who makes the offer is the offeror and the person whom the offer is made to is the offeree.

Provide an institutional basis for arrangements made for the transfer of land, goods and services.

### **Classification – types of contracts**

- Sealed instrument – deed → does not require consideration to be enforceable
- ‘Special contract’ → a ‘contract under seal’
- ‘Simple contracts’ → must be supported by consideration.
  - May be written, oral or partly both
  - Except in cases where writing is required, an oral contract is valid as a written contract or one evidenced by writing.

### **Perspectives that criticise the state of law:**

- Matter of choosing the perspective appropriate to the issue
  - (a) the realist view: in practice courts focus on policy objectives to decide in whose favour a legal rule should be applied
  - (b) the critical legal studies approach: contract law is indeterminate and used to legitimise both the system and the decisions of those who wield power
  - (c) contract as a promise thesis: promise alone is the basis of contract enforcement
  - (d) feminist approach: gender issues should be considered in critically evaluating existing legal doctrine
  - (e) relational approach: contract is unsuitable to the resolution of contract disputes because it gives insufficient emphasis to the relational interests and social conditions to contracts
  - (f) law and economics approach: the law is incomplete without an economic perspective
  - (g) sociological approach: business people do not generally consult lawyers when planning contractual relationships or even when a contract dispute arises

## **1B. FREEDOM OF CONTRACT**

While notion of ‘freedom of contract’ is still mentioned, not all contracts concluded between parties will be enforced by courts. Legislation & common law doctrines severely limit extent to which parties can behave ruthlessly in business deals.

### **Freedom of contract**

- (1) Contracting parties should be free to agree to whatever agreement they wish
- (2) People should be free to decide to enter into contracts with whoever they please & should not be compelled to enter contractual relationships.

**(i) Capacity**

Consideration must be made by a person who has valid capacity:

- Minors – 18 years of age (*Minors (Property and Contracts) Act 1970 (NSW)*). Generally not bound by contracts but can enforce any resulting rights against an adult party.
- Mental Disability/Intoxication: A person cannot intentionally intoxicate himself or herself so as to avoid a contract. However, intoxication is a defence of doctrine of unconscionability
- Companies: an individual/group of legal individuals invested with legal personality.
- The Crown: The *Judiciary Act 1903 (Cth)* made it possible for the crown to be a defendant
- Bankrupts & Married Women in NSW: Bankruptcy does not affect contractual capacity yet it is regulated by the *Bankruptcy Act 1966 (Cth)*

**(ii) Public Policy and Illegality**

- (a) If contracts infringe some types of public policy, the contract will be considered illegal (e.g. contract to commit a legal wrong) whereas other contracts or clauses will be unenforceable or void (e.g. in restraint of trade)

**(iii) Other vitiating factors**

Some contracts will not be enforced because they are not considered 'fair', because they are affected by undue influence, duress or unconscionability. Still other clauses may be held unenforceable on public policy grounds, such as harsh *exclusion clauses* (clauses excluding liability) and *penalty clauses*.

## LECTURE 2 – OFFER AND ACCEPTANCE

Useful analytical tools but they do have their limits.

### (i) Offer

An indication by one person to another of their willingness to enter into a contract on certain terms

- an **indication of an intention** to be immediately legally bound.

Whether there is an offer depends on whether a reasonable person in the position of the offeree would consider that an offer was made. This is a question of intention determined objectively.

**Advertisement** – generally argued that promises contained in advertisements are not supported by ‘consideration’

**Subsequent conduct of parties** – in written contract, that what the parties have subsequently done is immaterial to be referred to in construing the terms of the contract however in determining whether a contract has in fact been made by certain correspondence, it has been held that subsequent acts of the parties can be referred to.

### What is not an offer?

#### 1. Invitation to Treat

#### ***Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd [1953]***

**Facts:** D conducted a retail pharmacy shop organised on a ‘self-service basis’ Customers who wished to purchase selected goods from the shelves would present them at one of the cash desks and in every case involving the sale of a drug, pharmacist supervised transaction. P brought action for a declaration that certain sales of drugs effected in manner described contravened s 18 of *Pharmacy and Poisons Act* that it was unlawful for a person to sell certain drugs unless ‘ the sale is effected by, or under the supervision of, a registered pharmacist.’

**Resolution:** D did not contravene s 18 of the Act. Display of items on a ‘self-service’ basis did not amount to an offer.

When a customer picks up something from the shelf, this does not amount to acceptance of an offer to sell. It is an offer by the customer to buy and there is no sale effected until the buyer’s offer to buy is accepted by the acceptance of the price.

- Tenders – where property is sold by tender, established that each person submitting a tender is making an offer, which the seller is then free to accept or reject (*Meudell*)
- The mere use of the word ‘offer’ is not conclusive. (*Seppelt*)

**2. Provision of information:** circulation of price lists, publication of information regarding products/services