

## **CONTRACT NOTES**

Contract: A legal expression of agreement between parties  
Statute/legislation overrides common law/judge made law

**The signature rule:** Signature will ordinarily bind a party to the terms even if the signatory has not read or understood the terms set out in the document, unless there is fraud or misrepresentation

**The Parol evidence rule:** The rule is concerned with entirely written contracts and that's that oral evidence / extrinsic material cannot be introduced that will have the effect of adding to, subtracting from or varying the terms of an entirely written contract.

ACL provisions and cases such as *Amadio v Commercial Bank* [1982] 151 CLR 447.  
Common law (judge-made law) NB; the doctrine of precedent e.g. *CBA v Amadio* (1983) 151 CLR 447.

**A valid contract** is an agreement between two or more parties  
Whereby legal rights and obligations are created which the law will enforce: Offer and acceptance, Consideration, Intention and can be affected by: Capacity, Legality , Consent

<b>Valid</b>	The essential elements are present
<b>Void</b>	No legal validity
<b>Voidable</b>	Validly formed but inherent defect
<b>Unenforceable</b>	Validly formed but with a technical defect
<b>Illegal</b>	'The court will not lend its aid to a man who founds his cause of action in an immoral or illegal act.'
<b>Executed</b>	Where a party has performed their promise
<b>Executory</b>	Where all the parties have done is exchange promises
<b>Express</b>	By written or spoken word
<b>Implied</b>	By conduct
<b>Formal</b>	Some must be in writing
<b>Simple</b>	Six essential elements (can be written or oral or both)

## **OFFER**

Offer and Acceptance of the offer. The need for a meeting of the minds (consensus ad idem) (Smith v Hughes 1871)

Objective approach: (*Taylor v Johnson* 1983, *Franklins v Metcash* 2009)  
*Fitzwood Pty Ltd v Unique Goal Pty Ltd* [2001] FCA 1628 at [88] per Finkelstein J

*MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* 1975 (an example of the Ticket cases.)

Would it appear to a reasonable person in the position of the offeree that an offer was intended and that a binding agreement would be made upon acceptance : (*Carlill* 1893 *Taylor v Johnson* 1983, *Fitzwood Pty Ltd v Unique Goal Pty Ltd* (2001)

Rules of Offer: May be made to a single person or a class of persons, Must be communicated. Cannot be accepted without knowledge of existence, All terms of the offer must be brought to the notice of the offeree, Must be distinguished from an invitation to treat. An invitation to treat is an invitation or an enticement to others to make an offer, May be revoked any time prior to acceptance (nb: options), May have conditions of acceptance, May lapse through non acceptance

In a unilateral contract the obligation of the offeree is executed.  
(*United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968], *Carlill*)

*Australian Woollen Mills Pty Ltd v Commonwealth* (1954)

- ☐ An offer can only lead to a binding agreement if the offer identifies the terms of the proposed agreement with sufficient certainty
- ☐ This case demonstrates the inextricable connection between the requirement of offer and acceptance, intention, consideration and certainty
- ☐ Complex facts: the Australian Government announced a wool subsidy scheme and the plaintiff claimed it purchased of wool "*in pursuance of the said agreement*", that is, under the subsidy scheme. Argued that a contract had been formed by the offer of a subsidy and was accepted by the buying the wool.

**Need for clarity:**

There needs to be a clear expression of a willingness to be legally bound by the stated terms. If accepted, is capable of binding both parties.

*Lefkowitz v Great Minneapolis Surplus Store* 1957

Offer and a mere supply of information: *Harvey v Facey* 1893

Offer and Mere Puff: *Leonard v Pepsico Supp* 1999

Invitations to Treat:

Advertisements: *Partridge v Crittenden* 1968

Brochure Distribution: *Grainger and Son v Gough* 1896

Shop displays: *Pharmaceutical Society Of Great Britain v Boots Cash Chemists (Southern) Ltd* 1953, *Fisher v Bell* 1961 Display of items in shop window

Auctions: The traditional analysis is that there is no legal relationship prior to the fall of the hammer (or selection of tenderer). *Payne v Cave* (1789), if auction is cancelled: *Harris v Nickerson* (1873), Without Reserve: No difference whether there is or is not a reserve *AGC (Advances) Ltd v McWhirter* (1977) (however there may be a claim against the auctioneer *Warlow v Harrison* (1859) ), Internet Auctions: (*e Bay International AG v Creative Festivals* 2006 *Smythe v Thomas* 2007), Sale of Goods Act s60

Options: changing conditions: *Goldsbrough Mort & Co Ltd v Quinn* 1910

**The Requirement of Communication:** *Fitch v Snedaker* (1868)

**Motive of acceptor immaterial:** *Williams v Carwardine* (1833)

**Knowledge is essential:** *R v Clarke* (1927)

**Where offer is to specific offeree**

*Byrne v Van Tienhoven* 1880 must be communicated

*Dickinson v Dodds* 1876 offeree can be informed about the withdrawal from a reliable source.

**Revocation in unilateral contract scenario**

#### Prior to performance:

May be withdrawn prior to performance so long as publicised as prominently as the original offer *Shuey v United States* (1875)

#### Partly performed:

It has been held a unilateral offer cannot be withdrawn once the offeree has partly performed the requested act.

*Daulia Ltd. v. Four Millbank Nominees Ltd* (1978) , *Veivers v Cordingly* (1989 )

BUT The notion that there is a general principle preventing revocation of offers in exchange for acts (unilateral contracts) has been rejected by the Full Federal Court. *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998)

Offers terminate upon rejection and cannot be accepted. *Stevenson Jacques & Co v McLean* (1880)

A counter offer acts as a rejection of the offer to which it relates. *Hyde v Wrench* (1840), and will become an offer that can then be accepted or rejected.

Needs to be distinguished from a request for further information *Stevenson Jacques & Co v McLean* (1880)

If no time limit is set the offer expires after a reasonable time: *Balla v Theophilos* (1957) (16 months too long to exercise an option to purchase deceased partners business interest).

Death may not suit parties: *Fong v Cili* (1968)

**Condition Bringing Offer To An End:** *Financings Ltd v Stimson* (1962)

Possible Statutory Intervention in relation to offers:

Competition and Consumer Act 2010 (Cth), Sch 2 (Australian Consumer Law , “ACL”)\*, Sch 2, ss18, 21, 29, Sch 2 Part 3-1 Unfair practices provisions .

Unconscionable conduct, Misleading & deceptive conduct, False representations, Implied terms regime, Industry Codes of Practice Australian Consumer Law Sch 2, s 51 AD

## **ACCEPTANCE**

Acceptance is a final and unqualified assent to the terms of the offer, made in the manner specified or indicated by the offeror.

### **Express/Implied**

*Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988)

Subject to formal contract *Masters v Cameron* (1954):

Three classes

1. The parties have reached finality in arranging all the terms of their bargain and intend to be immediately bound but wish to have their terms restated in a form that is more full or precise.
2. The parties have agreed to all the terms and plan no departure from the terms but have made performance conditional upon the execution of a formal document.
3. The intention of the parties is not to make a concluded bargain at all unless they execute a formal contract.

Acceptance in Response to the offer *R v Clarke* (1927)

By Someone other than the Offeree

- ‘ where a contract is made, in which the personality of the contracting party is or may be of importance... not other person can interpose and adopt the contract’  
*Boulton v Jones* (1857)

By More than One Person

- Offerors need to be careful that they are not committed to obligations they cannot meet.
- Where the offer can be accepted by more than one (even though there can be only one contract) the liability will depend on the ways the terms are construed.

*Patterson v Dolman* (1908)

Underlying the law of agreement is a meeting of the minds or a 'consensus ad idem' (*Dickinson v Dodds* (1876) 'The existence of the same mind between the two parties ...is essential in point of law to the making of [an] agreement' (per James LJ) but the issue is complex. Is consensus, actual consensus or an appearance of consensus?

Acceptance must be communicated: As a general rule acceptance must be communicated to be effective. The manner of that communication is up to the parties and more particularly up to the offeror if s/he wishes to prescribe method of acceptance. *Carlill v Carbolic Smoke Ball Co* [1893], *Latec Finance Pty V Knight* [1969]

**Exception: Postal rule:** Where the parties contemplate acceptance by mail, acceptance will be complete as soon as the letter is properly posted. *Adams v Lindsell* (1818)

Instantaneous communications: ***Entores Ltd v Miles Far East Corp* [1955]**, *Brinkibon Ltd v Stahag Stahl GmbH* [1983], *Reese Bros Plastics Ltd v Hamon – Sobeko Australia Pty Ltd* (1988), Telegrams have been treated as ordinary mail. *Leach Nominees v Walter Wright* [1986] (if through a 3<sup>rd</sup> party such as a public telex system, communication complete when it reached the operator, such a response was within the contemplation of the parties.), Electronic Transactions Act, 2000, (NSW), s13 based on the \*Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996), ***Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA* (No 4) [2009]**

Methods of Communication:

**Silence** *Felthouse v Bindley* (1862)

**Inferred by Conduct:** *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988)

There may be circumstances where it is incumbent on the party who has received an offer to reject it explicitly or be bound. **This is a major modification to the rule in *Felthouse v Bindley*.**

*PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* [2007]

*Waldorf Apartment Hotel, the Entrance Pty Ltd v Owners Corp* SP71623 [2010]

'Although the offer and acceptance formulation is a useful tool in most circumstances and is the conventional approach ' it is neither sufficient to explain all cases nor necessary to explain all cases'. Haydon JA *Brambles Holdings Ltd v Bathurst City Council* (2001)

## 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.' (*Currie v Misa* 1875)

**The Doctrine of Privity:** Only an original party to a contract may sue or be sued. (This will be covered later in the course)

**Doctrine of Consideration:** A promisor's promise must be paid for to be enforceable and the payment must proceed from the promisee

The two doctrines are interrelated.

Under the traditional law if a third party is specifically intended to benefit from a contract he or she cannot sue to enforce that benefit. Why? : because there is no consideration passing from the 3rd party.

Consideration essential for every simple contract.

***Dunlop Pneumatic Tyre Company v Selfridge (1915)***

Move from the promise: *Coulls v Bagot's Executor & Trustee Co Ltd (1967)*

Need not flow to the promisor: *Bolton v Madden (1873)*

Domestic Relationships: *Balfour v Balfour, Jones v Padvattor*

*Beaton v McDivitt (1987)*: Kirby P... 'The triumph of the bargain theory of consideration necessary for a contract amounts to a rejection of the theory of contractual obligation based on reliance.'

Deliberately not doing something or not exercising some right, Usually at the request of another can constitute good consideration: *Callisher v Bischoffsheim (1870)*, *Hercules Motors Pty Ltd v Schubert (1953)* Forebearance: *Wigan v Edwards (1973)*

**Must be sufficient but need not be adequate**

- ▶ *Woolworths Limited v Kelly (1991)* Kirby P.
- ▶ *Thomas v Thomas (1842)*
- ▶ *Chappell & Co Ltd v Nestlé Co Ltd (1960)* Lord Somervell, 'A contracting party can stipulate for what consideration he chooses. A peppercorn does not cease to be good consideration if it is established that the promisor does not like pepper and will throw away the corn.'

**Must be Lawful**

- ▶ *Parkinson v College of Ambulance (1925)*

Cannot be illusory: *Placer Development Ltd v The Commonwealth (1969)*

Must be definite: *Shiels v Drysdale (1880)*, *Dunton v Dunton (1892)*, *White v Bluett (1853)*

Past consideration is not consideration: *Roscorla v Thomas (1842)*, *Lampleigh v Brathwaite (1615)*, *Re Casey's Patents: Stewart v Casey [1892]*

A promise to perform a contractual duty already in existence is generally not valid consideration. This rule is commonly known as the rule in *Stilk v Myrick (1809)*

Where an existing agreement is terminated by the parties and a new one is substituted for it.

Where there is a bona fide grievance and compromise *Wigan v Edwards 1973*

Where additional risks are undertaken or where the promise provides some additional act or forbearance *Hartley v. Ponsonby 185*

Where the promise confers a practical benefit on the promisee, including avoiding a detriment