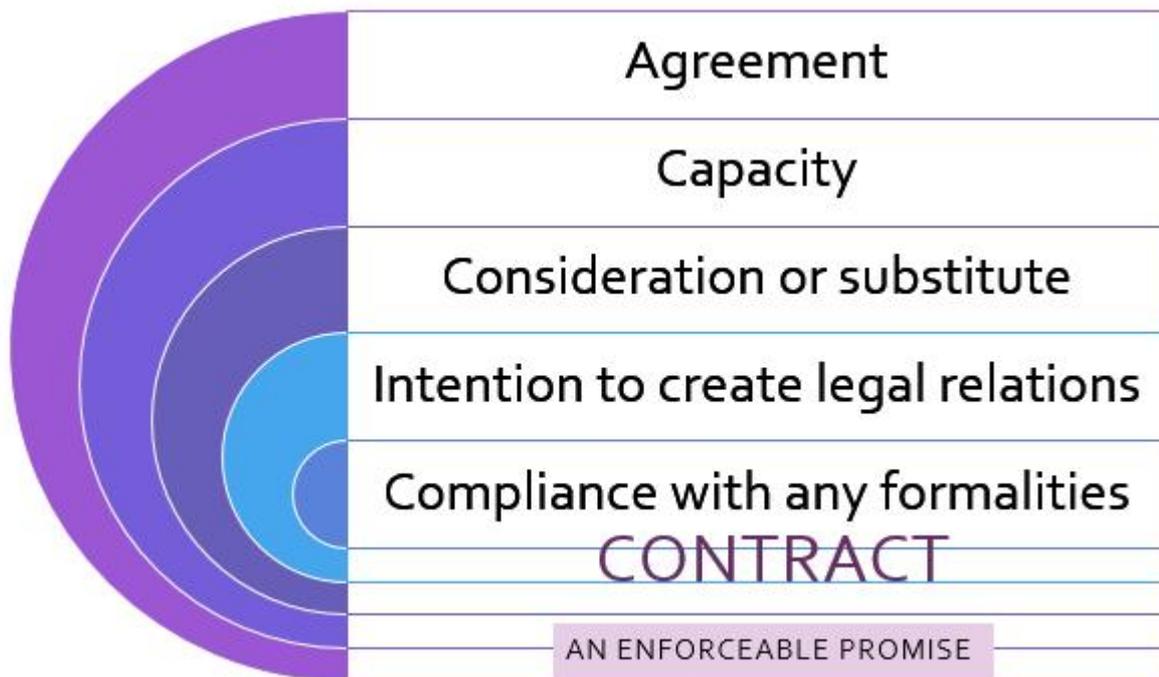


Laws 105 Subject Notes

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2 Introduction



A contract is a legally binding agreement

- → Legally binding = the law will compel the person making the promise (promisor) to perform, or to pay damages to compensate the person to whom it was made (promisee) for non-performance.

A contract is a promise (or a set of promises) that is legally binding. The law will compel the promisor to perform, or to pay damages to compensate the promise for non-performance. Only some promises are legally binding and only some binding promises are contracts. Contracts must amount to an undertaking by the promisor that is offered in exchange for something sought in return by the promisee. 'Bargain' → I will do something if you do something in return—defining characteristic of contract.

A promise that does not contain the element of a bargain may still give rise to legal rights and obligations if the promisee has relied upon the promise and it would be unjust to allow the promisor not to fulfil the promise and remain unpunished → *Waltons Stores (Interstate) Ltd v Maher*: 'an equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts to his detriment, seeks to resile from the promise.' (*The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 428-429, per Brennan J)

2.1 The importance of contract law

Contract law underpins our society. Every transaction made involves a contract.

Importance of contracts to society helps to explain one of the principle reasons why the law enforces them.

Professor PS Atiyah → one of the leading contract scholars of the C20th.

(*Stephen A Smith, Atiyah's Introduction to the Law of Contract*, Clarendon Press Oxford, 2005)

[at 3] *The Justification for Contract Law*

'Assuming that contracts are voluntary undertakings, why should the law enforce such undertakings?' 'Why lend the State's support to what is an essentially private complaint?' 'Two justifications are typically given for the law of contract.' 'Economic' and 'broadly utilitarian' → 'it facilitates mutually beneficial exchanges, and so promotes overall social welfare or social wealth.' 'A justified use of the state's resources because it helps everyone become better off.'

'From an economic perspective, the primary reason a law of contract is needed is that most exchanges of any complexity cannot be performed simultaneously. One or both parties will have to perform in the future, which means that the other party has to have confidence that she will perform.' 'There are many reasons aside from the law that each of us might keep to our agreement, such as our interests in our reputation or simply our sense of morality.' 'The risk of non-performance will sometimes dissuade people from entering otherwise beneficial deferred exchanges. It is because of this risk that contract law is needed.' 'The fundamental role of contract law...is to facilitate the making and performing of deferred exchanges.' 'The law fulfills this role...by providing remedies for breaches of contract.'

'Contract law's essential purpose is to secure cooperation in human behavior, and particularly in exchange.' 'Contract law ultimately provides the backing needed to support the whole institution of credit.' Roscoe found → 'Wealth, in a commercial age, it is made up largely of promises.'

'The individualist or 'moral' justification focuses not on the social benefits of contracting, but on the rights and duties of individual contracting parties.' 'Defendants have duties, *owed to the claimants*.' 'Courts order that damages be paid...to remedy the injustice caused by the defendants having infringed the claimant's rights.' 'The payment of damages reflects the idea that the defendant has

wronged the claimant, and so must repair the harmful consequences of that wrong.’ ‘Damages correct the injustice *to the individual claimant* caused by the breach.’

‘The economic view supposes that society’s interests take precedence over those of the individual, while the moral view supposes the opposite.’

2.2 The nature of contract law

2.2.1 Contract law is largely judge-made law

Almost entirely common law, primarily found in judicial decisions. Statutes are increasingly being passed which regulate, or have an impact on, substantial areas of contract law. I.e.

Commonwealth → *Insurance Contracts Act 1984*, *Carriage of Goods by Sea Act 1991*. State and territory → Sale of Goods Acts, Fair trading Acts and Credit Acts. *Competition and Consumer Act 2010* (Cth) → Most significant. Has revolutionized contract law in areas such as misrepresentation, implied terms, manufacturer’s liability and unconscionable conduct. Australian contract law is now a complex mix of judge-made law and statute law.

Statutory modifications of case law are not conveniently collated in a single source; constantly being added to. English texts may no longer accurately represent important areas of Australian contract law. Australian texts may soon become dated in certain areas.

2.2.2 Contractual obligations are largely self-imposed

Provides a framework within which the individuals can create their own rights and obligations if they wish to do so. *Baltic Shipping Co v Dillon* → Brennan J: institution ‘by which parties are empowered to create a charter of their rights and obligations *inter se*.’ Individuals are free to decide whether or not to enter into a contract and:

- What the nature and content of their respective rights and obligations will be; and
- What the consequences will be of those obligations not being honoured, or rights infringed

In some cases it is mandatory to enter into contracts i.e. third party personal injury in relation to the use of motor vehicles and workers compensation insurance. Inequality in bargaining position and use of standard form contracts means that if a person wishes to enter into a contract they must do so on the terms laid down by the other party. The former is taken to have agreed to the latter’s terms notwithstanding that they felt they had no choice about it. If the dominant party’s conduct constitutes duress or undue influence, or is unconscionable in some way, or the terms in question form part of a standard form consumer contract are judged to be ‘unfair’, the contract will be unenforceable.

2.2.3 The law of contract not contracts

Common-law recognizes a general law of contract that applies equally to all types of agreements. However, as a result of legislation, special rules have been introduced to govern particular types of contracts.

2.2.4 Relationship with other branches of law

Contract and other branches of the law are not mutually exclusive. An even may give rise to rights and obligations under more than one regime i.e. if a consumer purchases a faulty product they will have a remedy for breach of contract, and a statutory right to claim compensation. If the goods cause personal injury or negligence they will also have a claim under the tort of negligence.

2.3 Contract theory

'Classical' contract theory: laissez faire, C19th, doctrines of freedom of contract and sanctity of contract. Individuals are the best judges of what is in their own interests and they should be 'free'. *Photo Production Ltd v Securicor Ltd* [1980] AC 827, 848 → Lord Diplock: It is 'A basic principle of the common law of contract...that the parties to a contract are free to determine for themselves what primary obligations they will accept.'

Sanctity: once made, a contract is 'sacred' and should be enforced according to its terms, not changed by the courts.

'Neo-classical' contract theory: Accommodated growing sympathy for those who lacked bargaining power; growing desire for courts to intervene in order to ensure just outcomes.

2.4 What's the difference between a promise and a contract?

- → for a promise to give rise to contract it must amount to an undertaking by the promisor in exchange for something sought in return from the promisee.
- → eg. A promises to give B pays A \$10 000

(ie. terms and conditions for use of services (differs from the idea of the parties negotiating terms))

THE MAIN SOURCE OF CONTRACT LAW IN AUSTRALIA IS THE COMMON LAW, ALTHOUGH THERE'S INCREASING STATUTE LAW.

CONTRACTUAL OBLIGATIONS ARE SELF-IMPOSED.

PARTIES TO THE CONTRACT DECIDE BETWEEN THEMSELVES:

→ THEIR OBLIGATIONS UNDER CONTRACT; AND

→ THE CONSEQUENCES OF THE BREACH OF THEIR OBLIGATIONS

STATUTE LAW CAN LIMIT CONTRACTUAL FREEDOM, FOR EXAMPLE: FOR THE PROTECTION OF CONSUMERS (TO PREVENT UNFAIR TERMS OR MISLEADING CONDUCT) ← AS WITH STANDARD CONTRACTS

2.5 If contracts are private, voluntary undertakings, why should the law enforce them?

From Professor Aliyah:

1. The law enforces contracts because of the importance of contracts to our society (almost every transaction by a business will involve a contract) The law provides remedies for breach of contract.
2. To remedy injustice.

Derived from England-but increasingly diverging with the development of Australian common law and statute law.

Common law: contract law is largely judge-made law

Statutes: there is not an Australian "Contract Act" (like the 'Indian Contract Act 1872'). However, increasingly statutes in Australia are impacting on areas of contract law.

- *'Insurance Contracts Act 1984 (Cth)'* (with the stated purpose of reforming the law so that a fair balance is struck between the interests of insurers, insureds and other members of the public") and;
- *'Competition and Consumer Act 2010 (Cth)'* (which contains provisions dealing with: misinterpretation, implied terms, manufacturers' liability and unconscionable conduct.)