

1: Introduction to the Law of Contract

Definition

What is a Contract?

- Contracts are defined as an agreement between two parties that can be enforced at law. The contract must be valid and enforceable at law to be legally binding.
- Contracts enable the parties to make the rules – it is a mechanism used to define, arrange and regulate a transaction.

Key Elements

Promise

There must be an exchange of promises. A cannot get something from B for nothing. There must be an equal, beneficial exchange on a level-playing field under the Australian legal system.

Capable persons

A cannot enter into such a contract if they are insane/prisoners/bankrupt/under the age of 18 etc. This area of law establishes the framework – i.e. the set of rules and regulations - under which contracts can be formed.

Obligation

Does the contract suggest an obligation to fulfil a certain action? Does A have an obligation to fulfil that action in accordance with the contract?

Enforceable

Is the contract legally enforceable?

RULE: Law does not lay down the rights, not concerned with specifics only mechanisms.

- Contract is an agreement **freely** entered into by 2 parties.
- Law can set the boundaries (i.e has to be legal) but other than that should not interfere with a contract that has been freely entered into by two parties.

Definitions

Term	Definition
Valid	The essential elements are present.
Void	No legal validity – i.e. no rights or obligations as there is no contract.
Voidable	Validly formed but inherent defect. E.g. contract made with under 18 – child has ability to say they have no capacity to make a contract → can become void if agreed party voids the contract (<i>Amadio</i>).
Unenforceable	Validly formed but with a technical defect.
Illegal	If contract illegal it will be void (i.e. contract to sell marijuana)
Executed	At least one party has performed (unrelated to whether or not the contract is valid – contract became valid when promises were exchanged).

Executory	Both parties still have obligations. Does not mean there is no contract (as there was an exchange of promises).
Express	By written or spoken word.
Implied	By conduct.
Formal	Must be in writing.
Simple	Six essential elements (see diagram) – can be written or oral or both.
Unilateral Contract (executed)	The offeree does not undertake to perform but accepts the offer by performing their side of the bargain – i.e. obligation of offeree is executed. (Typically rewards contracts are unilateral – e.g. <i>Carlill</i>).
Bilateral Contract (executory)	Exchange of promises.

Theories of Contract Law

Provides a context for understanding modern contract law and how it is evolving.

Classical Contract Theory

- Market individualism → reflects historical origins; predominant in the 19th century or early 20th century.
- Provides a mechanism under which parties to a definite arrangement can regulate their relationship – people free to enter into own agreements and courts should not interfere.
- For predictability, certainty and convenience society places a great deal of importance on contracts and commerce could not operate without a comprehensive and settled body of law.
 - ‘Contract is the central concept on which commercial law is founded’ (Schmitthoft).
- Freedom of contract and sanctity of contract reinforced the purpose of contract law to provide certainty.
 - Freedom of contract = embracing partner freedom and term freedom.
 - Sanctity of contract = embracing the inviolability of contracts → parties should be held to their bargains.
- Significant challenges:
 - Circumstances have changed in the 21st century (both in the prevailing economic theory and the nature of the transactions conducted in it). The challenge for the law has been to accommodate the principles, which have developed, to take account of the changed circumstances within the framework of contract law.
- Criticism of the classical theory:
 - Legal realists particularly from the US have argued against the Classical Theory.
 - Contracts do not necessarily represent the will of the parties.
 - Fails to take into account the complexities of social behaviour and distribution of economic power (inequality of bargaining power, standard form contracts).

*Always start with the classical approach

Promise Theory

- Contract has a unifying theory of ‘moral principles’. The moral basis of contract is the promise – Fried (1981).

Consent Theory

- Contractual obligations can only be fully understood if they are seen as dependant on an underlying system of legal entitlements.
- The parties to a transaction have entitlements and they consent to transfer them.
- A transfer requires the consent of the rights holder, and it is consent that provides moral justification of enforcement. Consent may be manifested formally (written) or informally (verbal).

Economic Theory

- Contract law can be seen as a vehicle for facilitating economic exchange.
- At the heart of the capitalist system and the heart of the market economy.
- Often economic theory in line with classical approach.
- Emphasis on giving effect to parties' choices or preferences without applying any ethical criteria to those preferences has been criticized.

Critical Legal Scholarship

- Critique of legal formalism in contract law: the notion of contract law as a set of value-free, abstract rules that can be applied to any fact situation with predictable results.
- Contract law conceals political choices made by judges, supports the existing economic and social order, and suppresses communitarian values and collective interests (i.e. law of contracts serves the powerful).
- Critical legal scholars have claimed that contract law generally favours markets over community, individualism over altruism, self over other and form over substance. Arguments put forward state that these dichotomies make the law incoherent as it relies on contradictory principles and flips from one side to the other. It has been stated that occasional application of altruism, etc (through estoppel, unconscionable dealing, etc) is simply preserving the existing structure and pre-empting more comprehensive reform.
- The more unequal the bargaining power the more inclined courts will be to interfere in the contract (e.g. parents contracting with children, lawyer contracting with client etc).

HC decision of <u>Amadio</u> → HC said there was inequality; bank had informational advantage and partnership with property developers, parents elderly and did not speak fluent English, contract signed in kitchen (unprofessional) etc.
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Feminist Theory

- Some argue that the classical approach to contract law reflects a masculine viewpoint.
- Women are physically, socially and psychologically and politically different from men and those differences need to be taken into account.
 - Females may contract for different reasons.
- Three approaches:
 - i. Identical Treatment Approach:** denies any significant differences between women and men, and promotes gender-neutral treatment of people.
 - ii. The Difference Approach:** Women are physically, socially and psychologically and politically different from men and those differences need to be taken into account to effect substantive equality. The law reflects a masculine viewpoint that uses abstract,

rule-orientated analysis, a style reliant on characteristics associated with the cultural stereotype of man. A more contextual approach to give voice to the feminine viewpoint is advocated, emphasizing such values as reliance, compromise, and respect.

- iii. **The Subordination Approach:** assesses particular legal practices and policies to determine whether they operate to maintain women in a subordinate position. The approach suggests that the gender of the parties and the power relation between them must be taken into account in resolving contractual disputes.

Garcia v National Australia Bank Ltd: HC recognized continued existence of a special principle protecting women who guarantee their husbands' business loans, where the woman has either been subject to undue influence by her husband or has misunderstood the effect of the guarantee.

Contract as a Social Relationship/Relational Contract Theory

- Contract is a social relationship between transacting parties which is an inseparable part of a broader web of social relations, as opposed to classical and economic contract theories which assume that each contract involves a discrete, one-off exchange. Parties to commercial contracts are often engaged in long-term relationships with one another or are part of a close-knit industry, which impacts dealings.
- Business people in some contexts are 'neither aware of nor significantly influenced by' relevant principles of contract law in the planning, adjustment or settlement of disputes in contractual transactions, often relying on good will of the other party rather than the law. (Macauley- 1960s). An enterprise cannot be completely planned from beginning to end. (Macneil).
- Theory contests the idea that promise is at the heart of the contract. In more relational transactions, the parties do not plan comprehensively and their promises are likely to be incomplete, and so their relationship is governed by relational norms. Instead they gather increasing information and gradually agree to more and more as they proceed.

Private Regulation

- Contract can be understood as a means of regulating markets and exchanges.
- Braucher argues it plays a strong regulatory role and does not simply facilitate private ordering.
- Criticisms:
 - tends not to look beyond the interests of the parties to a particular dispute (can't see the bigger picture- if a person has a grievance with a manufacturer, the fact that many others have the same problem will not be taken into account).
 - Also the private law's commitment to consistently applying general rules in favor of freedom of contract has been criticized as it often produces unfair outcomes for one of the parties.

International Contract Law

- United Nations Convention on Contracts for the International Sale of Goods (aka the Vienna Convention)- creates a set of standard principles governing international contracts for the sale of goods

- UNIDROIT Principles of International Commercial Contracts 2004 attempts to develop international principles of contract law.

The Law of Obligation

- The law of obligations owed by individuals to each other.
- Relationship with Tort, Restitution, Equity and Statute.

Torts Laws

- Duties imposed by law, unlike in contracts where the obligation is self-imposed.
- Torts in contractual context: e.g. false statements induced a party into the contract, then that may be actionable in the tort of deceit or tort of negligence if the promisor was careless in believing the truth of a statement.
- Concurrent liability in torts and contracts exists if one party had a contractual obligation and also owed a duty of care to the other.
- Duplication of damages is not permitted in such circumstances, but it gives the plaintiff a choice between suing in contract or in tort.

Restitution

- Obligation to restore unjust gains.
- Duty imposed on a party to restore something to the other on the ground that they would otherwise enjoy an unjust enrichment at the expense of the other party.
- This action may be used to recover a sum for goods or services.

Pavey & Matthews Pty Ltd v Paul: builder able to recover reasonable remuneration in restitution for the work done because Mrs Paul had requested and accepted benefit of the work, despite there being no written contract.

Equity

- A system of doctrines and remedies developed as a means of remedying defects in common law.
- Equitable obligations relevant to contracts include:
 - Equitable estoppel → creates rights where promises and representations have been relied upon.
 - Fiduciary obligations → these are owed in situations where one person (the fiduciary) undertakes to act in the interests of a second person (the principal or beneficiary). These duties may exist alongside contractual obligations.
 - Obligations of confidence → this duty may arise in contractual negotiations where confidential information is disclosed.

Statutory Obligations

- Many statutory obligations are closely connected with contract.
- Those with the closest connection are those imposed by the *Trade Practices Act 1974* (Cth) and the Fair Trading and Sale of Goods Acts which deal with aspects of transactions such as implied terms, misleading or deceptive conduct and unconscionable conduct.

2(a)(b): Agreement: Offer & Acceptance

Introduction

- For there to be acceptance of the offer, there must be a meeting of the minds = *consensus ad idem* (Smith v Hughes 1871).
- Acceptance is not always easily ascertained.

Old Fashioned Rules

- Rules about contract formation were developed in the 19th century when there was a concern for certainty and a reasonable degree of precision.
- The rules are precise but as a consequence it is often difficult to fit the precise model to what people actually do.

Traditional Approach

- **The traditional approach** to answering the question: have the parties reached agreement? → apply the rules of **offer and acceptance**. When a properly constituted offer has been made by one party and accepted by the other, then there is agreement at the moment of acceptance or, more precisely, at the moment of *communication* of acceptance.

Other Factors

- **Consideration:** the agreement is essentially the exchange of promises → occurs prior to or at the same time.
- **Intention:** is a key factor → if it is lacking it is unlikely the contract will be bound.
- **Certainty:** is a requirement → must have some certainty about what the terms are before giving consideration/acceptance.

Gibson v Manchester City Council [1979]

Facts:

- Case concerned with housing commission tenants.
- Council stated that they may be willing to sell houses to the tenant.
- The tenants said they were willing to buy, and that they would sort out their finances.
- The council changed their mind.
- Issue: Was there an offer capable of being accepted?

Held:

- No binding contract had come into existence.
- The most that could be said about the Council's letter was that it represented part of the negotiations where the parties were feeling their way towards an agreement; an implication of intent to sell.
- It lacked the unequivocal nature of a true offer.

MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) (1975)

Facts:

- Taxation department in WA trying to levy tax on airline tickets.
- A passenger bought a ticket from an airline company.
- A condition printed on the ticket provided that the airline reserved the right to abandon the flight at any stage and that the airline was under no liability other than providing a refund.

Held:

- Three High Court judges used entirely different reasoning concerning offer and acceptance in such an everyday transaction as buying an airline ticket
 - **Ultimately held that an airline ticket is NOT a contract; at best it is a voucher.**
- Barwick CJ: The airline does not by issuing the ticket offer to assume any obligation. The exemption occupies the entire area of possible obligation leaving no room for any contract of carriage. The airline accepts no obligation until the passenger is given a seat on the aeroplane hence the ticket is not subject to the provisions of the Stamp Act 1921 WA.
- Stephen J: Ticket constitutes only an offer and not an agreement subject to Stamp Duty; therefore there is no completed agreement.
- Jacobs J: adopted complex interpretation involving 2 contracts (in neither case however does the ticket constitute an agreement making it liable to stamp duty):
 - Carriers offer is accepted by passenger accepting the ticket and paying the price, forming an executory contract between carrier and purchaser.
 - Ticket also constitutes an offer of carriage to the proposed passenger capable of acceptance by presentation of ticket.

Carlill v Carbolic Smoke Ball (1893)

Facts:

- In a newspaper, the Ds (manufacturers of an influenza remedy, the carbolic smokeball) offered £100 reward to any person contracting influenza having used the remedy in accordance with the company's directions.
- The advertisement also stated that the Ds had deposited £1000 with the bank to show the sincerity of their offer.
- P on the faith of this offer bought and used the remedy in accordance with the directions and contracted influenza.
- D argued that an offer must be made bilaterally (i.e. an offer cannot be made to the world) and that there was no intention, no offer or acceptance, no consideration → therefore no contract.

Held:

- Court disagreed with D and held that an offer CAN be made unilaterally (i.e. to the entire world).
 - There was intention → 100 pounds put in the bank was a clear statement of intent to be bound by the contract.
 - There was acceptance → it was a unilateral contract; therefore acceptance occurs at the time of performance. The performance also constitutes consideration.
- This case established that an advertisement can sometimes be an offer, and that the notification of acceptance is not always necessary.
- Today we have legislation in place (Trade Practices Act) that deals with misleading and deceptive conduct.

Offer

- A clear statement of the terms upon which the offeror is prepared to be contractually bound.

The Rules

- An offer can be bilateral (i.e. agreement made between two people or a group of people) or unilateral (i.e. an offer made to the world at large) (*Carlill*).
 - If the merchant limits the number of acceptors then it is possible to argue that it is an offer to the world at large (*Lefkowitz v Great Minneapolis Surplus Store*).
- The offer must be definite → the test is **objective** – i.e. would a reasonable person in the position of the offeree believe that an offer was intended and that a binding agreement would be made upon acceptance? (*John Howard v J P Knight [1969]*).
 - Motive of an acceptor is immaterial due to the objective test.

Williams v Carwardine (1833)

Facts:

- Government claimed D gave knowledge to ease her conscience because she felt guilty – not strictly acting in response to offer.

Held:

- HC held motive was irrelevant.
- BUT different decision reached in R v Clarke (1927) – see below.

R v Clarke (1927)

Facts:

- P gave information which led to the apprehension and conviction of two murderers – motive was to save himself, otherwise he would have been charged.

Held:

- The court held that Clarke could not claim a reward for information he had given because he had given the information to convince the police of his innocence and not in response to the offer of the reward → he did not have the reward offer in his mind at the time.
- SUBJECTIVE approach – court getting a result they're comfortable with.
- Knowledge is essential.

- An offer is only valid if it identifies a valid **consideration** and manifests an **intention** to create a legal obligation. It must also have an element of **certainty**.
- Merely calling something an offer doesn't make it an offer.
- Must be communicated, all terms and conditions must be brought to the attention of the offeree. If the offeree is unaware of an offer, then it would be impossible to accept it.

Fitch v Snedaker (1868)

P unaware of reward at time of giving information.

- An offer must be distinguished from 'mere puffs' → offers must be distinguished from non-promissory statement made during the course of negotiations. Objectively, these statements are exaggerated and a reasonable person would not expect them to be true (*Leonard v Pepsico Inc 88 Supp 2nd (1999)*).
- An offer must be distinguished from a request for information → a request for further information is not an offer.

Harvey v Facey (1893)

Facts:

- P (Harvey) sent a telegram requesting the lowest price at which D (Facey) would sell his property ('Bumper Hall Pen').
- When he received this price he assumed that a contract had been thus formed and sent a telegraph to state that he accepted.

Held:

- The court held that there had been NO offer; just a request for information, and the mere statement of the lowest price was not a promise to sell.
- P's cable accepting was an offer to buy, which D refused.

- An offer must be distinguished from an 'invitation to treat' → invitation or an enticement to others to make an offer.
 - Advertisements are not usually offers; they are asking people to make offers (*Partridge v Crittenden 1968*).
 - *Carlill* is an exception in which they added more to the advertisement lending it to become an offer.

Lefkowitz v Great Minneapolis Surplus Store

Facts:

- D (the owner of a store) published an advertisement which read 'Saturday 9am, 3 brand new fur coats worth \$100.00. First served, \$1 each'.
- P was the first customer to ask for one of these coats but was refused.

Held:

- There was a sufficient mutuality of obligation in the conduct of the parties to constitute a contract.
 - "The test of whether a binding obligation may originate in advertisements addressed to the general public is whether the facts show that some performance was promised in positive terms in return for something requested"....
 - "the authorities emphasize that where the offer is clear, definite and explicit, and leaves nothing open to negotiation, it constitutes an offer, acceptance of which will complete the contract".

- Advertising goods for sale in brochures → generally only an invitation to treat. The reader makes the offer by placing an order or visiting the shop, and (in theory) the shop owner can either accept or reject the reader's offer.

Grainger v Gough (1896)

Facts:

A wine merchant distributed a circular that listed the prices of wines that he stocked.

Held:

In holding that the circular constituted an invitation to treat, the court noted that a price list does not amount to an offer to supply an unlimited quantity of goods at the published price.

- Display of goods for sale → goods displayed in shops for sale are invitations to treat, notwithstanding that a price tag is attached.

Pharmaceutical Society of Great Britain v Boots (1953)

In this case it was held that goods that are on display in a shop are an invitation to treat, and that any contract is established at the checkout of the shop when the shop assistant accepts the customer's offer to buy the selected goods. This was done for economic expediency as if there were a contract formed when a person picked up goods off the shelf, would this place them in breach of this contract when they changed their minds and put them back?

- Termination of the offer → an offer may be revoked at any time prior to the moment of acceptance.
- There may be conditions of acceptance within the contract and it may lapse – if a contract has lapsed, it cannot be accepted.

Features

- An offer can only lead to a binding agreement if the offer identifies the terms of the proposed agreement with sufficient certainty.

Australian Woollen Mills v Commonwealth (1954)

*Authoritative on issues of offer and acceptance, and consideration.

Facts:

- Government encouraged cloth manufacturers to use local wool and if they did would subsidise it.
- The government then cancelled the subsidiary after a certain period.
- Ps claimed breach of contract (unilateral contract – offer made; they accepted through performance).

Held:

- Court held that there was no contract.
- It was not an offer capable of being accepted, it was merely an announcement of policy.
- It was an administrative arrangement, not a contract.
- The Commonwealth never intended to be contractually bound from a public policy perspective.

Auctions

- The bidder makes an offer, the owner accepts at the fall of the hammer = 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)

An auctioneer who puts a property up for sale is not making an offer to sell but is issuing a request for bids. The various bids form a series of offers that the auctioneer can accept or reject on behalf of the seller. The rule is now codified with respect to goods in the **Sale of Goods** legislation in each State and Territory (**s59 NSW**).

- There is no claim if the auction is cancelled (although the auctioneer may be at risk).

Harrison v Nickerson (1873)

- It was held that a notice advertising an auction on a specified date did not constitute an offer which could be accepted by turning up at the stated time.
 - Prospective purchaser cannot claim compensation for expenses due to travelling and finding the auction cancelled.
 - If an auction is advertised 'without reserve' there is debate whether the auctioneer has entered into a contract with potential bidders (a separate contract from the possible contract for sale of the property or goods) to sell to the highest bidder so that the auctioneer is personally liable if the auctioneer does not do so.
 - **N.B.** = doubt was cast on the possibility of this outcome in *ACG Ltd v McWhirter* (1977) although *Hughes Aircraft Systems International v Air-services Australia* (1997) seems to suggest that the auctioneer might be liable.
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- Auctions with a reserve:
 - For auctions with a reserve, the call for bids = invitation to treat.
 - For most property sold by auction, the owner will set a reserve price. This means that the auctioneer cannot sell the property unless he or she receives a bid at or greater than the reserve price. If the bids do not reach the reserve, the property is said to be 'passed in' and the property is not sold.
 - Each bid made at the auction represents an offer that may be accepted or rejected by the auctioneer. Acceptance of the offer occurs, and the agreement is formed, when the auctioneer knocks the property down to the successful bidder.
 - Because the agreement is not formed until a bid is knocked down, a bidder can withdraw a bid (offer) before this time.
 - Auctions with no reserve:
 - *It makes 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)*
 - It is less common for auctions to occur without a reserve price being set = the legal status of a property advertised to be sold to the highest bidder is not entirely settled.
 - An auctioneer who refuses to knock down the property to the highest bidder will be in breach of contract (*Warlow v Harrison – where the auction does have a reserve, an auctioneer will not incur contractual liability by failing to knock the property down to the highest bidder*) – **BUT** – even in an auction without a reserve, each bid represents an offer that could be accepted or rejected by the auctioneer. If the bid is not accepted, then a contract cannot be formed (*AGC v McWhirter*).
 - Internet auctions:
 - Before participating in an online auction, parties will typically need to first become registered users. Parties will accept relevant terms and conditions appearing on the online site.
 - Acceptance of the terms and conditions will usually be constituted by the parties clicking on an 'accept' button. The significance of these terms being accepted by all

registered users is that those terms and conditions will govern any contractual relationship arising from an online auction.

Smythe v Thomas (2007)

Facts:

- Thomas listed a rare and valuable Wirraway aircraft on eBay, with an auction duration of 10 days and a minimum price of \$150k.
- There was a phone call, the contents of which were disputed.
- Smythe placed a bid for \$150k and, there being no other bidders, "won" the auction.
- Thomas wanted \$250k for the aircraft. He refused to complete the transaction.
- Smythe sued. Thomas' defence was:
 - Privity : The contract was the eBay User Agreement between Thomas and eBay, and between Smythe and eBay, but there was no contract or agreement between Thomas and Smythe;
 - The eBay listing was an invitation to treat;
 - Even if there was offer and acceptance, the contract was uncertain and incomplete as the time for payment was to be negotiated;
 - Smythe waived his right to bid on the auction, based on the content of the disputed phone call.

Held:

- Rein AJ referred to a number of overseas cases in which online auctions have been discussed, the relevant provisions of the **Sale of Goods Act 1923 (NSW)**, rejected each of Thomas' defences, and concluded that there was a valid and enforceable contract for the sale of the aircraft.
- Remedy: Specific performance.

Tenders

- A tender does not usually constitute as an offer.
 - *Spencer v Harder (1870)*: A request to tender is an invitation for interested persons to send in offers. The recipient of the offers (or bids) can then enter into a contract by communicating acceptance with the chosen tenderer. When the offer is accepted, the contract is formed
- Two instances where liability may otherwise arise:
 - Wording important: If the wording indicates the highest or lowest bid may be accepted could be interpreted as an offer.

Harvela Investments Ltd v Royal Trust Co of Canada (Ci) Ltd (1986)

This case held that if the request is made to specific persons and it is stated that the contract will be awarded to the highest or the lowest bidder, then this statement was binding as a unilateral offer. Thus, an invitation to treat may itself be treated as an offer.

- Failure to comply with the agreed tendering process (*Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council (1990)*). The promise to give proper consideration to complying tenders (*Hughes Aircraft Systems International Inc v Airservices Australia (1997)*).

Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council (1990)

Facts:

- The Blackpool council invited the Aero Club and six other parties to tender for the operation of pleasure flights from its airport.
- These invitations stated tenders were to be submitted in an envelope provided and that tenders received after a specified date would not be considered.
- The club submitted a tender by the due date. However, due to an error within the Council's office, this tender was recorded as being received late and not considered.
- The club took proceedings against the Council, arguing that it had promised to consider all tenders received before the specified date and that it had not done so.
- The club succeeded at first instance and the Council appealed.

Held:

- Bingham LJ (at 29) held that "in all the circumstance of this case, I have no doubt that the parties did intend to create contractual relations to the limited extent contended for. I think it plain that the council's invitation to tender was, to this limited extent, an offer, and the club's submission of a timely and conforming tender an acceptance".
- The tender must be considered but there's no obligation to accept and form a contract.

- There is a preliminary process contract which includes an implied term to act in good faith and engage in fair dealing.

Hughes Aircraft Systems International Inc v Airservices Australia (1997)

The Federal Court held that if a request for a tender specifies the criteria for assessing the submitted bids, then those tenderers have a right to demand assessment in accordance with the stated criteria.

A call for tenders may contain an undertaking to treat the tender in a specified manner which the law will characterize as an offer. In such cases, by submitting a tender, the invitee accepts this offer and thereby creates a contract in the terms of the undertaking, regardless of whether the tender itself is ultimately accepted or not.

- Failure to comply does not mean that you will win the tender (*Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council (1990)*).
- The effect of accepting a tender depends upon its terms = it may obligate both parties or only the person submitting the tender.

Options

- A form of offer which also contains a promise not to withdraw it for a certain time.
- The crucial feature of an option is that the offeree must have provided a consideration for the benefit of being given the exclusive right to accept for a certain period. This consideration usually consists of a nominal sum of money, for example, \$1 = i.e. an exchange of promises, giving the money is the performance.

Goldsborough Mort v Quinn (1910)

Facts:

- Term in contract which said “ I John Thomas Quinn in consideration of the sum of **5 shillings paid** to me hereby grant to Goldsborough Mort & Co. the right to **purchase** the whole of my **land...within 1 week** from this date...upon the exercise of this **option** I agree to transfer the lands to said co. or it’s nominees”
- A week before the expiry date and before the acceptance of the offer, respondent (Q) informed the appellants (G) solicitor that he had repudiated the offer and made a mistake.
- Appellants sued to enforce the contract.
- Issue: Is the option a contract or an (irrevocable) offer which has lesser remedies?

Held:

- HC held that the option contract is tied to the sale of the farm; therefore remedy should be specific performance.
 - A contract for the sale of the property conditional upon the option being exercised.
 - Breach of option = breach of contract =remedy for the breach of main contract should be applied.
- Option = contract BUT must be supported by consideration.

Tickets

- A ticket may be an offer but is not evidence of a contract.
- In *MacRobertson Miller Airline Services v Commissioner Of State Taxation (WA)* (1975) (see case summary above) Stephens J ruled that in relation to the formation of contracts in ticket cases, the ticket is considered to be the offer. The passenger accepted the offer on the terms in the ticket either by conduct (boarding the plane) or by not returning the ticket after having a reasonable opportunity to read the terms.
- Automatic vending machines:
 - The presence of the machine ready to accept the money constitutes the offer, and the passenger accepts the offer by inserting coins.
 - After this point, it is too late for terms to be introduced to govern the transaction.
 - Any terms appearing on the ticket issued by the machine that were not drawn to the passenger’s attention beforehand could not be regarded as forming part of the contract.

Thornton v Shoe Lane Parking Ltd

Facts:

- Involved an automatic ticket vending machine in a car park.
- Once the car approached the machine, a ticket was issued to the customer.
- Issue: whether the terms referred to on the ticket by the machine as the car approached formed part of the contract.

Held:

- Court of Appeal held that “the offer is made when the proprietor of the machine holds it out as being ready to receive money”.
- The proposition is slightly different in the car park context.
- If a notice is displayed – giving prices and stated that cars are parked at owner’s own risk – the offer is contained in the notice.
- Acceptance occurs when the car proceeds to the machine and the ticket is taken by the driver.

Termination of the Offer

Revocation

- An offer may be revoked by the offeror any time before it has been accepted.
- A revocation of an offer is ineffective until it is communicated to the offeree.

Byrne and Co v Leon Van Tienhoven and Co (1880)

Facts:

- P (Van Tienhoven) posted a letter to D (Byrne) offering to sell tinplate.
- P posted a further letter a week later revoking the offer.
- Unfortunately for P, it was not received until after the defendant had cabled its acceptance.

Held:

- The court held that the postal acceptance rule is “inapplicable to the case of a withdrawal of an offer” even though the letter of revocation was posted before the acceptance cable was sent.
- The withdrawal of an offer sent by cable was held to be communicated only when the cable was received.

- The offeror does not have to specifically communicate the revocation. It is efficient if the offeree learns of the revocation from a third party where a reasonable person would treat that communication seriously.
 - Where offer is to a specific offeree, indirect communication may suffice.

Dickinson v Dodds (1876)

Facts:

- D wrote to P (Dodds) agreeing to sell a farm for £800.
- Day before the offer was due to expire, a neighbour told P that D had decided to sell the farm to a third party.
- P then purported to accept the offer before the time had expired.
- D refused to sell the farm to P.

Held:

- Court held that the note was an offer (and not an option, as there was no consideration) and it could be withdrawn before acceptance.
- There does not need to be an express or actual withdrawal of the offer – communication through a third party will suffice.

- Revocation in unilateral contracts:
 - No decided Australian cases on the subject.
 - Prior to performance can withdraw offer as long as it is publicised as prominently as the original offer.

Shuey v United States (1875)

Revocation should take place in the same form as the offer was made. (e.g. if unilateral offer was made through a newspaper advertisement, the revocation should also be in the same manner).

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

Daulia v Four Milbank Nominees [1978]

Held: in unilateral contracts- *“a person who makes an offer susceptible of acceptance of an act, may not revoke that offer after the offeree has embarked upon performance of the act”*.

Errington v Errington (1952)

Facts:

- A father promised his daughter and son-in-law that if they paid off the outstanding mortgage on a house the father owned, he would transfer the ownership to them.
- The couple moved into the house and began the mortgage repayments.
- Sometime later, the father died, and his widow sought to withdraw the father's offer before the mortgage was fully repaid.

Held:

- The widow was unsuccessful as the court held there was an implied ancillary unilateral contract promising that the offer in the main contract would not be revoked once performance had begun.

- 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

Mobil Oil Australia Ltd v Wellcome International Pty Ltd (1998)

Facts:

- It was alleged that in 1991, D (Mobil) promised its franchisees a 9-year renewal of the franchise of their service stations if the franchisees achieved a certain level of annual performance over a 6-year period in an incentive scheme known as 'Circle of Excellence'.
- D sought to withdraw the incentive scheme before the 6-year period was completed though several franchisees had achieved the annual desired targets.
- Ps (Wellcome and others) argued that the offer under the scheme could not be withdrawn by D before they had a chance to complete the performance.

Held:

- According to a number of circumstances in which franchisees were placed and the uncertainty of General Manager's statements, his speech was not a legally enforceable offer of a promise.
- Given the qualified nature and context of General Manager's statement, it could not reasonably said to be misleading or deceptive conduct under s52 of Trade Practices Act.
- If Mobil did not make a contractual offer, it did not make an ancillary promise not to revoke the offer once franchisees embarked upon performance of the act of acceptance.
- Conduct of Mobil was not sufficiently specific and unqualified to attract application of equitable estoppel, and none of the franchisees established detriment proportional to the relief they sought.
- Held: *"We do not accept it to be a universal principle that it would be unjust for an offeror to revoke an offer once the offeree has embarked upon performance of an act which is both the sought act of acceptance of offer & executed consideration"*.

Rejection

- Offers terminate upon rejection and cannot be accepted.
- A request for information about an offer is not a contract.

Stephenson Jacques v Mc Lean (1880)

Facts:

- D (McLean) made an offer to sell iron for cash to P (Stevenson).
- P responded by asking whether they can buy it on credit. D believed that the offer was therefore rejected because it did not involve cash, so D sold the iron to someone else.
- P then quickly accepted, but D had already sold it to someone else.
- Went to court to decide whether the mere inquiry as to the existence of credit terms represented a rejection of the offer.

Held:

- The court ruled NO.
- Court found for P, because the 'credit' comment/question was merely an inquiry (request for information), and was not a rejection.

Counter-Offer

- An offer is terminated if the offeree makes a counter offer.
- A counter offer is a response that indicates a willingness to contract but on different terms from the offer.
- A counter offer can only be accepted by the original offeror.
- Even in simple contracts for the sale and purchase of commodities, parties may transact business on the basis of their respective standard form. While the parties may agree on the basics of sale (e.g. subject matter), the other terms may differ. The difficulty this creates is referred to as the **"battle of the forms"**.
 - In **Hyde v Wrench**, no contract was formed because there had been a rejection by the offeree of a fundamental term of the contract – the price.
 - BUT, the current Australian position is that even if there is agreement on the fundamental terms of the transaction, if the offeree adds an additional term, a counter-offer is made. A contract will not be formed until the counter-offer is accepted.
 - Two approaches suggested in **Butler Machine Tool Co v Ex-Cell-O Corp [1979]**:
 - Synthesis approach: per Denning preferred the view that the **"documents were to be considered as a whole**, and the important factor was finding the decisive document".
 - Conflict approach: Lawton and Bridge LJ preferred traditional offer-acceptance analysis, and considered that the last counter-offer killed all preceding offers (**"Last shot"** approach).
 - **United States Uniform Commercial Code, ARTICLE 2-207:**

- If there is a discrepancy arising out of a 'battle of the forms', then it does not necessarily result in no contract **so long as there is no 'material discrepancy'**.
- Allow acceptance to include non-material modifications.

Hyde v Wrench (1840)

Facts:

- A seller offered to sell his farm for 1000 pounds. The buyer replied that he would buy it for 950 pounds. The seller refused. The buyer later purported to accept the seller's original offer to buy the farm for 1000 pounds.

Held:

- The buyer had made a counter-offer (the 950 pounds) which terminated the offer by the seller to sell the farm for 1000 pounds. Therefore, there was no offer for the plaintiff to accept, and there was no contract.

Butler Machine Tool Co Ltd v Ex-cell-o Corporation (England) Ltd

Facts:

- The seller of machinery quoted a price on a standard form. The form contained a clause entitling the seller to vary that price.
- The buyer placed an order for the same machinery on its own order form. The order form contained different standard conditions.
- The seller acknowledged the order by returning the acknowledgment form to the buyer.

Held:

- The English Court of Appeal held that the seller was not entitled to rely on the price variation clause as it did not form part of the contract.
- The buyer's order constituted a counter-offer because it contained terms different from the seller's original offer. That counter-offer was accepted when the seller returned the acknowledgment.

Brambles Holdings Ltd v Bathurst City Council (2001)

Facts:

- D (Brambles) expressed dissatisfaction with the low fees offered by P (Bathurst council) for disposing of the city's liquid waste.

Held:

- In subsequent legislation, the NSW Court of Appeal held that this dissatisfaction was not a rejection as subsequent performance of the contract by the defendant for the low fees confirmed it had accepted the plaintiff's offer.

Lapse

- When an offer lapses, it no longer legally exists and the offeree can no longer accept it.
- An offer may lapse through:
 - The effluxion of time.
 - An offer that requires acceptance within a specified time, lapses when that time expires. An offer that contains no time limit for acceptance lapses after a reasonable time. What is 'reasonable' depends upon the circumstances.

Ramsgate Victoria Hotel Co Ltd v Montefiore (1966)

Facts:

- D (Montefiore) applied for shares in P's hotel company.
- 5 months later P allotted the shares to D, but he refused to accept them.

Held:

- Court held that D was entitled to refuse the shares because his offer had not been accepted within a reasonable time.

- The death of the offeror/offeree.
 - The death of either party before acceptance of an offer generally causes the offer to lapse BUT this is unworkable and may not suit the parties. Depends on which of the parties has died, whether the death has any bearing on the continuation of the offer, the subject matter of the contract, knowledge and whether there was an option.

Fong v Cilli (1968)

Facts:

- The owner of certain land and one of the two joint purchasers signed the relevant contract for sale document.
- Owner died before the other joint purchaser (who knew of the owner's death) signed the contract.

Held:

- Court held that an offeree could not accept an offer after the offeror's death, to the case where the offeree knew of the death before the purported acceptance.

- Failure of a condition.
 - An offer may be made subject to an express or implied condition that must be fulfilled before the offer can be accepted – or an express or implied condition that it should lapse upon the happening of a certain event.

Financings Ltd v Stimson [1962]

Facts:

- D signed an offer to purchase a car on hire-purchase terms from a finance company through a document.
- Document contained a clause stating that the agreement contained in it would not be binding until it had been accepted on the finance company's behalf.
- Before finance company signed agreement, D took possession of the car, but later returned it because he was dissatisfied with the performance of the car.
- Car was stolen from the dealer's premises, but later recovered in a very bad condition.
- Finance company then agreed D's offer. Company sued D for breach of contract.

Held:

- Court of Appeal held that D's offer was subject to an implied condition that the car should continue in the condition it was in when the offer was made and that, on the failure of that condition, D's offer lapsed.

Gilbert J McCaul (Australia) Pty Ltd v Pitt Club Ltd (1959)

Facts:

- P (Pitt) entered into a contract to lease property from D (McCaul) for a period of 5 years.
- The lease contained a right for P to renew the lease for a further 5 years subject to two conditions being satisfied – 1) the plaintiff had to give three months' notice of his intention to exercise the option AND 2) the plaintiff had to pay rent punctually and perform all the obligations under the lease.
- P gave D the required three months, but had not punctually paid the rent. P sued when D refused to renew the lease.

Held:

- The court held that the condition to pay rent punctually was a condition precedent to P's right to exercise the option, and consequently the right lapsed.

- If the offeror becomes incapable of performing the offer will lapse.
 - E.g. loss of capacity.
- Statutory intervention.
 - May be rendered illegal by statute.
 - Statute will prevail over common law.
 - Possible statutory intervention in relation to offers:
 - Trade Practices Act, 1974 (C'lth) s 52, 53, 54, 56 & s 82
 - Fair Trading Act, 1987 (NSW) S 42, 44, 48, 51, 68
 - Industry Codes Of Practice

Acceptance

Definition

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

- Acceptance is the moment of contract.
- In some cases it may also be necessary to determine where a contract comes into being.
 - This will determine what laws the contract is covered by.
- Acceptance must be in response to an offer.
- Acceptance must correspond with the offer.
 - If the offeree attempts to vary the terms or add additional terms this amounts to a counter offer (see ***Butler Machine Tool Co v Ex-Cell-O Corp [1979]***).
- Acceptance must generally be communicated (*Carlill*).
 - May be express (oral/writing) or implied (conduct).

Brogden v Metropolitan Railway Co. (1877)

Facts:

- One party forgot to sign a draft agreement, but both parties continued to act as if a contract existed between them until a dispute arose.

Held:

- Courts found that a contract was implied by the conduct of the parties. 'The acceptance of the offer by the defendant could be inferred from his conduct.'

- Silence does not generally constitute acceptance of an offer; however there are some exceptions.

Felthouse v Bindley (1862)

Facts:

- P – Uncle (Felthouse) offered to buy a horse from his nephew – he stated "If I hear no more about him I shall consider the horse mine at £30 15s 0d"
- The nephew never replied and uncle took the horse. Later an auctioneer mistakenly sold the horse and the uncle then sued the auctioneer in the tort of conversion.
- The basis of this claim was that the horse belonged to the uncle – tort of conversion would have only succeeded if there was a valid contract between the nephew and the uncle.

Held:

- It was held that there could not be a contract in circumstances where the offeror had purported to impose contract by saying "If I hear nothing, I shall assume that you have accepted" – even if the nephew was willing to accept it under those terms.
- Mere "mental acceptance" is not enough. An offeror cannot compel to take positive steps to reject an offer by stating that silence will amount to acceptance

Empirnall Holdings Pty Ltd v Machon Paul Partners Pty Ltd (1988)

Facts:

- Involved comprehensive negotiations between the parties concerning a building project.
- P architects (Machon) commenced work on the project and then forward to D (Empirnall) a contract and progress payment claim.
- P's covering letter stated that 'we are proceeding on the understanding that the conditions of the contract are accepted by you and works are being conducted in accordance with those terms and conditions'.
- D, who subsequently acknowledged that the proposed contract was "fine", paid the claim but never signed the contract.

Held:

- The court, after restating the general rule that silence is not acceptance, held that in some situations there may be a duty on the offeree to communicate a rejection of the offer.
 - D had such a duty, and their acceptance was implied.

Conditional Acceptance and the Need for Finality

- What must be accepted is what was offered without addition, deletion or qualification.
- Conditional acceptance is NOT acceptance.
- Must have a final and unequivocal acceptance.

***Masters v Cameron (1954)**

Facts:

- D (Cameron) owned a farm and his agent entered into a contract for sale with P (Masters).
- The agreement was 'subject to the preparation of a formal contract of sale which shall be acceptable to (D's) solicitors'.
- The purchaser subsequently decided not to continue and P unsuccessfully sued.

Held:

- The court held that there was no binding contract.
- The court noted that, where negotiating parties reach agreement upon contractual terms but make their agreement dependent upon formal documentation, the agreement may be in one of three categories:
 - i. Where the parties have reached finality (and intend no departure) and merely wish to reflect their agreement in a fuller and more precise form. In this situation, there is a binding contract.
 - ii. Where the parties have reached finality (and intend no departure) but have made performance of one or more of the terms conditional upon the execution of a formal document. In this situation, there is a binding contract; and
 - iii. Where the intention of the parties is not to make a concluded bargain at all until they execute a formal contract. In this situation, there is NO BINDING CONTRACT, as was held in Masters v Cameron.
- In Sinclair Scott v Naughton [1929]¹ the court made reference to a fourth category of contract – that parties will be bound from this point, but can be replaced by a clearer and more revised contract.

Who May Accept?

- **General rule:** an offer can only be accepted by those persons to whom it was made.
 - Acceptance cannot occur unless and until the offeree has received the offer. The offeree must be aware of the existence and terms of the offer before they can accept it.
 - An act done in ignorance of the offer cannot be accepted.
 - The offer must be present in the mind of the acceptor when the acceptance occurs (see R v Clarke (1927) – Court held Clarke wasn't responding to the offer).
- Acceptance by someone other than the offeree.

Boutlon v Jones (1857)

"Where a contract is made, in which the personality of the contracting party is or may be of importance... no other person can interpose and adopt the contract".

- Acceptance 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)

Facts:

- 2 offers – both accepted – but only one lot of hay.

Held:

- 2 contracts were formed; therefore vendor liable for the breach of one contract.
- Remedy = Damages.

Acceptance Must be Communicated to the Offeror

- **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.
 - In unilateral contracts acceptance can be communicated through performance (*Carlill*).

Latec Finance v Knight [1969]

Facts:

- It was explicitly stated in the terms that there would be no contract until the finance company signed the agreement .
- Knight, the person buying a TV, filled in the hire-purchase form and it was sent in to the finance company. The company then processed the form and accepted the offer which was constituted by the completed form. This acceptance took place within the company's office and was not communicated to Knight.
- The TV set was defective and Knight returned it to the retailer and stopped paying the hire-purchase payments.
- The finance company then sued Knight for the payments.
- Knight argued there was no contract, as there was no communication of acceptance of offer.

Held:

- Court held acceptance was not communicated; therefore NO CONTRACT.
- This is not a case of contract by conduct because Knight returned the TV set reasonably promptly. Thus it could not be said that Knight must have known that the company had accepted.

The Postal Acceptance Rule

- Where the parties contemplate acceptance by mail, acceptance will be complete as soon as the letter is properly posted (**Henthorn v Fraser [1892]**).
- Acceptance takes place when the letter is posted, not when it is received, even if the acceptance is lost in the post.

Adams v Lindsell (1818)

Facts:

- D (Lindsell) wrote to the P (Adams) offering to sell him a quantity of wool and requiring acceptance by post, which P provided.
- Problem arose because D's original letter to P arrived late because it was addressed incorrectly.
- D, believing his offer had been rejected by P, sold wool to another buyer.
- This took place after P's acceptance had been posted, but before receipt.

Held:

- Court held that the acceptance by P was effective on the date of posting, and therefore a binding contract existed between the parties.

- Exceptions to the postal rule:
 - **Intention:** For the rule to apply, acceptance by post MUST have been contemplated by the parties (**Henthorn v Fraser [1892]**). It may be excluded by the offeror either expressly or impliedly.
 - **Revocation:** rule only applies to acceptance – i.e. cannot use for revocation of OFFER (see **Byrne and Co v Leon Van Tienhoven and Co (1880)**).
 - Postal rule can be negated by requiring actual communication instead of constructive (postal) communication (**Elizabeth City Centre v Corralyn (1994)**).
 - **Instantaneous communication:** The rule does not apply to means of instantaneous communication such as telex (**Entores v Miles Far East Corp [1955]**), telephone or facsimile transmission (**Reese Bros Plastics v Hamon (1988)**).
 - Telegrams have been treated as ordinary mail.

Entores v Miles Far East Corp [1955]

Facts:

- P (Entores) carried business in London, and D (Miles) carried business in Amsterdam.
- Both parties had a telex machine. P telexed offering to buy goods from D. D's agent accepted this offer by return telex.
- Issue: Which court had jurisdiction of the contract – i.e. where was the contract accepted?

Held:

- English Court of Appeal held that the postal rule should not apply to instantaneous forms of communication, such as telephone or telex.
- Agreement arose upon receipt of the acceptance (i.e. in London).

Brinkibon v Stahag Stahl GmbH [1983]

Facts:

- Concerned with a contract, made between an English buyer and an Austrian seller, for the sale of steel bars.
- Buyer sought to enforce the contract in the English Courts and sought a leave to serve a writ outside the jurisdiction.
- Under Rules of Supreme Court, leave could be granted where the litigation concerned a contract made in the jurisdiction.
- Contract was made by an exchange of telex messages between buyer in London and sellers in Vienna.
- After negotiations, buyer sent a telex to Vienna accepting the terms of the sale offered.

Held:

- The contract was made in Vienna, where the acceptance was received. The general rule is that a contract is formed where the acceptance is communicated with the offeror.
- In this case of instantaneous communication, the general rule applies. Situation may be different where the message is sent or received through a third party – as there is not universal rule for this, it must be resolved by reference to the intention of the parties.

Reese Bros Plastics v Hamon (1988) – NSW authority.

- NSW CA held that a facsimile message should be treated as a form of instantaneous communication.

Leach Nominees v Walter Wright (1986)

Facts:

- A telex was sent to a third party who was operating the facsimile machine.

Held:

- Court held that the postal acceptance rule applied to an acceptance sent by 'public telex'.

- There may be instances where the postal acceptance rule is appropriate for instantaneous communication.
- There has been no Australian case law in relation to contracts formed by email. Therefore need to consider:
 - Technology being used to transmit email (i.e. Internet or EDI¹);
 - Business practice of industry on both national and international level;
 - Intention of the parties;
 - Existence of legislative or model rules aimed at facilitating electronic commerce.
- Electronic Transactions Act 2000 (NSW) s13 → based on the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce (1996).
- Ultimately no universal rule → need to look at intentions of the parties involved. The general principle of acceptance upon communication should be applied first and only if parties have provided otherwise should another type of acceptance be looked at.

¹ Electronic data interchange (EDI) = unlike the internet EDI is a virtually instantaneous form of communication.