broader implicit norms of behaviour. Developments such as these suggest that relational ideas may be quietly filtering into relevant aspects of contract law.

Criticism

[1.170] Some contract scholars argue that relational ideas do not have a useful role to play in the development of contract law. Michael Trebilcock has observed that relational contract theory "does not yield determinate legal principles" and that its "highly amorphous sociological inquiry" is too wide-ranging to be useful to courts in particular cases. [201] Melvin Eisenberg has argued that it is not possible to implement a set of principles governing relational contracts without developing an operational distinction between relational and discrete contracts. [202] No such distinction can be developed, he suggests, because it would require us to draw an arbitrary line somewhere along the discrete/relational spectrum. If all contracts are relational to some extent, then there is no subcategory of contracts that should be governed by relational rules. [203] Accordingly, rules that take into account relational issues, such as those mentioned in the preceding section, must either be justified as general principles of contract law or rejected altogether. [204]

CONTRACT LAW AS REGULATION

[1.175] Contract law can also be understood as a means of regulating markets and exchanges. Jean Braucher has explained that "[t]he regulatory role of contract law is played out in … three normative dimensions": validity, interpretation and gap-filling. [205] First, the courts decide which exchanges should be enforced. Secondly, the courts interpret the language and conduct of the parties in order to identify the parties' rights and obligations. That process of interpretation "unavoidably involves normative choices about when obligation should arise and what its content should be". [206] Thirdly, the courts supply terms to deal with gaps and inconsistencies in the parties' agreement, "a process that constrains and in some cases replaces party control". [207] Braucher seeks to remind us that contract law plays a strong regulatory role and does not simply facilitate private ordering.

Hugh Collins sees common law contract rights as a form of state regulation. [208] This form of regulation gives rights to the parties themselves and allows them to enforce those rights through the mechanism of state sanctions provided by the courts. Collins calls this "private law regulation". Markets and exchanges can also be regulated publicly, through the legislative

201 Trebilcock, *The Limits of Freedom of Contract* (1992), pp 141-2. See also Kidwell, "A Caveat" [1985] *Wisconsin Law Review* 615.

202 Eisenberg, "Why There is No Law of Relational Contracts" (2000) 94 *Northwestern University Law Review* 805, 813.

203 Eisenberg, "Why There is No Law of Relational Contracts" (2000) 94 *Northwestern University Law Review* 805, 817.

204 Eisenberg, "Why There is No Law of Relational Contracts" (2000) 94 *Northwestern University Law Review* 805, 818.

205 Braucher, "Contract Versus Contractarianism: The Regulatory Role of Contract Law" (1990) 47 *Washington and Lee Law Review* 697, 712.

206 Braucher, "Contract Versus Contractarianism: The Regulatory Role of Contract Law" (1990) 47 *Washington and Lee Law Review* 697, 712.

207 Braucher, "Contract Versus Contractarianism: The Regulatory Role of Contract Law" (1990) 47 *Washington and Lee Law Review* 697, 712.

208 Collins, *Regulating Contracts* (1999).

setting of standards enforced by a government agency, with or without the use of the courts. Public regulation occurs in some areas, such as competition law and consumer protection, often in conjunction with private law regulation.

If we see contract as a form of regulation, we can ask what form and content of legal regulation is best suited to the task of regulating markets. [209] The answer to this question will, of course, depend on what goals are to be pursued. Collins draws on economic analysis and relational contract theory to take economic efficiency, addressing market failure and the preservation of social relations to be the principal goals of contract regulation. Is the private law of contract the best means by which to pursue those goals? Collins suggests that the private law of contract has both advantages and disadvantages as a form of regulation. The principal advantage enjoyed by private law as a regulatory system is its reflexivity or responsiveness. [210] The law of contract allows the parties themselves to set most of the standards for a transaction, modify them, monitor compliance and decide when state sanctions are necessary. In practice, the responsiveness of contract law to the needs of the parties is more limited than it might sound in theory. The common imposition of standard form contracts constrains reflexivity in standard setting, and problems of access to justice limit the ability of parties to seek sanctions.

A more fundamental problem with regulation by private, rather than public, law is that the private law of contract tends not to look beyond the interests of the parties to a particular dispute. In this respect contract law differs from the law of tort, which more often takes account of broader community interests. In contract cases, the focus of the courts on the interests of the contracting parties prevents the courts from taking account of the effects of the parties' conduct on third parties. Performance of contractual obligations may affect others by causing environmental damage or posing risks to safety. While a consumer may be one of hundreds or even thousands of consumers with a similar problem, contract law treats each consumer's grievance as a separate problem and fails to take account of the "collective harms" caused by the behaviour of contracting parties. [211] Public regulation is required to set and enforce standards in order to avoid undesirable externalities.

Another disadvantage of the private law of contract is its commitment to general rules that can be applied consistently to all types of transactions. The problem with this sort of generality can be seen in relation to exemption clauses in standard form contracts. [212] In a commercial contract made between parties of equal bargaining power, a clause exempting one of the parties from liability for a significant breach may be seen as a fair and efficient allocation of risk. In a contract between a large corporation and a consumer, on the other hand, a similar clause may be seen as an unfair outcome of a gross disparity of bargaining power between the parties. [213] The common law of contract fails to differentiate between the two situations and applies general rules that favour freedom of contract in each case. This failure has been addressed by consumer protection legislation. [214]

209 Collins, *Regulating Contracts* (1999), pp 5-6.

210 Collins, *Regulating Contracts* (1999), pp 62-9.

211 Collins, *Regulating Contracts* (1999), p 70, quoting Nader, "Disputing without the Force of Law" (1979) 88 *Yale Law Journal* 998, 1021.

212 Collins, *Regulating Contracts* (1999), p 77.

213 See further Chapters 12, 13 and 16.

214 See Chapters 16 and 38.

The regulatory approach to contract law is considered further in the introduction to Part VII of this book.

COMPARATIVE PERSPECTIVES

[1.180] Internationalisation is a significant force in contract law. This is manifested in a number of different ways. First, the desire to facilitate international trade has given rise to treaties such as the *United Nations Convention on Contracts for the International Sale of Goods* (known as the CISG or the Vienna Convention), which promulgates a set of standard principles governing international contracts for the sale of goods. The treaty aims to remove legal barriers to international trade by providing a set of uniform rules for international sales, thus avoiding uncertainty resulting from differences in national laws and uncertainty as to which national law should apply to a particular transaction. Australia has ratified this treaty and legislation has been passed in all Australian States and Territories to carry it into effect. [215] The principles laid down by the convention apply to "contracts for the sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State". [216] The convention expressly provides that, in its interpretation, regard is to be had to "its international character and to the need to promote uniformity in its application and the observance of good faith in international trade". [217]

Secondly, there have been significant attempts to develop regional [218] and international statements of contract law principles. [219] An important statement of international principles of contract law is provided by the *UNIDROIT Principles of International Commercial Contracts 2010* (UPICC). [220] These principles have been developed under the auspices of the International Institute for the Unification of Private Law, which is an independent inter-governmental organisation based in Rome. Its purpose is to examine ways of harmonising and co-ordinating the private law of different states and to prepare uniform rules of private law for adoption by states. The UPICC is a code of principles governing international commercial contracts, which has been developed by representatives of common law, civil law and socialist systems. The UPICC are intended to provide balanced and comprehensive rules that are ideal for international commercial transactions. They provide a model for national legislators, provide a basis for contract negotiation, can be adopted as the governing law of a particular contract (typically between parties belonging to different legal systems or speaking different languages) and are used by arbitrators and judges as a statement of internationally recognised

215 *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act* (NT); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Goods Act 1958* (Vic); *Sale of Goods (Vienna Convention) Act 1986* (WA).

216 *United Nations Convention on Contracts for the International Sale of Goods (1980)*, article 1(1).

217 *United Nations Convention on Contracts for the International Sale of Goods (1980)*, article 7.

218 See the *Principles of European Contract Law*, Parts I and II (1999) and Part III (2002), produced by the Commission on European Contract Law, and von Bar and Clive, *Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference* (2009).

219 See generally Berger, *The Creeping Codification of the New Lex Mercatoria* (2nd ed, 2010).

220 The UPICC were first published in 1994 and were revised and expanded in 2004 and 2010. See http://www.unidroit.org. A list of cases and arbitral awards citing the principles and details of relevant books and articles may be found at www.unilex.info.

principles.[221] The UPICC are also used as a means of interpreting, supplementing and influencing the development of domestic contract law.[222] The New Zealand Court of Appeal has referred to the principles as a "restatement of the commercial contract law of the world".[223] The principles may have a direct influence on the development of Australian contract law. In *Hughes Aircraft Systems International v Airservices Australia*,[224] for example, Finn J cited art 1.7 of the UPICC as evidence that the implied contractual duty of good faith has been propounded as a fundamental principle in international commercial contracts. This, along with other factors, led Finn J to the view that more open recognition of the duty is warranted in Australian contract law. Useful comparisons with the UPICC have been drawn in numerous other cases.[225]

Thirdly, Australian contract law is enriched by comparisons with approaches adopted in other jurisdictions. It is possible, for example, to point to particular contract cases in which Australian courts have been directly influenced by the principles applied in other countries.[226] Comparisons with the laws of other countries also help to provide us with a better understanding of Australian law and are drawn throughout this book. Care must be taken in relation to comparisons with the United States, because each State has its own law of contract. Since the United States Supreme Court does not hear appeals in contract law cases, there is no single court that can unify contract law in the manner of the High Court of Australia.[227] Problems of uniformity in the US are addressed to some extent by *Restatements of Law* published by the American Law Institute, which include the *Restatement of Contracts (2d)*, published in 1981. The *Restatements* are written by eminent lawyers in the relevant field and are recognised as highly authoritative secondary sources.[228] References are also made in this book to the *Uniform Commercial Code*, article II of which deals with contracts for the sale of goods.[229] It must be noted that the *Uniform Commercial Code* has not provided the uniformity its name might suggest, because the code has been amended in different ways by State legislatures and interpreted in different ways by State courts.[230]

221 Bonell, "UNIDROIT Principles 2004" (2004) 9 *Uniform Law Review* 5, 6-15.

222 Bonell, "UNIDROIT Principles 2004" (2004) 9 *Uniform Law Review* 5, 15-16. See also Bonell, *An International Restatement of Contract Law* (3rd ed, 2005); Bonell (ed), *A New Approach to International Commercial Contracts – The UNIDROIT Principles of International Commercial Contracts* (1999) and Bonell, "Symposium Paper: The UNIDROIT Principles of International Commercial Contracts: Achievements in Practice and Prospects for the Future" (2010) 17 *Australian International Law Journal* 177.

223 *Yoshimoto v Canterbury Golf International* [2000] NZCA 350; [2001] 1 NZLR 523, [89].

224 (1997) 76 FCR 151, 192.

225 See also, eg, *Aiton Australia Pty Ltd v Transfield Pty Ltd* [1999] NSWSC 996; (1999) 153 FLR 236, 260-261; *Bobux Marketing Ltd v Raynor Marketing Ltd* [2001] NZCA 348, [39]; *Tan Hung Nguyen v Luxury Design Homes Pty Limited* [2004] NSWCA 178, [705]; *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61; (2007) 233 CLR 115, [108]; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101, [39]; *Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407, [7]-[9]

226 See, eg, the influence of French law in *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502, 521, discussed at [5.15], and the influence of American law in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, 267-8, discussed at [16.40].

227 See Priestley, "A Guide to Comparison of Australian and United States Contract Law" (1989) 12 *University of New South Wales Law Review* 4, 5-6.

228 See Farnsworth, *Farnsworth on Contracts* (3rd ed, 2004), vol 1, pp 32–34.

229 See generally Farnsworth, *Farnsworth on Contracts* (3rd ed, 2004), vol 1, pp 41–59.

230 See Priestley, "A Guide to Comparison of Australian and United States Contract Law" (1989) 12 *University of New South Wales Law Review* 4, 5-9.

CHAPTER 2

The place of contract within private law

[2.05] A useful perspective on contract law is provided by considering its place within the law of obligations and its place within the field of private law. The law of obligations is concerned with the obligations owed by individuals (including legal entities, such as corporations) to one another. The law of obligations comprises the fields of contract, tort and restitution (or unjust enrichment), along with a number of miscellaneous categories such as the equitable principles relating to fiduciaries, confidential information and estoppel. Statutes such as the *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) are also an important source of obligations owed by individuals to one another. [1]

It is sometimes said that what distinguishes contractual obligations from other private law obligations is that the obligations owed by contracting parties are self-imposed, while other private law obligations are imposed by law. [2] As we have already seen, however, contractual obligations may be imposed on both parties by the state or by one party on the other. [3]

The expression "private law" is commonly used to describe a field of law comprising the law of obligations and the law of property. [4] The law of property can be understood as "a

1 See [2.70]-[2.105] and Chapters 33 and 38.

2 See, eg, Burrows, *Understanding the Law of Obligations* (1998), p 13.

3 See [1.15]-[1.25].

4 See, eg, Burrows (ed), *English Private Law* (3rd ed, 2013), which deals with the law of *persons* (family and corporations law), the law of *property* and the law of *obligations* (including contract, agency, bailment, torts and equitable wrongs and unjust enrichment) and *litigation* (insolvency, private international law, judicial remedies and civil procedure).

category of law concerned with relations between people and things". [5] In the case of both obligations and property, the relevant legal rights are "private", in that they are exclusively enforceable by the individuals who are recognised as holders of the relevant rights, and who may choose whether or not to enforce them. Private law is sometimes distinguished from public law, which is the body of law dealing with the relationship between individuals and the state and between states. [6] This distinction is somewhat artificial, since private law obligations exist only because they are recognised and enforced by the state through the courts. Thus "private law" has a significant public dimension. [7]

Contract commonly overlaps and intersects with other parts of the law of obligations, particularly tort, unjust enrichment, equitable doctrines (such as the duty of confidence, fiduciary duties and estoppel) and statutory obligations (such as the duty not to engage in misleading or deceptive conduct in trade or commerce). It is important to be able to identify and distinguish the different types of claim that may be available in a particular situation in order to determine the nature of the remedies available and, in some cases, to identify the claim that provides the optimal measure of relief.

TORT

[2.10] The law of torts is concerned with actions that harm others. Torts are often described as "civil wrongs". These wrongs are "civil" as distinct from "criminal" because they are enforceable by the person wronged, rather than by the state. The law of torts provides the victim with a remedy against the perpetrator in the form of an award of damages. Torts comprise a rather miscellaneous group of anti-social acts, such as assault, battery, false imprisonment, trespass to land, conversion of goods, nuisance, defamation, deceit and negligence. From this list it will be seen that the law of torts imposes a host of duties to avoid certain kinds of conduct which cause various kinds of harm, including physical injury, nervous shock, loss of freedom, loss of reputation, damage to or loss of property and economic loss. Generally there is no liability without fault on the part of the perpetrator ("fault" meaning here an intention to cause the harm or carelessness in bringing it about), but there are also instances in which the law of torts imposes *strict liability*, or liability without fault.

The most significant tort from a practical point of view is the tort of *negligence*. The elements of this tort are: (1) a duty of reasonable care owed by the defendant to the plaintiff; (2) a breach of that duty; and, (3) a legally recognised form of damage to the plaintiff resulting from that breach. The law has imposed duties of care on a wide variety of defendants, including manufacturers, drivers of vehicles, employers, school authorities, occupiers of land, solicitors, medical practitioners and many others. The general aim of an award of damages in negligence, as in tort actions generally, is to restore the victim as far as money can to the position he or she would have been in if the tort had not been committed.

5 Samuel, *Law of Obligations and Legal Remedies* (2001), p 2.

6 To the list of topics covered by Feldman (ed), *English Public Law* (2nd ed, 2009), of constitution and administrative law, human rights, public law remedies and criminal law, we might add public international law and fields of regulation such as environmental law and competition law, although in some cases these regulatory regimes also confer rights enforceable by individuals against other individuals.

7 Compare Beever, "Our Most Fundamental Rights" in Nolan and Robertson (eds), *Rights and Private Law* (2011), p 63 (arguing that private law rights exist independently of the state).

Torts committed in a contractual context

[2.15] The law of torts must often be considered in a contractual context. Consider the following situations.

First, assume that A is induced by B's statement to enter into a contract with B, and that B's statement later proves to be false. If the statement was incorporated into the contract (so that it can be said that B promised the truth of the statement in the contract), A will have an action against B for damages for breach of the contract. If the statement was not incorporated in the contract, such an action is not available. However, A may have an action for damages in *tort* – the tort of *deceit* (if B did not believe in the truth of the statement) or the tort of *negligence* (if B owed a duty of care to A and was careless in believing in the truth of the statement).

Secondly, a victim of loss may be able to sue in the tort of negligence when an existing contract provides no means of relief. Assume A purchases a product from B and is injured as a result of a defect in the product. The contractual action against B may be of no use because, for example, B is bankrupt. However, A may be able to bring an action in *negligence* against C, the manufacturer of the product, who owes a duty of care to consumers such as A. [8]

Take another example. Assume A retains solicitor B to prepare a will under which A leaves $1 million to C. When A dies C gets nothing under the will because it is invalid owing to B's carelessness in preparing it. C has no action for breach of contract against B as B's only contract was with A (ie, the contract of retainer). There is a doctrine of privity of contract which requires that only a party to a contract can sue on it. [9] But C may have action in negligence against B for breach of a duty of care owed by B to C. [10]

The point to note in both these examples is that, although B's duties in contract may be owed solely to A, an independent duty of care may be owed by B to a third party, such as C. The argument that B's duties are governed exclusively by the contract with A has been rejected by the courts.

Concurrent liability in contract and tort

[2.20] A particular incident may provide a plaintiff with actions in both contract and tort against a particular defendant. This is known as *concurrent liability*. Concurrent liability typically arises where one person (A) owes a contractual obligation to another (B) to take reasonable care in performing services for B, and also owes B a duty of care in tort. If A is careless in performing the services, B may have an action for breach of contract and also an action for the tort of negligence. Hence, a taxi driver who drives carelessly and injures a passenger would be liable to that passenger in both contract and negligence. An employer who maintains an unsafe system of work may be liable in both contract and negligence to an employee injured as a result.

Needless to say, duplication of damages is not permitted in these situations, but the law does allow a choice between suing in contract and suing in tort. The plaintiff may "assert the cause of action that appears to be most advantageous". [11] The choice of one action over another may be significant given that contract and tort rules differ in areas such as the assessment of damages, remoteness of damage, the effect of the plaintiff's contributory negligence and limitation periods.

8 *Donoghue v Stevenson* [1932] AC 562.

9 See Chapter 11.

10 See, eg, *Hill v Van Erp* (1997) 188 CLR 159.

11 *Bryan v Maloney* (1995) 182 CLR 609, 622, quoting *Central Trust Co v Rafuse* [1986] 2 SCR 147, 204-5.

Tort and contract compared

[2.25] Is there any significant difference between a tort and a breach of contract? [12] They may both be described as civil wrongs and they are both creations of the common law. However, a number of possible distinctions should be noted.

Contract as self-imposed obligation

[2.27] It is often claimed that duties in contract are determined by the contracting parties themselves when they voluntarily enter into an agreement, whereas we are all bound not to commit torts whether or not we have agreed not to commit them. Ultimately, however, all duties are imposed by law in that the law recognises them as suitable for recognition.

As we saw in Chapter 1, the objective approach to contract formation means that contractual liability arises where parties behave in a certain way, regardless of their actual intentions. [13] In this sense, contractual obligations can be seen to be imposed by law on the basis of expected conformity with standards of conduct determined by the courts, in the same way as tort. [14] Moreover, as we have seen, parties to a contract often have duties imposed on them that have not been the subject of express agreement between the parties. On the other hand, duties in tort are sometimes, in a sense, self-imposed. The law of negligence recognises a duty of care in some instances where a person has assumed a responsibility to take care. [15] Whether these obligations can properly be understood as being voluntary is a matter of debate. [16]

Tort as universal duties

[2.30] It is sometimes said that by virtue of the doctrine of privity of contract a contractual duty is only owed to the other party to the contract, whereas duties to avoid committing torts are owed to everyone. No doubt this is broadly true, and yet a duty of care, the foundation of the tort of negligence, is not owed by everyone to everyone. It is owed only by a person in a particular situation to "neighbours" (foreseeable victims) and sometimes only to just one group of people or indeed just one person. The range of potential plaintiffs in a negligence context may be quite strictly limited where the loss suffered is of a purely economic kind, such as economic loss resulting from careless financial advice. While the doctrine of privity of contract allows that contractual duties are owed only to other parties to the contract, that principle is not without some flexibility and has been substantially modified by statute in many jurisdictions. [17]

Contract as strict liability

[2.35] Another point of difference relates to culpability. Liability in contract is strict: it is not to the point that the contract breaker did not intend to break the contract or was not careless

12 See generally Swanton, "The Convergence of Tort and Contract" (1989) 12 *Sydney Law Review* 40.

13 See [1.15]-[1.25].

14 See Robertson, "On the Distinction between Contract and Tort" in Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004), pp 87-109.

15 See, eg, *Shaddock v Parramatta City Council* (1981) 150 CLR 225; *Hill v Van Erp* (1997) 188 CLR 159.

16 See Barker, Grantham and Swain (eds), *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (2015), especially Robertson and Wang, "The Assumption of Responsibility" (ch 3) and Beever, "The Basis of the Hedley Byrne Action" (ch 4).

17 See Chapter 11.

in doing so. We noted earlier that culpability of some kind is normally relevant to establishing liability in tort and, in the case of some torts such as deceit and negligence, the very name of the tort spells a degree of culpability. Nevertheless, the standard of care in negligence is objective and may be pitched so high as to be virtually strict.

Measure of damages

[2.40] An award of compensatory damages is the primary remedy for both tort and breach of contract. The aim of such damages in both instances is to compensate for loss: to put the plaintiff in the position he or she would have been in had the contractual or tortious duty not been breached. Although it is sometimes said that the two measures of damages are different, it has been pointed out that this "is no more than a convenient way of indicating that the wrong involved and, thus, the loss occasioned by a breach of contract is of a different kind from that involved in and occasioned by the commission of a tort". [18] In contract the wrong is the promisor's failure to perform the contractual promise. In tort the wrong is the tortfeasor's failure to avoid harming the plaintiff or to take appropriate care of the plaintiff's interests.

The primary purposes of tort and contract are not the same. The law of torts is concerned to protect individuals from interferences that make them worse off, such as physical injury, damage to property, loss of reputation and diminution of wealth. The duties recognised by the law of tort are generally of a negative kind, prohibiting certain forms of antisocial behaviour that may harm others. Accordingly, in tort, the award of damages aims to put the victim in the position he or she would have been in had the tort not been committed – to protect the plaintiff's status quo ante interest. The law of contract, on the other hand, is concerned to ensure that the promisor improves the position of the other party by providing the promised money, property or services. The duties recognised by the law of contract are generally of a positive kind, requiring the promisor to act affirmatively in the promisee's favour. Accordingly, in contract the award of damages aims, as we have seen, to put the promisee in the position he or she would have been in had the contract been performed – to protect the promisee's expectation interest.

This distinction between tort and contract is useful, but it is important to note that in some contract cases damages do no more than protect a promisee from being made worse off by the contract, and in some tort cases the plaintiff is made better off by having his or her expectation interest protected. In some cases contractual damages protect the promisee's reliance interest by compensating the promisee for loss incurred as a result of acting in reliance on the promisor's promise. [19] Such an award restores the promisee to his or her previous position or status quo ante the contract. Similarly, damages awards in tort occasionally have the effect of fulfilling the plaintiff's expectations. For example, a solicitor making a will for a client owes a duty of care to the prospective beneficiaries (even though they are not contractually linked with the solicitor) to take care to ensure that the will is valid. If a prospective beneficiary loses his or her bequest because of the solicitor's negligence, the solicitor will be required to pay damages to the disappointed beneficiary equal to the value of the expected bequest. [20]

18 *Marks v GIO Australia Holdings Ltd* [1998] HCA 69; (1998) CLR 494 at [14].

19 See Chapter 26.

20 See *Hill v Van Erp* (1997) 188 CLR 159.

UNJUST ENRICHMENT

[2.45] The law of unjust enrichment is another principal source of obligations owed by individuals to one another. [21] It is concerned with obligations to restore unjust gains. In certain circumstances a duty will be imposed on one individual to pay a sum of money to another on the ground that otherwise the former will enjoy an unjust enrichment at the expense of the latter. Where a defendant has been unjustly enriched at the expense of the plaintiff, the plaintiff seeks *restitution*, which means the return of the benefit which has been transferred from the plaintiff to the defendant. A restitutionary remedy is one that "aims to give back to the plaintiff the value obtained directly from the plaintiff's labour or assets". [22]

A claim for restitution based on unjust enrichment may take the form of a claim to recover money paid (under mistake, for example) or a claim to recover reasonable remuneration for services rendered or goods delivered (under an unenforceable contract, for example). The liability to restore unjust gains used to be described as a "quasi-contractual" obligation, because it was based on an implied contract to repay money or to pay a reasonable value for goods or services received. The implied promise was a fiction designed to provide the plaintiff with a basis for recovering an unjust gain under the constraints imposed by the medieval forms of action. It is now accepted that the obligation recognised in certain defined circumstances to restore a benefit received at the expense of another party is one that is imposed by law in order to prevent unjust enrichment. [23] That obligation is not based on an implied contract and has a different legal foundation from contractual obligations.

We have already seen that a sharp distinction cannot be drawn between contract and tort. Similarly, the law of unjust enrichment cannot be sharply distinguished from contract or tort. One type of restitutionary remedy is somewhat like tort, in that the result of a successful claim is the restoration of the status quo ante (ie, the parties are returned to their earlier positions): this is the effect of recovery of money paid where there has been a total failure of consideration. Another type of restitutionary claim is closer to contract in that the result of a successful claim is the realisation of an exchange: this is the effect of recovery of a reasonable sum for services rendered or goods delivered. In such a case the plaintiff may be better off than before the exchange, just as in contract law the promisee is made better off than before the contract by virtue of the enforcement of the contractual agreement.

In the leading restitution case of *Pavey & Matthews Pty Ltd v Paul*, [24] Mrs Paul's contractual promise to pay reasonable remuneration to builders for work on her cottage was unenforceable under a statutory provision because the contract was not in writing and signed by both parties. The builder was able to recover reasonable remuneration in restitution for the work done because Mrs Paul had requested and accepted the benefit of the work. Mrs Paul's obligation to pay was a restitutionary obligation, which was said to be imposed by law on the basis of unjust enrichment. The existence of the unenforceable contract was said to serve only to demonstrate that the services had not been performed gratuitously and to provide guidance in the determination of the amount that should be paid. Steve Hedley has argued that the restitutionary claim that was allowed in this case was indistinguishable from the contract

21 See Chapter 10.

22 Edelman and Bant, *Unjust Enrichment in Australia* (2006), p 19.

23 See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

24 (1987) 162 CLR 221, discussed at [10.10].

claim that was barred by statute: "The builders had simply dressed up a contractual claim in the language of unjust enrichment." [25] The law of unjust enrichment is considered further in Chapter 10.

EQUITY

[2.50] Equity is also a rich source of personal obligations. The word "equity" in popular usage means, among other things, the quality of fairness or justice. While this meaning is not irrelevant for our purposes, it is important to understand that "equity" has a specialised meaning in law. It is to be compared with the *common law* and seen as a system of doctrines and remedies developed historically as a means of remedying defects in the common law. In this context, "common law" means the law developed by judges in England in the centuries following the Norman Conquest. The King's justices, in the three courts of King's Bench, Common Pleas and the Exchequer, unified the various local customs existing throughout the kingdom into a common custom: the common law. This judge-made law was ultimately the source of the basic principles of what today we call the law of contract, the law of torts and the law of restitution.

From the Middle Ages on there was much dissatisfaction with the common law system for several reasons. To take just one example, the common law courts offered a limited range of remedies: they could order the payment of damages but they could not order someone to do something or to refrain from doing something. A separate court developed, the Court of Chancery, to redress various inadequacies of the common law. It was this court that administered and developed a system of doctrines and remedies that we describe as *equitable*. For example, the Court of Chancery could exercise the power of ordering someone to perform a contract (*specific performance*) or to refrain from committing a tort or breach of contract (*injunction*). Accordingly, the word "equity" has the following specialised meaning: it is the system of doctrines and remedies developed by the Court of Chancery to rectify defects in the common law. A brief historical excursus will explain how this development occurred and its relevance to the current position in Australia. What follows is a simplified account of the development of equity. [26]

The development of equity

[2.55] In the 13th century, litigants who were dissatisfied with the injustice or inadequacy of the common law system petitioned the King to intervene in particular disputes. These petitions were referred to the Chancellor, as the representative of the King, and in due course the petitions came to be addressed to the Chancellor. Gradually a distinctive court, the Court of Chancery, was developed to hear these petitions. In its early years, the Chancellors resolved disputes on a discretionary basis, according to what the *conscience* of the defendant required in the particular circumstances. The Chancellors usually came from an ecclesiastical background and thus exercised a spiritual authority over the litigants. After the Reformation, Chancellors with training in the common law came to be appointed and this led to the legalisation of the Court of Chancery. Cases began to be decided on the basis of precedent:

25 Hedley, "Unjust Enrichment: The Same Old Mistake" in Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004), pp 75, 81.

26 The following discussion draws on Heydon, Leeming and Turner, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (5th ed, 2015), Ch 1, and Baker, *An Introduction to English Legal History* (4th ed, 2002), Ch 6.

decisions came to be reported and a body of equitable principles was developed. However, it was clearly inconvenient for litigants to have two sets of courts applying different principles. Moreover, the Court of Chancery eventually gained a reputation for scandalous delay and inefficiency. This sad state of affairs was memorably described by Charles Dickens in his celebrated novel *Bleak House*.

The Court of Chancery was abolished and the administration of common law and equity in England and Wales was merged by the *Judicature Act*, passed in 1873. This established the Supreme Court of Judicature, which was to give effect to both common law and equitable principles, with equity prevailing in the event of conflict between the two. These reforms were soon followed in the Australian colonies, where the Supreme Courts were given power to administer common law and equity together, although in the Supreme Court of New South Wales equity was administered exclusively by a separate division until 1972. [27]

Although the administration of common law and equity has been merged, the bodies of principles have not been fused. It remains important to distinguish between common law and equitable doctrines because they operate according to different principles. Equity provides different remedies from the common law. Equitable remedies (such as specific performance) are available at the discretion of the court, unlike common law remedies (such as damages for breach of contract), which are available as of right. A separate set of defences is also available in equity.

Historically, the role of equity was to remedy injustice resulting from an overly rigid common law. In the 19th century there was a decline in this ameliorative role. Towards the end of the 20th century, however, there was an equitable revival within the law of contract, which did much to restore equity's role as the guardian of conscience. This is seen, for example, in the more frequent invocation of unconscionability as a basis for equitable relief. [28] Indeed, the prevention of unconscionable conduct may be seen today as the unifying rationale for a number of specific heads of equitable intervention. [29]

Equitable obligations

[2.60] Three equitable obligations are particularly relevant in the contractual context: the obligation not to harm others by behaving inconsistently (equitable estoppel), the obligation to act solely in the interests of those who repose special trust and confidence in us (fiduciary obligations) and the obligation not to misuse confidential information.

Equitable estoppel creates rights where promises and representations have been relied upon. As we will see in Chapter 9, in terms of its operation and remedial effect, equitable estoppel is in some ways similar to contract, because it results in the enforcement of promises and the fulfilment of expectations. It can also be seen as closely analogous to tort, however, since, like tort, it is concerned with providing protection against harm. [30]

27 See Heydon, Leeming and Turner, *Meagher Gummow and Lehane's Equity Doctrines and Remedies* (5th ed, 2015), pp 12-23.

28 See, eg, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 and *Commonwealth v Verwayen* (1990) 170 CLR 394 (discussed in Chapter 9); *Taylor v Johnson* (1983) 151 CLR 422 (discussed in Chapter 31); *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447 (discussed in Chapter 36).

29 See Loughlan, "The Historical Role of the Equitable Jurisdiction" and Parkinson, "The Conscience of Equity", Ch 1 and 2 in Parkinson (ed), *The Principles of Equity* (2nd ed, 2003).

30 See Robertson, "Situating Equitable Estoppel within the Law of Obligations" (1997) 19 *Sydney Law Review* 32.

Fiduciary obligations are owed in certain situations where one person (the fiduciary) undertakes to act in the interests of a second person (the principal or beneficiary) and has the ability to exercise powers and discretions that affect the interests of the beneficiary. [31] The beneficiary reposes trust and confidence in the fiduciary and is entitled to expect that the fiduciary will act solely in the beneficiary's interests. For example, solicitors owe fiduciary obligations to their clients. Fiduciaries must not profit from their position and must ensure that their personal interests do not come into conflict with their duties to the beneficiary. The remedies for breach of fiduciary duty are sometimes restitutionary (where the fiduciary profits from the breach of duty) and sometimes compensatory (where losses are suffered by the beneficiary as a result of the breach of duty). Fiduciary duties can exist alongside contractual obligations, although it is very difficult to establish a fiduciary relationship between parties dealing at arm's length on an equal footing in a commercial transaction. [32]

Equity also enforces a duty not to misuse information that is disclosed in circumstances giving rise to an *obligation of confidence*. [33] Again the remedies for breach of confidence are sometimes restitutionary (where profits are made from misuse of the information) and sometimes compensatory (where losses result from disclosure of the information). A duty of confidence may arise, for example, between parties negotiating for a contract. If one party divulges confidential information to another during contractual negotiations which later break down, no contractual duty to pay for the information ever arises, but equity may recognise an obligation not to use the information for any purpose other than that for which it was disclosed.

Equitable doctrines and remedies in contract

[2.65] In this book we will be concentrating on equitable doctrines and remedies that are so closely connected with contract that they are regarded as part of contract law. Equitable estoppel falls into this category, but the equitable doctrines relating to fiduciaries and confidential information do not. There are other aspects of equity that are crucial to a study of contract law. First, equitable remedies supplement the common law remedy of damages in the enforcement of contracts. The equitable remedies of *specific performance* and *injunction* will be granted in circumstances where the common law remedy of damages would be inadequate. [34] Secondly, a contract will be set aside or rescinded in equity where there has been some unconscionable conduct in the bargaining process, such as misrepresentation, undue influence or unconscionable dealing. [35] Thirdly, equity will rectify a written document where the parties have by mistake inaccurately recorded the terms of their agreement. [36]

31 See generally Parkinson, "Fiduciary Obligations" in Parkinson (ed), *The Principles of Equity* (2nd ed, 2003), Ch 10.

32 See *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

33 See generally Richardson and Stuckey-Clarke, "Breach of Confidence" in Parkinson (ed), *The Principles of Equity* (2nd ed, 2003), Ch 12.

34 See Chapter 30.

35 See Chapters 31-32, 34-37 and 39.

36 See Chapter 31.

STATUTORY OBLIGATIONS AND REGULATION

Statutory obligations and regulation

[2.70] A number of statutes impose obligations that affect the formation, performance and enforcement of contracts. Some statutes also regulate the content of contract terms. The statutory regime with the closest connection to contract is the *Australian Consumer Law* (ACL), which is set out in Sch 2 of the *Competition and Consumer Act 2010* (Cth) (CCA). [37]

The Australian Consumer Law

[2.75] The origin of the ACL is in the Productivity Commission's *Review of Australia's Consumer Policy Framework*, which recommended the introduction of a single national consumer law. [38] The enactment of the ACL followed an agreement by the Council of Australian Governments in October 2008 to implement the Productivity Commission's recommendation. The ACL is comprehensive consumer protection legislation which applies uniformly across Australia. [39] It draws on the consumer protection provisions previously contained in *Trade Practices Act 1974* (Cth) (TPA), as well as other consumer protection regimes that were previously in operation in different Australian jurisdictions. The ACL regulates misleading and deceptive conduct, unconscionable conduct, unfair contract terms, consumer guarantees, product liability and unsolicited consumer agreements. The Australian Competition and Consumer Commission is given power to enforce certain provisions of the ACL, by seeking fines and remedies for affected parties. Parties who are affected are also able to seek redress by instituting legal proceedings of their own.

Legislative power to pass laws relating to consumer protection is shared between the Commonwealth and State and Territory Parliaments. To implement the ACL, the Commonwealth Parliament acted as the lead legislator. The ACL is contained in Sch 2 of the CCA. Schedule 2 applies to the extent provided for by application legislation. [40] The Commonwealth parliament, and the parliaments of all of the States and Territories, have passed legislation applying Sch 2 of the CCA as a law of their respective jurisdictions. As a result, corporations, unincorporated entities and individuals are all caught by the ACL under Commonwealth and/or State and Territory application laws.

Application as a law of the Commonwealth

[2.80] Part XI of the CCA provides for the application of the ACL as a law of the Commonwealth. The legislative power of the Commonwealth Parliament is limited by the Commonwealth Constitution. The CCA provides that the ACL applies to activities with respect to which the Commonwealth has constitutional power. In particular, s 131(1) of the

37 The CCA was, until 2010, called the *Trade Practices Act 1974* (Cth); see the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth), Sch 5, items 1 – 2.

38 Productivity Commission, *Review of Australia's Consumer Policy Framework, Inquiry Report No 45* (2008), http://www.pc.gov.au/inquiries/completed/consumer-policy/report.

39 See, the Council of Australian Governments, *Intergovernmental Agreement for the Australian Consumer Law* (2009), cl 3.2, https://www.coag.gov.au/sites/default/files/IGA_australian_consumer_law.pdf, where the States and Territories have undertaken to enact legislation applying the ACL as laws of their jurisdictions. See also Department of Treasury (Cth), *Implementing the Australian Consumer Law: Information Note* (2010), pp 5-6, http://www.consumerlaw.gov.au/content/the_acl/downloads/Implementing_ACL_Information_Note.pdf.

40 ACL, s 1.

CCA applies the ACL to the conduct of corporations.[41] Section 4 of the CCA defines "corporation" to mean a body corporate that is:

- a foreign corporation (a body corporate incorporated overseas);
- a trading corporation formed within the limits of Australia (a body corporate is a trading corporation if a sufficiently significant proportion of the corporation's overall activities are trading activities);[42]
- a financial corporation formed within the limits of Australia (a body corporate that performs the function or engages in the activity of dealing in finance);[43]
- incorporated in a Territory; or
- the holding company of a trading corporation, financial corporation or body corporate incorporated in a Territory.

The ACL also applies as a law of the Commonwealth to individuals in certain circumstances.[44] This extension is achieved by reliance on other constitutional powers: the trade or commerce power, the Territories power, powers governing dealings with Commonwealth agencies and the post and telegraph power. The general result is that s 18 applies as a law of the Commonwealth to natural persons who engage in trade and commerce between Australia and places outside Australia, among the States, within a Territory, between two Territories, by way of supply of goods to the Commonwealth[45] or where "engaging in conduct" involves the use of postal or telephone services[46] or takes place in a radio or television broadcast.[47]

Section 131A of the CCA provides that with the exception of Pt 5.5 of the ACL, which is not relevant for present purposes, the Commonwealth application laws do not apply "to the supply, or possible supply, of services that are financial services, or of financial products". These types of services and products are regulated under the *Australian Securities and Investment Commission Act 2001* (Cth) (ASIC Act), which contains many, though not all,[48] of the consumer protection provisions found in the ACL. Interestingly, the State and Territory laws applying the ACL do not contain a provision equivalent to s 131A of the CCA. It is as yet uncertain whether the ACL as applied by State and Territory law could be used in respect to "to the supply, or possible supply, of services that are financial services, or of financial products" or whether such an application of the ACL would be found inconsistent with the intention expressed in the CCA for these services and products to be regulated under the ASIC Act.

---

41 Other heads of constitutional power are invoked as a basis for applying the ACL under CCA, s 6.

42 *R v Judges of the Federal Court of Australia; Ex parte Western Australian National Football League* (1978) 143 CLR 190, 233.

43 *State Superannuation Board v Trade Practices Commission* (1982) 60 FLR 165, 175.

44 CCA, s 6(3), (3A).

45 CCA, s 6(2).

46 Note that sending an email has been held to constitute the use of telephone services: *Dataflow Computer Services Pty Ltd v Goodman* [1999] FCA 1625, [9].

47 CCA, s 6(3). This result is not immediately apparent from reading the version of s 6(3) that appears in the consolidated version of the legislation which, at the time of writing refers to parts of the CCA that have been repealed and makes no mention of the ACL. However, note 2 (which can be found in the notes section of the Act, which follows Sch 2) provides that the words "Part IVA, of Divisions 1, 1A and 1AA of Part V and of Divisions 2 and 3 of Part VC" should be omitted and replaced with the words "Parts 2-1, 2-2, 3-1 (other than Division 3), 3-3, 3-4, 4-1 (other than Division 3), 4-3, 4-4 and 5-3 of the Australian Consumer Law".

48 See Chapter 16.

States and Territories

[2.85] Under the *Intergovernmental Agreement for the ACL* (2009), the States and Territories undertook to enact legislation applying the ACL as a law of their jurisdictions. [49] Laws to apply to "persons" have been enacted in all States and Territories. [50] Section 22(1)(a) of the *Acts Interpretation Act 1901* (Cth) provides that "expressions used to denote persons generally … include a body politic or corporate as well as an individual". [51] Thus the State and Territory application laws apply directly to both individuals and corporate entities. [52]

The CCA confirms that the ACL provisions in the CCA do not exclude the operation of an application law of a participating jurisdiction to the extent that they are capable of operating concurrently. [53]

While the ACL regulates a range of different types of conduct, the provisions with most significance to the law of contract are outlined as follows. [54]

Misleading or deceptive conduct

[2.90] In the discussion of torts earlier in this chapter we saw that a person who suffers loss through acting on a false statement might recover damages for deceit (for a dishonest statement) or negligence (for a careless statement made in breach of a duty of care). Accordingly, a person induced to enter a contract by a false statement that did not become part of the contract might nonetheless claim damages for loss suffered. A contract might also be set aside or rescinded in equity if it has been induced by a misrepresentation (restrictively defined) and various bars to relief can be avoided.

Today, however, the most important source of relief for misleading conduct (including misrepresentations) is under Pts 2-1 and 3-1 of the ACL. In particular, s 18(1) in Pt 2-1 of the ACL prohibits misleading or deceptive conduct in trade or commerce. [55] More specific prohibitions on misleading and deceptive conduct are contained in Pt 3-1 of the ACL. Persons

49 See further Attorney General's Department, *Implementing the ACL* (Commonwealth of Australia, 2010), http://www.consumerlaw.gov.au/content/Content.aspx?doc=the_acl/implementation.htm.

50 *Fair Trading (Australian Consumer Law) Act 1992* (ACT), as amended by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (ACT); *Fair Trading Act 1987* (NSW), as amended by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW); *Consumer Affairs and Fair Trading Act* (NT) as amended by the *Consumer Affairs and Fair Trading (National Uniform Legislation) Act* (NT); *Fair Trading Act 1989* (Qld) as amended by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld); *Fair Trading Act 1987* (SA) as amended by the *Statutes Amendment and Repeal (Australian Consumer Law) Act 2010* (SA); *Australian Consumer Law (Tasmania) Act 2010*; *Fair Trading Act 1999* (Vic) as amended by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (Vic); *Fair Trading Act 2010* (WA).

51 The State and Territory application laws provide that the Commonwealth interpretation legislation applies to the ACL rather than the State and Territory interpretation legislation: *Fair Trading (Australian Consumer Law) Act 1992* (ACT), s 10; *Fair Trading Act 1987* (NSW), s 31; *Consumer Affairs and Fair Trading Act* (NT), s 30; *Fair Trading Act 1989* (Qld), s 19; *Fair Trading Act 1987* (SA), s 17; *Australian Consumer Law (Tasmania) Act 2010* (Tas), s 9; *Fair Trading Act 1999* (Vic), s 12; *Fair Trading Act 2010* (WA), s 23.

52 *Fair Trading (Australian Consumer Law) Act 1992* (ACT), as amended by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (ACT); *Fair Trading Act 1987* (NSW), as amended by the *Fair Trading Amendment (Australian Consumer Law) Act 2010* (NSW); *Consumer Affairs and Fair Trading Act* (NT) as amended by the *Consumer Affairs and Fair Trading (National Uniform Legislation) Act* (NT); *Fair Trading Act 1989* (Qld) as amended by the *Fair Trading (Australian Consumer Law) Amendment Act 2010* (Qld); *Fair Trading Act 1987* (SA) as amended by the *Statutes Amendment and Repeal (Australian Consumer Law) Act 2010* (SA); *Australian Consumer Law (Tasmania) Act 2010*; *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Fair Trading Act 2010* (WA).

53 CCA, s 131C.

54 More information about the ACL can also be found at http://www.consumerlaw.gov.au.

55 See Chapter 33.

who suffer loss as a result of contravention of these provisions have access to a wide range of remedies (including damages and rescission) under the legislation itself.[56] Provided the misleading conduct occurred in trade or commerce, applicants for relief are not hampered by the limitations on claims for damages imposed by the law of torts (such as culpability) nor by limitations on claims for rescission imposed by equity.

Unconscionable conduct

[2.95] Part 2-2 of the ACL prohibits certain types of unconscionable conduct in trade or commerce.[57] The courts are given power to grant a wide range of remedies, including the power to award monetary compensation and to declare contracts void, where a person suffers loss as a result of unconscionable conduct engaged in by another. These prohibitions are particularly important during contractual negotiations, but also regulate the exercise of contractual rights, such as the power to terminate a contract.

Unfair Contract Terms

[2.100] Part 2-3 of the ACL regulates unfair terms in consumer contracts.[58] This part of the ACL looks to the fairness of the terms of the contract, not merely to the conduct of the parties in making, performing or enforcing the contract. The effect of an unfair term is that it is void, which means that the term is treated as if it never existed.

Consumer guarantees

[2.105] Part 3-2 of the ACL contains a regime of "consumer guarantees".[59] The consumer guarantees provide a range of minimum standards of quality that apply to the supply of goods and services to consumers. These guarantees cannot be excluded or limited by contract and take priority over any express guarantee or extended warranty that might be provided by a retailer or manufacturer. The consumer guarantees replace the contract terms that were previously implied under the TPA.

56 See Chapter 33.
57 See Chapter 38.
58 See Chapter 16.
59 See Chapter 17.

FORMATION

PART II

[**PtII.05**] We saw in Chapter 1 that, according to one view, contract law is essentially concerned with enforceable promises or agreements. The law distinguishes between enforceable and unenforceable promises by reference to a series of formal requirements. For an enforceable contract to come into existence, four essential requirements must be satisfied. First, the parties must reach an agreement. The requirement of agreement is often expressed in terms of offer and acceptance: one party must make an offer that is accepted by the other party. Secondly, each party must provide consideration. This means that each party must give something in return for the promises made by the other. Thirdly, it must appear objectively that the parties intend the agreement to create legal relations between them. Fourthly, the agreement must be complete and certain. Satisfaction of these four requirements shows that the parties have reached a consensus, that they have struck a bargain that involves an exchange, that they intend their actions to have legal consequences and that they have identified their respective obligations with sufficient precision. These requirements are discussed in Chapters 3 to 6. The circumstances in which writing is required to create an enforceable contract are then considered in Chapter 7. The issue of contractual capacity is considered in Chapter 8.

CHAPTER 3

Agreement

OFFER AND ACCEPTANCE

[3.05] The traditional approach to establishing an agreement between two parties is to identify an offer made by one party and an acceptance of that offer by the other. Under that analysis, a contract is said to come into existence when acceptance of an offer has been communicated to the offeror. [1] This approach to contract formation by reference to offer and acceptance was developed in the 19th century. It is based on a 19th century model of contracting, in which negotiations are conducted through written correspondence, with a series of letters passing between the parties leading ultimately to an agreement. [2] This approach is also based on a 19th century idea of contracting, in which parties can bargain freely in an unregulated market, stipulating the terms they require, reaching a concluded bargain only if there is a real consensus between them.

According to classical contract theory, the offer and acceptance formula identifies a "magic moment of formation" [3] when the parties are ad idem (of one mind) and their individual wills come together to create binding obligations. In that moment, all of the parties' contractual

1 Eg, *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93, 110.

2 See Stoljar, "Offer, Promise and Agreement" (1955) 50 *Northwestern University Law Review* 445, 453-6.

3 Mensch, "Freedom of Contract as Ideology" (1981) 33 *Stanford Law Review* 753, 760.

obligations spring into existence. [4] The rules about offer and acceptance are based on the idea that up until the moment of formation the parties are under no obligation to one another and are free to withdraw from negotiations. Hugh Collins has observed that these rules "typify the formalist qualities of classical law: they are detailed, technical and mysterious, yet claim logical derivation from the idea of agreement". [5]

The classical approach to contract formation has been softened by developments in the law of estoppel, misleading conduct, negligent misrepresentation and unjust enrichment, which mean that parties in negotiation today clearly owe obligations to one another before the moment of formation. [6] The courts also find it difficult to fit the facts of some cases within the offer and acceptance framework. Even where the parties have clearly reached an agreement it can be difficult to identify conduct that can be characterised as an offer on one side, and conduct that can be characterised as an acceptance on the other. Many everyday transactions are entered into with little or no discussion of terms. A tram ticket may be purchased from a machine, for example, or an airline ticket over the telephone, with very few terms having been spelt out. A contract may be made with a professional person, such as a medical specialist, without even any mention of price. In cases where there is extensive discussion of terms, such as commercial agreements drafted by solicitors, there is unlikely to be a formal offer made by one party which is accepted by the other. Instead there may be a series of negotiations, which culminates in the parties simultaneously signing a written document.

Although the courts recognise its deficiencies, [7] the traditional offer and acceptance approach is routinely applied when the courts need to decide whether a contract has been formed. In order to identify whether, when or where a contract has been formed, the courts will usually seek to attach the labels "offer" and "acceptance" to particular actions, even where it seems somewhat artificial to do so. [8] As we will see, however, a contract can be established without an identifiable offer and acceptance, provided the parties have manifested mutual assent and appear to have reached a concluded bargain. [9]

OFFER

The nature of an offer

[3.10] An offer is an expression of willingness to enter into a contract on specified terms. [10] A proposal only amounts to an offer if the person making it indicates that an acceptance is invited and will conclude the agreement between the parties. [11] In *Brambles Holdings Ltd v Bathurst City Council*, Heydon JA suggested in obiter that an offer must take the form of a proposal for consideration which gives the offeree an opportunity to choose between

4 See Mensch, "Freedom of Contract as Ideology" (1981) 33 *Stanford Law Review* 753, 755-6.

5 Collins, *The Law of Contract* (4th ed, 2003), p 159.

6 See [3.150].

7 See, eg, *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125, 136.

8 See, eg, *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125.

9 See [3.145].

10 JW Carter, *Contract Law in Australia* (6th ed, 2012), [3-07].

11 *Restatement of Contracts (2d)* (US), § 24, American Law Institute, 1981; Greig and Davis, *The Law of Contract* (1987), p 254.

acceptance and rejection.[12] On this view, a communication which "uses the language of command" and "peremptorily requests" the other party to adopt a particular course of action may not be regarded as an offer.[13]

It becomes important to determine whether particular conduct constitutes an offer when the party to whom it was directed purports to accept the offer and claims that a binding contract has been formed. Whether particular conduct amounts to an offer may also be relevant in ascertaining the terms of a contract or in determining when or where a contract has been made. The cases discussed below show that it is also sometimes necessary to determine whether particular conduct constitutes an offer for other reasons, such as determining whether a statutory offence of offering prohibited goods for sale has been committed.

In determining whether an offer has been made, the crucial issue is whether it would 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. It does not matter whether the offeror in fact intended to make an offer; the court determines the offeror's intention objectively, according to outward manifestations.[14] The decision of the English Court of Appeal in the quaint old case of *Carlill v Carbolic Smoke Ball Co*[15] provides a useful illustration of the classical principles.

The defendants manufactured and sold a device called the "Carbolic Smoke Ball", which was claimed to prevent colds and influenza. They placed an advertisement in various newspapers which said that a £100 reward would be paid to any person who contracted a cold or influenza after having used the device three times daily for two weeks, in accordance with the directions supplied with each ball. The advertisement said: "£1000 is deposited with the Alliance Bank, Regent Street, shewing our sincerity in the matter." After reading the advertisement, the plaintiff purchased a smoke ball, used it for several weeks and then contracted influenza.

The defendants refused to pay the reward to the plaintiff. The plaintiff's claim that there was a contract between the parties was met with five arguments. The defendants first argued that no promise was intended and the advertisement was a "mere puff" which meant nothing. Secondly, no offer had been made to any particular person. Thirdly, the plaintiff had not notified her acceptance of any offer. Fourthly, the agreement was uncertain because it failed to stipulate a period within which the disease must be contracted. Fifthly, the plaintiff had supplied no consideration for the defendant's promise.

The English Court of Appeal rejected these arguments and held unanimously that a contract had been formed between the plaintiff and the defendants. That contract obliged the defendants to pay £100 to the plaintiff. In relation to the first argument, the court held that the statement relating to the bank deposit made it clear that a promise was intended.[16] The court construed the advertisement objectively, according to what an ordinary person reading the document would think was intended, rather than by reference to what the defendant actually intended.[17] In relation to the second argument, the court held that the offer was made to the whole world and could be accepted by any person who performed the conditions on the faith

12 [2001] NSWCA 61; (2001) 53 NSWLR 153, 171. This point is discussed further at [3.145].

13 [2001] NSWCA 61; (2001) 53 NSWLR 153, 171.

14 Eg, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256; *Storer v Manchester City Council* [1974] 1 WLR 1403.

15 [1893] 1 QB 256.

16 [1893] 1 QB 256, 261-2, 268, 273-4.

17 [1893] 1 QB 256, 266.

of the advertisement. [18] Thirdly, the court held that, although acceptance of an offer must normally be notified to the offeror, the offeror may dispense with that notification. An offer that calls for performance of particular conditions may be accepted by performance of those conditions. An offer of a reward is typically this type of offer. [19] Fourthly, the court held that a reasonable construction must be placed on the advertisement, which made it sufficiently certain. It was possible to construe the document in three different ways, so that the reward would be paid to any person who contracted the disease during the epidemic, while the smoke ball was in use or within a reasonable time after using it. [20] Each of those possible restrictions was clearly satisfied here. Fifthly, the court held that the use of the smoke ball by the plaintiff constituted both a benefit to the defendant and a detriment to the plaintiff, either of which would have been enough to constitute good consideration for the promise. [21]

Unilateral contracts

[3.15] The contract in *Carlill v Carbolic Smoke Ball Co* was of a kind known as a "unilateral" contract. A unilateral contract is one in which the offeree accepts the offer by performing his or her side of the bargain. As the High Court has explained, "the consideration on the part of the offeree is completely executed by the doing of the very thing which constitutes acceptance of the offer". [22] The offer is accepted by performing an act, and the performance of that act is all that the contract requires of the offeree. Accordingly, by the time the contract is formed, the offeree has already performed all his or her obligations. In *Carlill v Carbolic Smoke Ball Co* the plaintiff accepted the company's offer to pay the reward by using the smoke ball in accordance with the instructions and then contracting influenza. The offer of a reward for a lost dog is another example of a unilateral contract; the finder accepts the offer by returning the dog and thereby does all that the contract requires of him or her.

As the High Court explained in *Australian Woollen Mills Pty Ltd v Commonwealth*, the expression "unilateral contract" is a misnomer because there must necessarily be two parties to a contract. [23] A unilateral contract is only unilateral in the sense that, because one party has performed his or her obligations by the time of formation, only one party is ever under a contractual obligation. The contract can thus be distinguished from a "bilateral" contract formed by an exchange of promises. At the time of formation of a bilateral contract, the obligations of both parties remain to be performed. In other words, in a bilateral contract, the obligations of both parties are *executory* at the time of formation. In the case of a unilateral contract, the obligations of one party (the offeree) are *executed* at the time of formation while the obligations of the other party (the offeror) are *executory*.

In *Australian Woollen Mills Pty Ltd v Commonwealth*, the plaintiff (AWM) claimed that a unilateral contract had arisen out of the Commonwealth Government's wool subsidy scheme. The scheme was introduced after the Second World War, at a time when wool was scarce. The Commonwealth subsidised purchases of wool by manufacturers of woollen products to enable those manufacturers to supply the products at low prices. In 1946, the Commonwealth announced in a series of letters to manufacturers, including AWM, that it would pay a subsidy

18 [1893] 1 QB 256, 262, 268.

19 [1893] 1 QB 256, 262-3, 269-70, 274.

20 [1893] 1 QB 256, 266-7, 263-4, 274.

21 [1893] 1 QB 256, 264-5, 270-1, 274-5.

22 *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456.

23 (1954) 92 CLR 424, 456.

on all wool purchased for domestic use by Australian manufacturers. AWM purchased large quantities of wool over the next two years, including purchases in April, May and June 1948 in respect of which the subsidy had not been paid. In June 1948 the Commonwealth announced that it was discontinuing the scheme, but would ensure that each manufacturer would have a certain amount of subsidised wool in stock on 30 June 1948. The stockpile of wool held by AWM exceeded this amount and so the Commonwealth required AWM to repay the subsidy paid on that excess. AWM repaid that amount, but later sued to recover it, along with the unpaid subsidy on the April, May and June purchases.

AWM claimed that each of the announcements by the Commonwealth constituted a contractual offer to pay the subsidy in return for AWM purchasing wool for domestic consumption. Each purchase of wool was therefore said to give rise to a unilateral contract. AWM claimed that each of its purchases of wool constituted both an acceptance of the Commonwealth's offer and consideration for the promise to pay the subsidy. The High Court held that, for a unilateral contract to arise, the promise must be made *in return for* the doing of the act. [24] There must be a relation of *quid pro quo* (this for that) between the offeree's act and the offeror's promise. The court distinguished a unilateral contract from a conditional gift. If A says to B in Melbourne, "I will pay you £1000 on your arrival in Sydney", this alone does not establish the existence of a contract on B's arrival in Sydney. B must establish that the money was to be paid in return for B travelling to Sydney. The court referred to three different ways of stating this requirement, which all state essentially the same test. [25] First, the principal test is whether the "offeror" has expressly or impliedly requested the doing of the act by the "offeree". Secondly, the court can look to whether the "offeror" has stated a price which the "offeree" must pay for the promise. Thirdly, the court can ask whether the offer was made in order to induce the doing of the act.

In this case AWM failed to establish that there was a relation of quid pro quo between the Commonwealth's promises and AWM's acts. AWM also failed to establish that, viewed objectively, the offer was intended to give rise to a contractual obligation. [26] There was, therefore, no contract between the parties and the Commonwealth was under no obligation to pay the subsidy. On appeal, the Privy Council accepted that the Commonwealth might be said to have impliedly requested the purchase of wool by manufacturers. They said: "There may be cases where the absence of a request negatives the existence of a contract. The presence of a request does not however in itself establish a contract." [27] The Privy Council nevertheless upheld the High Court's decision on the basis that the Commonwealth's letters must be read as statements of policy and could not be regarded as offers to contract. [28]

This case demonstrates the inextricable connection between the requirements of offer and acceptance, consideration and intention to create legal relations. An offer is effective only if it identifies a valid consideration and manifests an intention to create a legal obligation. The requirement of certainty is also inherent in offer and acceptance, as *Carlill v Carbolic Smoke Ball Co* shows. An offer can lead to a binding agreement only if the offer identifies the terms of the proposed agreement with sufficient certainty.

24 (1954) 92 CLR 424, 456-7.
25 (1954) 92 CLR 424, 458.
26 (1954) 92 CLR 424, 457–8.
27 (1955) 93 CLR 546, 550.
28 (1955) 93 CLR 546.

Offers and invitations to treat

[3.20] An offer is often distinguished from an invitation to treat, which is an invitation to others to make offers or enter into negotiations. An indication by the owner of property that he or she might be interested in selling at a certain price, for example, has been regarded as an invitation to treat. [29] A wine merchant's circulation of a price list has been regarded as an invitation to treat on the basis that, if it was an offer, the merchant might find himself obliged to supply unlimited quantities of wine at the listed price. [30] Whether particular conduct amounts to an offer is a question to be decided on the facts of each case [31] and there are no firm rules about whether particular types of conduct necessarily do or do not amount to an offer. [32] Nevertheless, the courts have tended to take a consistent approach to the identification of offer and acceptance in common transactions.

Shop sales

[3.25] The display of goods for sale, whether in a shop window or on the shelves of a self-service store, is ordinarily treated as an invitation to treat, and not an offer. [33] In the English case *Fisher v Bell* [34] it was held that the owner of a shop who displayed a flick-knife in a shop window had not committed the statutory offence of "offering" the knife for sale. In *Pharmaceutical Society of Great Britain v Boots Cash Chemists Ltd* [35] it was necessary for the English Court of Appeal to determine when a sale occurred in a self-service pharmacy in order to determine whether sales took place under the supervision of a registered pharmacist. Pharmacists supervised transactions at the cash registers, but did not supervise the customers' selection of goods from the shelves. The plaintiff argued that the display of goods should be regarded as an offer, which was accepted when a customer took an item from the shelf and placed it in his or her receptacle. The Court of Appeal rejected this argument on the basis that customers must be entitled to return and substitute articles they have chosen from the shelves. [36] If the customers are entitled to return articles selected from the shelves, the court reasoned, customers must be regarded as making an offer when they present the items to the cashier and are not bound until the cashier has accepted that offer. [37] Accordingly, the defendant was held to have complied with the legislative requirement that the sales be supervised. The characterisation of the display of goods as an offer is not, however, itself inconsistent with the entitlement of customers to return goods they have selected. A customer's acceptance would not be effective until communicated to the offeror, so a sale must on any interpretation take place at the checkout. [38]

In both *Fisher v Bell* and *Boots Cash Chemists* the issue before the court did not relate to the contractual rights of the parties, but to whether a statutory offence had been committed.

29 See, eg, *Harvey v Facey* [1893] AC 552.

30 *Grainger v Gough* [1896] AC 325, 334.

31 *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 457; *B Seppelt and Sons Ltd v Commissioner for Main Roads* (1975) 1 BPR 9147, 9151.

32 Eg, *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

33 See Winfield, "Some Aspects of Offer and Acceptance" (1939) 55 *Law Quarterly Review* 499, 517.

34 [1961] 1 QB 394.

35 [1953] 1 QB 401.

36 [1953] 1 QB 401, 405-6.

37 [1953] 1 QB 401, 406, 408.

38 Greig and Davis, *The Law of Contract* (1987), p 263.

The English courts took a technical approach in these cases to determining whether a statutory offence had been committed. In Australia, the courts have tended to take a less technical approach to deciding whether goods have been "offered for sale" for the purpose of determining whether a statutory provision has been breached. In *Goodwin's of Newtown Pty Ltd v Gurrey*, [39] for example, the defendant was held to have been "offering goods for sale" in breach of the *Early Closing Act 1926* (SA), although the defendant's conduct amounted to no more than an invitation to treat. The defendant displayed television sets with marked prices and provided information to prospective purchasers. Prospective purchasers were told that the sets on display were not for sale, but an equivalent set could be purchased from the defendant at the marked price.

A similar approach has been favoured in the interpretation of the provision that was s 56(2) of the *Trade Practices Act 1974* (Cth), now s 35(2) of the ACL, which requires a corporation that has advertised goods or services for supply at a specified price to "offer such goods or services for supply" at that price for a reasonable time and in reasonable quantities. Although it was held in one case that the corporation was required to make offers to sell in the technical contractual sense, [40] most judges have favoured a non-technical approach. [41] In *Wallace v Brodribb*, [42] Spender J said that unnecessary difficulties were introduced by drawing distinctions between offers and invitations to treat and the expression "offer to supply" should be given its ordinary meaning.

Auctions

[3.30] The holding of a public auction will also usually be regarded as an invitation to treat. It is well accepted that an auctioneer does not make an offer to sell, but merely invites offers from those present at the auction. Each bid constitutes an offer and the auctioneer communicates acceptance of the final bid by the fall of the hammer. [43] This means that no contractual claim can arise if the auction is cancelled, [44] a bidder is entitled to withdraw his or her bid before it is accepted, [45] and the auctioneer is not obliged to sell to the highest bidder. [46] The common law position is reflected in the Sale of Goods Acts, which provide that a sale of goods by auction is complete when the auctioneer announces its completion and, until such announcement, a bid may be retracted. [47]

The situation becomes more complicated when an auction is advertised to be held "without reserve". In *AGC (Advances) Ltd v McWhirter*, [48] it was held that an announcement that an

39 [1959] SASR 295.

40 *Reardon v Morley Ford Pty Ltd* (1980) 33 ALR 417.

41 *Attorney General for NSW v Mutual Home Loans Fund of Australia Ltd* [1971] 2 NSWLR 162, 165; *Attorney General for NSW v Australian Fixed Trusts* [1974] 1 NSWLR 110, 117; *WA Pines Pty Ltd v Registrar of Companies* [1976] WAR 149, 153; *Wallace v Brodribb* (1985) 58 ALR 737.

42 (1985) 55 ALR 737.

43 *Payne v Cave* (1789) 3 TR 148; 100 ER 502; *British Car Auctions Ltd v Wright* [1972] 1 WLR 1591, 1524; *AGC (Advances) Ltd v McWhirter* (1977) 1 BPR 9454.

44 *Harris v Nickerson* (1873) LR 8 QB 286.

45 *Payne v Cave* (1789) 3 TR 148; 100 ER 502.

46 *AGC (Advances) Ltd v McWhirter* (1977) 1 BPR 9454.

47 *Sale of Goods Act 1954* (ACT), s 60; *Sale of Goods Act 1923* (NSW), s 60; *Sale of Goods Act* (NT), s 60; *Sale of Goods Act 1896* (Qld), s 59; *Sale of Goods Act 1895* (SA), s 57; *Sale of Goods Act 1896* (Tas), s 62; *Goods Act 1958* (Vic), s 64; *Sale of Goods Act 1895* (WA), s 57.

48 (1977) 1 BPR 9454.

auction was to be held without reserve did not alter the general rule. The holding of an auction without reserve did not constitute an offer and did not bind the vendor to sell to the highest bidder. The auction in that case was not advertised as being without reserve, but the auctioneer announced during the auction that the "property is on the market", which was held to have the same effect.

It has been held in England that, by holding an auction without reserve, an auctioneer makes an offer to sell to the highest bidder. [49] If the highest bid is not accepted, no contract arises between the bidder and the vendor, but the bidder is able to sue the auctioneer for damages under a separate, collateral contract. This contract governs the process by which the auction is conducted. By announcing the conditions of auction, the auctioneer offers to conduct the auction in a particular way and a bidder may accept that offer by making the highest bid. [50]

Tenders

[3.35] A contract may also be formed by a tender process. Unlike an auction, a tender process involves each interested party submitting a single bid without knowing what other bids have been made. The tender process is sometimes used for the sale of commercial or residential property. It is commonly used by governments seeking to contract out the performance of government functions, such as the construction or operation of a prison. A call for written tenders will also usually constitute an invitation to treat, with each tender constituting an offer. A person calling for tenders can stipulate the basis on which the tender process will be conducted and will be bound by any conditions which he or she says will govern the tender process. In *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd*, [51] for example, a call for tenders was held to amount to an offer because the vendor promised to accept the highest bid.

In *Harvela Investments Ltd v Royal Trust Co of Canada (CI) Ltd*, two parties, Harvela and Outerbridge, were invited to submit written tenders for the purchase of shares. The successful tenderer would obtain control of the company. The letter sent by the vendors to the two tenderers said that "we bind ourselves to accept" the "highest offer" complying with the conditions of tender. Harvela tendered to purchase the shares for $2.175m and Outerbridge for $2.1m "or $101 000 in excess of any other offer which you may receive". The vendor accepted Outerbridge's tender, but Harvela claimed it was entitled to purchase the shares for $2.175m.

The trial judge, Peter Gibson J, held that the invitation to submit tenders amounted to an offer capable of acceptance by submission of the highest bid. [52] The Court of Appeal upheld this conclusion and it was accepted by the House of Lords. The resulting contract was said to be a unilateral contract "in the sense of a contract brought into existence by the act of one party in response to a conditional promise made by the other". [53] The fact that the invitation described the tenders as "offers" did not require the court to conclude that they were offers in

49 *Warlow v Harrison* (1859) 1 El & El 295; 120 ER 920; *Barry v Davies* [2000] 1 WLR 1962.

50 This reasoning was applied in *Ulbrick v Laidlaw* [1924] VLR 247. See further Carter, "Auction 'Without Reserve' – Barry v Davies" (2001) 17 *Journal of Contract Law* 69.

51 [1986] 1 AC 207.

52 [1985] 1 Ch 103, 119.

53 [1985] 1 Ch 103, 119.

law, since it was for the court to determine the character of a document.[54] The vendors' promise to accept the highest bid converted what would otherwise have been an invitation to treat into an offer which, when the highest bid was received, completed a contract.[55] Whether this should be regarded as a contract to sell the shares or a contract to enter into an enforceable contract to sell the shares did not matter, since they amount to the same thing.[56] The principal question, then, was whether the contract had been made with Harvela or Outerbridge. This depended on whether Outerbridge's tender conformed to the requirements of the vendor's invitation. The trial judge held that there was an implied term in the invitation that excluded referential bids.[57] This meant that a contract had been made between the vendors and Harvela. Although the Court of Appeal regarded Outerbridge's tender as valid, Harvela successfully appealed to the House of Lords. The House of Lords held that the question whether the invitation allowed referential bids depended on the presumed intention of the vendors deduced from the terms of the invitation read as a whole. Those terms were inconsistent with the making of referential bids.[58]

The use of the tender process for government procurement of goods and services has come under considerable judicial scrutiny in recent years.[59] Although each case turns on its own facts, it has been held in a number of cases that governments and government instrumentalities calling for tenders have owed contractual obligations to tenderers under preliminary contracts governing the tender process.[60] These tender process contracts also impose obligations on tenderers, such as an obligation not to withdraw their tenders.[61] In *Blackpool and Fylde Aero Club Ltd v Blackpool Borough Council*,[62] the English Court of Appeal held that the Council was under an implied contractual obligation to give consideration to complying tenders. The call for tenders amounted to an offer, which was accepted by the submission of a complying tender. The Council was liable for damages under this preliminary contract when it mistakenly failed to consider the plaintiff's complying tender. In *Hughes Aircraft Systems International v Airservices Australia*,[63] Finn J found that a tender process conducted by the Civil Aviation Authority (CAA) was governed by two "process contracts". The first contract was formed by signature of a letter in which the CAA and the two tenderers committed themselves to participate in a tender process. The terms of the second contract were set out in a request for tenders, which amounted to an offer accepted by each tenderer's lodgement of a tender. The CAA was obliged to conduct the tender process in accordance with those process contracts.

Ticket cases

[3.40] In some cases the courts are concerned to identify offer and acceptance for the purpose of determining *when*, rather than *whether*, a contract was formed between two parties. It has been necessary to decide when a contract has been formed in order to determine whether a

54 [1985] 1 Ch 103, 119.

55 [1985] 1 Ch 103, 119, 133-4, 137, 149.

56 [1985] 1 Ch 103, 121, 133-4, quoting *Hillas & Co Ltd v Arcos* (1937) 147 LT 503, 515.

57 [1985] 1 Ch 103, 119.

58 [1987] 1 AC 207, 230-4, 225.

59 See Seddon, *Government Contracts: Federal State and Local* (5th ed, 2013), Ch 7.

60 In addition to the cases mentioned below, see *Martel Building Ltd v Canada* [2000] 2 SCR 800.

61 See *Ontario v Ron Engineering & Construction Eastern Ltd* (1981) 1 SCR 111.

62 [1990] 1 WLR 1195. See Phang, "Tenders and Uncertainty" (1991) 4 *Journal of Contract Law* 46.

63 (1997) 76 FLR 151, 162-87.

document is chargeable with stamp duty. [64] When a contract has been entered into between parties in different jurisdictions, it is sometimes necessary for a court to determine when and where the contract was made so that the court can decide whether it can adjudicate on the contract. [65]

It may also be important to determine when a contract has been formed in order to determine whether written conditions given by one party to another form part of the contract. If one party gives the other notice of terms after a contract has been formed, then those terms cannot form part of the contract. [66] This problem is exemplified by cases involving the issue of tickets for passenger transport. Typically a ticket containing contractual terms is issued after the fare has been paid and it might therefore be thought that the contract is formed before the ticket is issued. The courts have usually regarded the issue of the ticket as an offer which can be accepted or rejected by the passenger after the passenger has had a reasonable opportunity to consider the conditions on the ticket. The difficulty of applying the offer and acceptance model to this type of transaction is illustrated by the decision of the High Court in *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)*. [67]

The issue before the High Court was whether an airline ticket issued by MacRobertson Miller was chargeable with stamp duty as an "agreement" or a "memorandum of agreement". The airline's practice was first to quote the fare and availability of seats and then to issue a ticket in return for the fare. The ticket contained a condition giving the airline the right to cancel a flight or cancel a booking without incurring any liability. The court held unanimously that a ticket did not record the terms of an agreement, but rather the terms of an offer which was subsequently accepted by conduct. The judges' reasons for reaching that conclusion differed.

Barwick CJ thought that the sweeping exemption clauses relieved the airline from any obligation to carry the passenger. The exemption conferred by clauses 2 and 5 "fully occupies the whole area of possible obligation, leaving no room for the existence of a contract of carriage". [68] Even apart from those express terms, however, the uncertainties of air travel precluded any promise to carry the passenger from being inferred from the issue of the ticket. Barwick CJ therefore considered that the arrangement was similar to a unilateral contract. The passenger was in effect making an offer, which could be accepted by conduct. If the airline carried the passenger, then the airline would be entitled to retain the fare as a "reward". If the passenger was not carried, the airline incurred no obligation other than to refund the fare. On that basis, there were no contractual obligations between the airline and the passenger until the airline provided the passenger with a seat on the plane. [69]

Stephen J adopted the conventional analysis in "ticket cases", which is that the ticket constitutes an offer by the airline, which is capable of acceptance or rejection by the passenger once the passenger has had a reasonable opportunity to read the conditions. [70] On that basis, the ticket records the terms of an offer. Jacobs J agreed that no agreement was formed at the

64 *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125.

65 Eg, *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34.

66 See [12.40].

67 (1975) 133 CLR 125.

68 (1975) 133 CLR 125, 133.

69 (1975) 133 CLR 125, 133-4.

70 (1975) 133 CLR 125, 137-40.

time the ticket was issued for the reasons advanced by both Stephen J and Barwick CJ. Jacobs J agreed with Stephen J that formation of the contract could not precede the notification of special conditions and the ticket simply recorded the terms of an offer made by an airline. He also agreed with Barwick CJ that clause 2 negatived any promise to carry which might have been implied. [71] The lack of any obligation imposed on the airline prevented the ticket from representing an enforceable agreement. Jacobs J also noted that the person who buys the ticket may not be the passenger. Where the buyer is not the passenger, then two contracts will arise. The purchase of the ticket will result in an executory agreement between the purchaser of the ticket and the airline. The issue of the ticket will also constitute an offer made to the passenger, which the passenger can accept by presenting herself or himself for travel. [72]

MacRobertson Miller Airline Services v Commissioner of State Taxation (WA) provides a good illustration of the difficulties experienced in applying the doctrine of offer and acceptance "outside the realms of commerce and conveyancing, to the everyday contractual situations which are a feature of life in modern urban communities". [73] As Stephen J noted, the contract involved sweeping restrictions on passengers' rights, passengers were not given the opportunity to negotiate the terms of the contract, and any attempt to negotiate would "in any event usually be pointless", since the carrier was willing to contract only on its standard terms. [74]

Electronic transactions

[3.41] The common law rules of offer and acceptance can be applied to electronic transactions in the same way they can be applied to other forms of communication. [75] Electronic communications raise some particular issues about the mechanics of contract formation, but do not call for a fundamentally different approach. [76] Although there is no particular need for legislation dealing with offer and acceptance in electronic transactions, Electronic Transactions Acts (ETAs) have been enacted in all Australian States and Territories with the broader object of providing a regulatory framework that facilitates and promotes confidence in electronic transactions. [77] The ETAs were originally introduced pursuant to a national scheme to implement the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on Electronic Commerce 1996*. The purpose of the Model Law was to remove obstacles to electronic commerce and ensure the validity of electronic transactions. [78] Since the introduction of the ETAs, the Model Law has been supplemented by the *United*

71 (1975) 133 CLR 125, 148.

72 (1975) 133 CLR 125, 146.

73 (1975) 133 CLR 125, 136.

74 (1975) 133 CLR 125, 136.

75 See generally Nolan, "Offer and Acceptance in the Electronic Age" in Burrows and Peel (eds), *Contract Formation and Parties* (2010), 61-87 and Furmston and Tolhurst, *Contract Formation: Law and Practice* (2010), 159-94.

76 Nolan, "Offer and Acceptance in the Electronic Age" in Burrows and Peel (eds), *Contract Formation and Parties* (2010), 86-87.

77 *Electronic Transactions Act 2001* (ACT), s 3; *Electronic Transactions Act 1999* (Cth), s 3; *Electronic Transactions Act 2000* (NSW), s 3; *Electronic Transactions (Northern Territory) Act*, 3; *Electronic Transactions Act 2000* (SA), s 3; *Electronic Transactions (Queensland) Act 2001*, s 3; *Electronic Transactions (Victoria) Act 2000*, s 4; *Electronic Transactions Act 2011* (WA), s 3.

78 UNCITRAL Secretariat, *Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce* (1996), http://www.uncitral.org.

Nations Convention on the Use of Electronic Communications in International Contracts.[79] The purpose of the Convention is to facilitate electronic transactions between parties located in different countries. The Convention builds on the Model Law and clarifies some of the issues and fills some of the gaps in the regime introduced by the Model Law. The Convention was not intended to alter substantive contract law rules, but only to clarify some of the legal issues.[80] The ETAs have been amended in accordance with the Convention to clarify some questions about the formation of contracts by way of electronic communications. Although the Convention relates only to international contracts, the amendments to the ETAs extend the provisions of the Convention to contracts made within Australia, including personal, family and household contracts.

The new legislation provides, first, that a proposal to make a contract through electronic communications which is not addressed to a particular person, but is made generally accessible to people using information systems, is to be treated as an invitation to make offers unless it clearly indicates an intention to be bound in the case of acceptance.[81] This is clearly intended to ensure that websites offering goods or services should generally be considered to be making an invitation to treat, rather than an offer, and is entirely consistent with the approach of the common law to more traditional communications in cases such as *Grainger v Gough*.[82] Secondly, the ETAs confirm that a contract formed between a natural person and an automated system, or between two automated systems, is not invalid merely on the ground that a natural person was not directly involved in the process.[83] Thirdly, and more significantly, the ETAs provide that where a natural person makes an "input error" in the course of a transaction with an automated system, and the system provides no opportunity to correct that error, then the person making the error is entitled to "withdraw the portion of the communication in which the input error was made", provided he or she does so as soon as possible after learning of the error, and provided he or she has not received any material benefit from goods or services provided by the other party.[84] The ETAs specifically provide that the right to withdraw a portion of an electronic communication is not a right to rescind a contract. The consequences of withdrawal of the relevant portion of the communication are to be determined in accordance with applicable legal rules, but clearly in some circumstances this

79 See Mik, "Updating the Electronic Transactions Act – Australia's Accession to the UN Convention on the Use of Electronic Communications in International Contracts 2005" (2010) 26 *Journal of Contract Law* 184.

80 Explanatory note by the UNCITRAL Secretariat on the *United Nations Convention on the Use of Electronic Communications in International Contracts*, [3]-[4]; *Explanatory Memorandum, Electronic Transactions Bill 2011* (Cth), p 3.

81 *Electronic Transactions Act 2001* (ACT), s 14B; *Electronic Transactions Act 1999* (Cth), s 15B; *Electronic Transactions Act 2000* (NSW), s 14B; *Electronic Transactions (Northern Territory) Act*, s 14B;*Electronic Transactions Act 2000* (SA), s 14B; *Electronic Transactions Act 2000* (Tas), s 12B; *Electronic Transactions (Victoria) Act 2000*, s 14B; *Electronic Transactions (Queensland) Act 2001*, s 26B; *Electronic Transactions Act 2011* (WA), s 18.

82 [1896] AC 325. See [3.20].

83 *Electronic Transactions Act 2001* (ACT), s 14C; *Electronic Transactions Act 1999* (Cth), s 15C; *Electronic Transactions Act 2000* (NSW), s 14C; *Electronic Transactions (Northern Territory) Act*, s 14C; *Electronic Transactions Act 2000* (SA), s 14C; *Electronic Transactions Act 2000* (Tas), s 12C; *Electronic Transactions (Victoria) Act 2000*, s 14C; *Electronic Transactions (Queensland) Act 2001*, s 26C; *Electronic Transactions Act 2011* (WA), s 19.

84 *Electronic Transactions Act 2001* (ACT), s 14D; *Electronic Transactions Act 1999* (Cth), s 15D; *Electronic Transactions Act 2000* (NSW), s 14D; *Electronic Transactions (Northern Territory) Act*, s 14D; *Electronic Transactions Act 2000* (SA), s 14D; *Electronic Transactions Act 2000* (Tas), s 12D; *Electronic Transactions (Victoria) Act 2000*, s 14D; *Electronic Transactions (Queensland) Act 2001*, s 26D; *Electronic Transactions Act 2011* (WA), s 20.

will undermine the validity of the contract. If, for example, a consumer booking a ticket for air travel through a website accidentally booked a seat for travel on the wrong date, and was not given an opportunity to correct the error, the withdrawal of that portion of the communication would undermine the validity of the contract, since the withdrawn communication would have identified the subject matter of the contract.[85] Since most websites provide an opportunity to correct input errors, it seems unlikely that this provision will be widely used.

Termination of an offer

[3.45] An offer will cease to be available for acceptance when it is withdrawn by the offeror, lapses or is rejected by the offeree.

Withdrawal

General rule

[3.47] An offer may be revoked at any time before it is accepted. At common law a promise to hold an offer open for a specified period is not binding unless the offeree has given consideration for that promise.[86] The offeror can therefore revoke the offer before the specified period for acceptance has expired, provided the offer has not been accepted in the meantime. The withdrawal of an offer is effective only when it has been actually communicated to the offeree. No exception is made for a withdrawal sent by post.[87]

In civil law systems a promise to hold an offer open is binding: in France an offeror who wrongfully revokes an offer will be liable in damages,[88] while in Germany an attempt to withdraw an offer prematurely will simply be ineffective.[89] The German approach is adopted in both the *United Nations Convention on International Contracts for the Sale of Goods* (Vienna Convention) and the *UNIDROIT Principles of International Commercial Contracts 2010* (UPICC).[90] Article 16(2) of the Vienna Convention and art 2.1.4 of the UPICC both provide that an offer cannot be revoked if it states a fixed time for acceptance or otherwise indicates that it is irrevocable.

Options

[3.50] A promise to hold an offer open is binding at common law if consideration has been given in return for that promise. The agreement between the parties is then described as an option. An option is an agreement between an option holder and a grantor under which the option holder is entitled to enter into a contract with the grantor on specified terms, either at a specified time or within a specified period. The option holder is then free to choose whether to exercise the option at that time or within that period. In *Goldsbrough, Mort & Co Ltd v*

85 See the Explanatory note by the UNCITRAL Secretariat on the *United Nations Convention on the Use of Electronic Communications in International Contracts*, [241].

86 *Dickinson v Dodds* (1876) LR 2 Ch D 463; *Goldsbrough Mort & Co v Quinn* (1910) 10 CLR 674, 678, 690. It is important to note that such a promise can give rise to an estoppel if it is relied upon: see [9.175]. See similarly *UNIDROIT Principles of International Commercial Contracts 2010*, article 2.1.4(2)(b).

87 *Byrne & Co v Leon Van Tienhoven & Co* (1880) LR 5 CPD 344.

88 Zweigert and Kötz, *Introduction to Comparative Law* (3rd ed, 1998), pp 359-60.

89 *Burgerliches Gesetzbuch* (BGB), § 145; Zweigert and Kötz, *Introduction to Comparative Law* (3rd ed, 1998), pp 361-2.

90 See [1.180].

Quinn, [91] for example, the grantor gave the option holder an option to purchase certain land at a specified price at any time within one week of the agreement in return for the sum of five shillings paid to the grantor. The grantor's attempt to repudiate the offer before acceptance was held to be ineffective. The option holder exercised the option within the specified period and was able to force the grantor to sell the land as agreed.

There was a difference of opinion in *Goldsbrough, Mort & Co Ltd v Quinn* as to the true nature of an option. Griffith CJ and O'Connor J regarded an option to purchase a property as a contract for the sale of that property, conditional upon the option being exercised within the specified period. [92] This has been confirmed in subsequent cases as the preferred interpretation. [93] Isaacs J regarded an option as a preliminary contract to hold open an offer to sell the property, with the exercise of the option giving rise to a separate contract of sale. [94] The significance of the distinction between an irrevocable offer and a conditional contract in this case related to the remedy available to the option holder if the grantor purported to revoke the option. Griffith CJ preferred to treat the agreement as a conditional sale, which was enforceable by specific performance once the condition was satisfied. He took the view that, if regarded as an irrevocable offer, the only remedy available to the offeree in the event of revocation was damages. Isaacs J, however, held that the grantor's attempt to revoke the offer was ineffective, and so the option was successfully exercised and specific performance was available. On either view, therefore, the grantor's attempt to revoke the option was ineffective and, once the option holder had exercised the option, a contract of sale enforceable by specific performance subsisted between the parties.

In England it has been said that an option is neither a conditional contract nor an irrevocable offer. [95] In *Spiro v Glencrown Properties Ltd*, in determining whether an option agreement satisfied the statutory requirement of a written contract for the sale of land, Hoffmann J did not find it useful or necessary to characterise the agreement as a conditional contract or an irrevocable offer. He found the analogy of the irrevocable offer useful to describe the position of the option holder, and the analogy of a conditional contract useful to describe the position of the grantor of the option. An option resembles each of them, but does not have all of the incidents of either. It is a legal relationship sui generis (of its own kind). [96] It cannot be regarded as a conditional contract, according to Hoffmann J, because "one generally thinks of a conditional contract as one that does not lie within the sole power of one of the parties to the contract". [97] Nor can it be regarded as an irrevocable offer, since it conveys an equitable interest in land to the grantee. [98] Hoffmann J held that the option agreement satisfied the statutory requirement of writing because such a result was consistent with the intention of the legislature. [99]

91 (1910) 10 CLR 674.

92 (1910) 10 CLR 674, 678-9, 685.

93 *Carter v Hyde* (1923) 33 CLR 115; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, 71-6.

94 (1910) 10 CLR 674, 696. See also *Carter v Hyde* (1923) 33 CLR 115, 123.

95 *Spiro v Glencrown Properties Ltd* [1991] Ch 536.

96 [1991] Ch 536, 544.

97 [1991] Ch 536, 544.

98 [1991] Ch 536, 543.

99 [1991] Ch 536, 546.

Lapse

[3.55] An offer which is expressed to be available for acceptance for a particular period of time will lapse at the end of that period. If no period is stipulated, the offer will lapse after a reasonable time has passed. This can be explained either on the basis that a term can be implied that the offer lapses after a reasonable time has passed or on the basis that the court can infer rejection from the offeree's failure to accept the offer within a reasonable time. [100] What period of time is reasonable will depend on the circumstances, including the nature of the subject matter and the form in which the offer was made. A verbal offer to buy a car, for example, is likely to lapse after a short period, whereas a written offer to purchase a substantial parcel of land will be open for acceptance for a relatively longer period.

Identifying the duration of an offer will in some cases simply be a matter of determining how a reasonable person in the position of the offeree would interpret the offer. In *Bartolo v Hancock*, an offer made at the beginning of a five day trial to settle the litigation on the basis the parties would discontinue their claims against each other and bear their own costs was interpreted, in its context, to be "a 'here and now' offer", the aim of which was "to dispose of the case then and there." [101] An attempt to accept the offer on the fifth day of the trial was unsuccessful.

There are judicial statements to the effect that both the death of an offeror [102] and the death of the offeree [103] will necessarily terminate the offer. However, in *Fong v Cilli*, [104] Blackburn J was careful to avoid such generalisations. He limited his statement 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. In the case of an option there is at least a presumption that the death of the option holder does not prevent the option from being exercised by the option holder's personal representatives. [105] However, if the offer is personal to the option holder, then the option lapses. There seems to be no good reason why a similar presumption should not apply to the case of the death of the grantor of the option. Gibbs J has suggested that since an option is in essence a conditional contract, it can be enforced against the estate of a grantor, unlike an ordinary offer. [106]

Failure of condition and changed circumstances

[3.60] An offer may be made subject to an express or implied condition that must be fulfilled before the offer can be accepted. Alternatively, it may be made subject to an express or implied condition that it should lapse upon the happening of a certain event. In *Financings Ltd v Stimson* [107] the defendant signed an offer to purchase a car on hire-purchase terms from a finance company, the document having been given to him by a car dealer. The document contained a clause stating that the agreement contained therein would not be binding until it had been accepted on the finance company's behalf. Before the company signed the

100 See *Farmers Mercantile Union and Chaff Mills Ltd v Coade* (1921) 30 CLR 113; *Manchester Diocesan Council v Commercial & General Investments Ltd* [1970] 1 WLR 241, 247-8.

101 [2010] SASC 305, [16].

102 *Dickinson v Dodds* (1876) 2 Ch D 463, 475; *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, 72-3.

103 *Reynolds v Atherton* (1921) 125 LT 690, 625. See further Greig and Davis, *The Law of Contract* (1987), p 344.

104 (1968) 11 FLR 495, 498.

105 *Carter v Hyde* (1923) 33 CLR 115, 121, 125, 132.

106 *Laybutt v Amoco Australia Pty Ltd* (1974) 132 CLR 57, 76.

107 [1962] 1 WLR 1184.

agreement, the defendant took possession of the car, but later returned it because he was dissatisfied with the car's performance. The car was stolen from the dealer's premises and was eventually recovered in a badly damaged condition. In ignorance of this fact, the finance company then purported to accept the defendant's offer. The company sued the defendant for breach of the hire-purchase agreement. The English Court of Appeal held that the defendant'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, the defendant's offer lapsed.

The "implied condition" approach adopted in *Financings Ltd v Stimson* is the traditional method of dealing with cases in which circumstances change between the making and acceptance of an offer, but is not the only approach. In *Neilsen v Dysart Timbers Limited*, the Supreme Court of New Zealand explored the different ways of dealing with the problem of changed circumstances.[108] The offer in question was an offer to compromise or settle litigation. Dysart had obtained judgment against the Neilsen brothers for almost $315,000 under a guarantee given by the Neilsens for the debts of their company. The Neilsens disputed liability under the guarantee and applied for leave to appeal the decision against them. Three days after the leave application was heard, the Neilsens offered, through their solicitors, to pay Dysart $250,000 in full satisfaction of the judgment debt. Dysart's solicitors were asked to obtain urgent instructions from their client. Only three hours later the parties were told by the court registrar that leave to appeal had been granted. There had been real doubt as to whether leave would be granted, and the granting of leave meant that Dysart was now faced with the costs of the appeal and the risk that it would be successful.[109] Dysart accepted the offer 42 minutes after receiving the news, but the Neilsens claimed that the offer was no longer available for acceptance. The New Zealand Supreme Court held (3-2) that the offer remained open for acceptance. The judges were agreed that a fundamental or important change of circumstances had the effect of terminating the offer, but did not agree on the conceptual basis for that rule or how it applied to these facts.[110] First, as in *Financings Ltd v Stimson*, a court can ask whether the offer was subject to an implied condition that it would remain open only while a particular factual state of affairs continued. Secondly, the relevant principle can be seen, like the doctrine of frustration, as a rule that an offer will lapse in the event of fundamentally changed circumstances *as a matter of law*, rather than as an implication as to the intentions of the parties.[111] Thirdly, the court can take the broader interpretive approach of asking "whether, having regard to the terms of the offer, the change of circumstances, and the subsequent 'acceptance', viewed as a whole and objectively, there is a concluded agreement."[112] The third approach could be seen as the same as the first, on the basis that "a condition that an offer lapse upon the occurrence of a particular change of circumstances should be implied into the offer only if it is objectively apparent that the willingness of the offeror to be bound by the offer has been fundamentally undermined by the change of circumstances."[113] This is consistent with the view recently expressed by the Privy Council

108 [2009] NZSC 43; [2009] 3 NZLR 160.

109 [2009] NZSC 43; [2009] 3 NZLR 160, [37] (Tipping and Wilson JJ).

110 McLauchlan and Bigwood, "Lapse of Offers Due to Changed Circumstances: A Contract Conversation" (2011) 27 *Journal of Contract Law* 222, 222.

111 [2009] NZSC 43; [2009] 3 NZLR 160, [54]-[60] (McGrath J); [30]-[32] (Tipping and Wilson JJ).

112 [2009] NZSC 43; [2009] 3 NZLR 160, [61] (McGrath J).

113 [2009] NZSC 43; [2009] 3 NZLR 160, [26] (Tipping and Wilson JJ).

that the implication of a term in an instrument is simply a matter of spelling out "in express words what the instrument, read against the relevant background, would reasonably be understood to mean." [114]

This implication of conditions has an important application to contracts involving more than two parties. Although each case must be decided on its own facts, a written contract signed by one party is often construed as an offer made by that party. That offer may well be subject to an implied condition that the document is ineffective until signed by all the parties to it. In *Neill v Hewens* [115] only one of two co-vendors signed a contract of sale. The purchasers signed the agreement and later sought specific performance, even though the second vendor had not signed. The High Court held that no contract had been concluded. When one of the co-vendors signed, the presumption was that she did not intend to bind herself unless her co-vendor also signed. [116]

Rejection and counter offer

[3.65] Once an offer has been rejected, it is no longer available for acceptance. [117] A rejected offer may, however, later be revived or may form the basis of an agreement which is inferred in the absence of a valid offer and acceptance. [118] The making of a counter-offer is treated as a rejection of the original offer and will, therefore, also extinguish it. [119] The courts draw a distinction between a counter-offer and an inquiry relating to an alteration of the terms. [120] By requesting information, the offeror is not intending to reject the offer, but only to obtain some guidance in deciding whether to accept or reject. In determining whether an agreement has been made, the courts are principally concerned to ascertain the intentions of the parties from the language and circumstances of their communications. [121] The characterisation of conduct as a counter-offer or an inquiry is really stating a conclusion about the manifested intentions of the parties. If a seller offers to sell a tonne of widgets for $1000 to a buyer, the buyer might be said to make a counter-offer if she responds by saying, "I'll give you $900". In applying this label, the court is saying that the buyer has implicitly rejected the seller's offer and the offer should therefore no longer be available for acceptance. The buyer might be said to make an inquiry or request for information if she asks whether there is some room for movement on the price. The label "inquiry" signifies that the buyer has not manifested an intention to reject and so the seller's original offer should be treated as remaining open.

Unilateral contract

[3.70] The revocation of an offer to enter into a unilateral contract raises more difficult questions. There is no difficulty if the offer is withdrawn before the offeree begins to perform. The difficulty arises where the offeree has begun to perform, but has not completed the acts that constitute acceptance. If, for example, the offeror offered to pay $100,000 to the first

114 *Attorney-General of Belize v Belize Telecom Ltd* [2009] UKPC 10; [2009] 1 WLR 1988, [21].

115 (1953) 89 CLR 1.

116 (1953) 89 CLR 1, 13. As to deeds, see *Federal Commissioner of Taxation v Taylor* (1929) 42 CLR 81, 87.

117 *Tinn v Hoffman & Co* (1873) 29 LT 271, 278.

118 *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153, 179. See [3.145].

119 *Harris v Jenkins* [1922] SASR 59; *Hyde v Wrench* (1840) 3 Beav 334; 49 ER 132.

120 *Stephenson, Jacques & Co v McLean* (1880) 5 QBD 346; *Brambles Holdings Ltd v Bathurst City Council* [2001] NSWCA 61; (2001) 53 NSWLR 153.

121 Greig and Davis, *The Law of Contract* (1987), p 338.

person to swim backstroke across Bass Strait, it might seem unfair if the offer could be revoked when a swimmer was halfway across. It has been held that an offer made in exchange for the doing of an act becomes irrevocable once the act has been partly performed. [122] This principle has been justified on the basis that the offeror is subject to an implied obligation not to revoke the offer after the offeree has started to perform. [123] In a broader sense, it can be justified on the basis that an offeror has power to stipulate the terms on which his or her offer is made and can expressly reserve the right to withdraw the offer. It is more difficult for an offeree to protect himself or herself against the risk of loss once the offeree begins to perform. The notion that there is a general principle preventing revocation of offers in exchange for acts was, however, rejected by the Full Federal Court in *Mobil Oil Australia Ltd v Wellcome International Pty Ltd*. [124]

Mobil v Wellcome involved an incentive scheme operated by Mobil to improve the performance of franchisees operating Mobil service stations. Mobil told its franchisees that it was seeking to implement a proposal whereby a franchisee who achieved certain performance targets within the "Circle of Excellence" scheme over a period of six years would be granted a nine-year renewal of his or her franchise. Mobil's representative acknowledged that there was a great deal of work to do on the proposal, but made a commitment "that we will find a way to extend your tenure automatically no costs to you if you consistently achieve 90% or better in Circle of Excellence judgings". [125]

Several franchisees claimed to have spent time and money improving the operation of their retail operations in order to meet the 90% performance target. After four years, Mobil unilaterally abandoned the Circle of Excellence scheme by which the franchisees' performance was judged. Wilcox J at first instance held that Mobil had made an offer to enter into a unilateral contract and was not entitled to revoke it once the franchisees had embarked on performance. [126] Since Mobil's abandonment of the scheme prevented the franchisees from completing performance, those franchisees who had achieved the 90% performance target in each year up to the time of revocation should be treated as though they had achieved the same in the remaining years. Those franchisees were, therefore, entitled to performance of the agreement to extend their franchises.

On appeal, the Full Court held that Mobil had not made an offer to the franchisees. There were numerous indications that the scheme was only at a developmental stage and what Mobil said was not in the nature of an offer. [127] The commitment to "find a way" to extend tenure was "simply too vague and uncertain to be capable of giving rise to contractual obligation". [128] Nevertheless, the court went on to address the question whether Mobil had successfully revoked any offer that had been made.

The court held that a person offering to enter into a unilateral contract may, in some circumstances, be prevented from revoking the offer by an implied ancillary contract not to revoke. Revocation in breach of such a contract would be effective, leaving the offeror liable in

122 *Veivers v Cordingly* [1989] 2 Qd R 278, 297-8.

123 *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, 239.

124 (1998) 81 FCR 475 (*Mobil v Wellcome*).

125 (1998) 81 FCR 475, 498.

126 *Lyndel Nominees Pty Ltd v Mobil Oil Australia Ltd* (1997) IPR 599, 636.

127 (1998) 81 FCR 475, 496.

128 (1998) 81 FCR 475, 499-500.

damages. [129] An estoppel may arise where the offeree has acted to his or her detriment on an assumption that the offer will not be revoked. The Full Court found, however, that there is no universal principle that the offeror may not revoke once the offeree embarks upon performance of the act of acceptance. [130] If there is no implied contract and no estoppel, [131] the offeror is free to revoke the offer. There is no basis for any universal principle, according to the Full Court, because the circumstances vary greatly from one unilateral contract to another. Whether it is unjust for the offeror to revoke the offer once the offeree has commenced performance may depend on whether the offeror knows the offeree has commenced performance, whether the offeree understands that incomplete performance is at his or her risk, whether the parties intended that the offeror should be at liberty to revoke the offer and whether the acts towards performance are detrimental or beneficial to the offeree. [132] In the present case, it was difficult to say when a franchisee should be taken to have "embarked upon" performance; the actions of the franchisees were of benefit to both parties and little or no detriment had been established. There was therefore no basis for an implied contract not to revoke the offer. [133] Accordingly, even if Mobil could be said to have made an offer to the franchisees, Mobil was free to revoke that offer.

The effect of *Mobil v Wellcome* is that, in general, an offer made in return for performance of an act is, like any other offer, revocable at any time. The offeror will only be prevented from revoking the offer where there is an implied contract not to revoke or an estoppel. An estoppel will arise only where the offeree is induced to adopt the assumption that the offer will not be revoked and relies on that assumption in such a way that he or she will suffer detriment if the offer is revoked. [134]

ACCEPTANCE

Conduct constituting an acceptance

[3.75] An acceptance is an unqualified assent to the terms of an offer. An important question is whether the acceptance must result in an actual consensus between the parties or a "meeting of the minds". Where A makes an offer to B and B appears to accept, but was seriously mistaken as to what A was offering, is B bound? Whether a real meeting of the minds is required depends in theory on whether one adopts an objective or subjective approach to agreement. [135] Under a subjective approach, no contract is formed unless there was a real consensus between the parties. An objective approach, on the other hand, looks only to the external manifestations of consent, disregarding the offeree's actual state of mind. In *Taylor v Johnson* [136] the High Court noted that, while there is a significant difference in legal technique between the subjective and objective theories, there is little difference in practice. The reason is that the subjective theory is coupled with a principle of estoppel that operates where a person conducts himself or herself in such a way that a reasonable person would believe that he or she

129 (1998) 81 FCR 475, 506.

130 (1998) 81 FCR 475.

131 The estoppel aspects of the decision are discussed [9.50].

132 (1998) 81 FCR 475, 501-2.

133 See [9.50].

134 See Chapter 9.

135 See further [1.25] and [3.140].

136 (1983) 151 CLR 422, 428.

was assenting to the terms of a contract. [137] In those circumstances, the principle of estoppel prevents the person from denying the existence of a contract. Accordingly, an offeree who behaves in such a way that a reasonable person would think he or she was accepting the offer and induces the offeror to contract with him or her on that basis will be bound under both the objective and subjective approaches.

Smith v Hughes [138] provides a useful illustration of this point. A buyer agreed to purchase a quantity of oats on the faith of a sample provided by the seller. The buyer wrongly believed the sample to be old oats, when in fact the sample and the oats supplied were new oats and were unsuitable for the buyer's purposes. Blackburn J held that there is no contract if the parties are not ad idem (of one mind) unless an estoppel prevents one of the parties from denying that he or she has agreed to the other's terms. The relevant principle is:

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other's terms. [139]

On a subjective approach to agreement, therefore, an estoppel prevented the buyer from denying the contract because he had behaved in such a way that a reasonable person would believe he was agreeing to buy new oats. An objective approach would lead to the same result: the court would impute an agreement on the basis that there appeared to be a consensus between the parties. While *Smith v Hughes* supports the application of a subjective approach coupled with a principle of estoppel, the High Court observed in *Taylor v Johnson* that "the clear trend in the decided cases and academic writings has been to leave the objective theory in command of the field". [140] The High Court has since confirmed that "the principle of objectivity" determines "the rights and liabilities of the parties to a contract": "It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe". [141] It is clear that the same objective approach governs the question whether two parties have entered into contractual relations. [142]

On that basis, an offeree will effectively accept an offer if the offeree behaves in such a way that a reasonable person would believe he or she is assenting to the terms of an offer, even if there is no real consensus between the parties. [143] There is certainly no need for a consensus as to the terms of a contract. [144] In *Fitness First (Australia) Pty Ltd v Chong*, [145] Ms Chong signed an application form to join a gym on a 12-month membership without first reading the form. She was unaware that it stipulated that she was liable to pay a $200 fee if she cancelled

137 (1983) 151 CLR 422, 428.

138 (1871) LR 6 QB 597, 607.

139 (1871) LR 6 QB 597, 607.

140 (1983) 151 CLR 422, 429.

141 *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, [40].

142 See *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95, [25], discussed at [5.07].

143 Subject to the principles of mistake, discussed in Chapter 31.

144 See also *Shahid v Australasian College of Dermatologists* [2008] FCAFC 72; (2008) 168 FCR 46, discussed at [5.07] (where, on the basis of an objective approach, the court overturned the decision of a trial judge who had found that "there was no meeting of the minds" in relation to a particular issue).

145 [2008] NSWSC 800.

the membership within the first two months. A Tribunal Member held that the parties did not have "the requisite consensus ad idem" required for a valid contract and therefore Ms Chong was not liable to pay the fee. That decision was overturned on appeal, with Harrison AsJ holding that "the Tribunal Member erred in law when he stated that a valid contract requires that the parties have the [requisite] consensus ad idem in that each fully know and understand the terms of their agreement". [146] By signing the form, Ms Chong had manifested her assent to the printed terms and it was irrelevant that there was no true consensus ad idem between the parties.

Consciousness of the offer

[3.80] In the case of bilateral contracts formed verbally or in writing, it will usually be clear that the offeree has deliberately accepted the offer. The situation is different with unilateral contracts. If an offeree performs an act requested by an offeror without intending to accept the offer, has a contract been formed? If a person returns a lost dog and subsequently learns of the reward that had been offered by the owner, can the finder of the dog claim the reward? The answer to these questions also depends on a choice between an objective and a subjective approach. In *The Crown v Clarke* [147] the High Court adopted a subjective approach to this particular question without abandoning the objective approach to formation generally. The court held that while an offeree's conduct is normally assessed by reference to external manifestations, performance of a requested act will not give rise to a unilateral contract if the evidence establishes that the offeree was not in fact acting on the faith of the offer. In other words, a unilateral contract will only arise if the offeree performs the requested acts in reliance on the offer.

The Crown v Clarke was concerned with a £1000 reward offered for information leading to the arrest and conviction of the person who murdered two police officers. Clarke and Treffene were arrested and charged with one of the murders. Clarke gave a statement which led to his own release and the arrest of a man named Coulter, and later gave evidence which led to the conviction of Treffene and Coulter. Clarke claimed the reward, but the Crown refused to pay it to him on the basis that he did not make the statement with a view to claiming the reward. Clarke admitted in evidence that, although he had seen the reward notice, he made the statement in order to clear himself of the charge of murder and not with the intention of claiming the reward. He gave no consideration to the reward until after the men were convicted.

Clarke claimed the Crown was under a contractual obligation to pay him the reward, but he was ultimately unsuccessful in establishing a contract. The High Court held that a unilateral contract will be made only where the acts required for acceptance are performed on the faith of the offer. [148] The court held unanimously that there must be a consensus of minds or wills between the parties before a contract can exist. [149] Isaacs ACJ observed that "acceptance is essential to contractual obligation, because without it there is no agreement, and in the absence of agreement, actual or imputed, there is no contract". [150] Higgins J noted that,

146 [2008] NSWSC 800, [22]. Harrison AsJ applied the principle stated in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* [2004] HCA 52; (2004) 219 CLR 165, discussed at [12.50].

147 (1927) 40 CLR 227.

148 (1927) 40 CLR 227, 234, 241-2, 244.

149 (1927) 40 CLR 227, 234, 239, 243.

150 (1927) 40 CLR 227, 233.

without Clarke's admission that he not acted in reliance on the offer, a presumption might have been made that he had acted upon it, but his own evidence rebutted such a presumption. [151] Starke J treated a unilateral contract as an exception to the rule that a person's contractual intentions are normally judged from their outward expressions. The position is different, he said, in a case where communication of acceptance is dispensed with. In such a case, evidence of subjective intention can be taken into account. [152]

By requiring an actual consensus between the parties, and allowing Clarke's actual intentions to override his apparent intentions, the High Court decided the case on the basis of subjective evidence of intention. Had the court taken a purely objective approach, the court would have looked only at the outward manifestations of the parties' intentions and would have imputed an agreement on the basis of Clarke's conduct. The decision in *The Crown v Clarke* shows that the principle of estoppel described in *Smith v Hughes* does not entirely eradicate the practical consequences of the distinction between the objective and subjective approaches to agreement. Although Clarke's conduct would have led a reasonable person to believe he was assenting to the Crown's offer, the principle of estoppel described in *Smith v Hughes* could only be used against Clarke to prevent him from denying the existence of the contract. It could not be used by Clarke to prevent the Crown denying the existence of a contract.

Communication of acceptance

The general rule

[3.85] An acceptance generally has effect only when communicated to the offeror. [153] Bowen LJ suggested in *Carlill v Carbolic Smoke Ball Co* [154] that notification of acceptance is required because this establishes that the minds of the two parties have come together and formed a consensus. This rule means that a contract is formed when the offeree's acceptance is received by the offeror. In *Latec Finance Pty Ltd v Knight* [155] Mr Knight signed a hire-purchase agreement relating to a television set. The document was expressed to operate as an offer by the hirer (Knight), which was irrevocable for a period of seven days and was not binding on the hire-purchase company until signed by the company. The company's acceptance of Knight's offer was noted on the document, but was not communicated to Knight. Knight found the set unsatisfactory and returned it to the dealer before any instalments were paid. The company sought to enforce the agreement. The New South Wales Court of Appeal observed that ordinarily, a contract is not made until acceptance of an offer has been communicated. [156] An offeror, however, may expressly or impliedly dispense with the need for actual communication, and will commonly do so in one of two ways. Firstly, the offeror may agree to treat the doing of an act as an effective acceptance. Unilateral contracts are always accepted by the doing of an act and bilateral contracts can also be formed in this

151 (1927) 40 CLR 227, 241

152 (1927) 40 CLR 227, 244.

153 Eg, *Latec Finance Ltd v Knight* [1969] 2 NSWR 79; *Batt v Onslow* (1892) 13 LR (NSW) Eq 79.

154 [1893] 1 QB 256.

155 [1969] 2 NSWR 79.

156 [1969] 2 NSWR 79, 81.

way. [157] Secondly, the offeror may treat the despatch of an acceptance by a particular method as effective, whether or not the acceptance is received by the offeror. [158] The company argued that this case fell into the first category, with the act of signing the document to be treated as an effective acceptance. The court held that clear language would be required to support such a construction of the document because, if signing without notification were enough, it would give the company power to "keep the form in their office unsigned, and then play fast and loose as they pleased". [159] The language of the clause did not require this interpretation and, accordingly, there was no contract between the parties.

The postal rule

[3.90] Common law courts have long recognised an exception to the general rule stated above in cases where the acceptance is expected to be sent by post. In such cases the acceptance is effective as soon as it is posted. [160] In England this rule has been held to apply where the parties must have contemplated that the acceptance might be sent by post. [161] In *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* [162] Dixon CJ and Fullagar J appeared to take a more restrictive view when they said that "a finding that a contract is completed by the posting of a letter of acceptance cannot be justified unless it is to be inferred that the offeror contemplated and intended that his offer might be accepted by the doing of that act". [163] In *Bressan v Squires* [164] Bowen CJ in Eq considered whether Dixon CJ and Fullagar J intended to narrow the rule to cases where the offeror appeared to intend that the action of posting should have the consequence of concluding the contract. He concluded that Dixon CJ and Fullagar J must not have intended to narrow the rule because they cited in support of their formulation *Henthorn v Fraser*, a case in which the broader rule was applied. [165] When applying the principle to the facts before them, however, Dixon CJ and Fullagar J said that the necessary inference could not be drawn because solicitors were "conducting a highly contentious correspondence" and so "one would have thought that actual communication would be regarded as essential to the conclusion of agreement on anything". [166] This seemed to be an application of the narrower principle. [167]

Where the postal rule does apply, it has the effect that a contract is made when the acceptance is posted, even if it is received some time later or is lost in the post. [168] It also means that the contract is formed at the place where the acceptance is posted.

Why should posted acceptances be effective on sending, rather than on receipt? One explanation is that one of the parties must bear the risk of the acceptance being lost in the post

157 See *The Crown v Clarke* (1927) 40 CLR 227, 233-4; *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666, 691.

158 See the discussion of the postal rule below.

159 [1969] 2 NSWR 79, 81, quoting *Robophone Facilities Ltd v Blank* [1966] 1 WLR 1428, 1432.

160 *Adams v Lindsell* (1818) 1 B & A 681; 106 ER 250; *Henthorn v Fraser* [1892] 2 Ch 27.

161 *Henthorn v Fraser* [1892] 2 Ch 27.

162 (1957) 98 CLR 93.

163 (1957) 98 CLR 93, 111-12.

164 [1974] 2 NSWLR 460.

165 [1974] 2 NSWLR 460, 461-2.

166 (1957) 98 CLR 93, 111-12.

167 See also *Nunin Holdings Pty Ltd v Tullamarine Estates Pty Ltd* [1994] 1 VR 74.

168 *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) LR 4 Ex D 216.

and the courts have simply created an arbitrary rule to resolve this practical problem. [169] The rule requiring actual communication of an acceptance prejudices the offeree, who has no way of knowing whether the acceptance has reached the offeror and therefore no way of knowing whether a contract has been formed. The postal rule, on the other hand, places the offeror in a difficult position because once the acceptance is posted, the offeror is bound without knowing it. If the letter of acceptance is lost in the post, the offeror may act on the assumption that there is no contract. Since one of the parties must bear the risk, the common law courts have chosen to place the burden on the offeror. French and German law, on the other hand, burden the offeree, rather than the offeror, by unconditionally requiring communication in all cases. [170] The civil law approach has been adopted in the Vienna Convention [171] and the UPICC, [172] both of which provide that an acceptance will be effective only when the "indication of assent reaches the offeror". Greig and Davis suggest that the English courts chose the time of posting on the basis that it is the moment at which "the necessary consensus could be shown to exist". [173] The rule was explained in some of the early cases on the basis that the post office is the agent of both parties and therefore receives the letter of acceptance as agent of the offeror, [174] but it has since been held that the post office is not the agent of either party. [175] More elaborate justifications for the postal rule have also been offered, [176] but no explanation is universally accepted.

Scope of the postal rule

[3.95] With the advent of electronic communications, it might have been thought that the postal rule would become an anachronism, which would have little application to modern methods of contracting. The postal rule has not, however, been confined to the post. The courts extended the postal rule to telegrams, on the basis that telegrams were given to the post office and delivered to the recipient in essentially the same way as posted letters. [177] The courts then sought to confine the postal rule, distinguishing forms of instantaneous communication. In *Entores v Miles Far Eastern Corp* [178] the English Court of Appeal held that the postal rule should not apply to instantaneous forms of communication, such as the telephone or telex. This decision has been followed by Australian courts in relation to telephone [179] and telex

169 Peel, *Treitel's Law of Contract* (13th ed, 2011), [2-029]; Atiyah, *An Introduction to the Law of Contract*, (5th ed, 1995), p 71.

170 Wheeler and Shaw, *Contract Law* (1994), p 217. See also Zweigert and Kötz, *Introduction to Comparative Law* (3rd ed, 1998), pp 356-64.

171 *United Nations Convention on International Contracts for the Sale of Goods* (1980), article 18.

172 *UNIDROIT Principles of International Commercial Contracts 2010*, article 2.1.6(2).

173 Greig and Davis, *The Law of Contract* (1987), pp 310, 314.

174 See *Household Fire and Carriage Accident Insurance Co Ltd v Grant* (1879) LR 4 Ex D 216, 221.

175 *Henthorn v Fraser* [1892] 2 Ch 27, 33, 35-6.

176 See, eg, Evans, "The Anglo-American Mailing Rule: Some Problems of Offer and Acceptance in Contracts by Correspondence" (1966) 15 *International and Comparative Law Quarterly* 553; Gardner, "Trashing with Trollope: A Deconstruction of the Postal Rules" (1992) 12 *Oxford Journal of Legal Studies* 170.

177 *Cowan v O'Connor* (1888) 20 QBD 640; *Bruner v Moore* [1904] 1 Ch 305. See also *Leach Nominees Pty Ltd v Walter Wright Pty Ltd* [1986] WAR 244.

178 [1955] QB 327.

179 *Aviet v Smith and Searls Pty Ltd* (1956) 73 WN (NSW) 274; *Dewhurst (WA) and Co Pty Ltd v Cawrse* [1960] VR 278, 282; *Hampstead Meats Pty Ltd v Emerson and Yates Pty Ltd* [1967] SASR 109.

communications [180] and by the House of Lords in *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [181] in relation to telex.

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

The House of Lords held that the contract was made in Vienna, where the acceptance was received. Lord Wilberforce said the general rule is that a contract is formed when acceptance is communicated to the offeror. It therefore "appears logical" that a contract should also be formed *where* acceptance is communicated to the offeror. [182] Where the postal rule applies, the acceptance is effective when and where it is placed in the hands of the post office. In the case of instantaneous communication, including telex, the general rule will usually apply. The situation may be different, according to Lord Wilberforce, where the message is sent or received through a third party, where it is sent out of office hours or is not intended to be read immediately. "No universal rule can cover all such cases; they must be resolved by reference to the intentions of the parties, by sound business practice and in some cases by a judgment where the risks should lie." [183]

Lord Fraser noted that a telex sent to a large firm is not really instantaneous, since it must pass from the telex operator to the responsible person in the firm. [184] It is, however, convenient to treat it as a form of instantaneous communication for three reasons. [185] First, no difficulty or complaint has arisen from the decision in *Entores v Miles Far Eastern Corp*. Secondly, it is the responsibility of the recipient to arrange for the prompt handling of messages within his or her office. Thirdly, the sender is more likely to be aware that an attempt to send a message has been unsuccessful than the recipient is to be aware that an unsuccessful attempt has been made. Lord Brandon also thought that commercial expediency justified the postal rule, but did not justify extending it to forms of instantaneous communication such as telephone or telex. [186]

The real issue faced by the House of Lords in *Brinkibon* was whether or not an English company could sue an Austrian supplier in an English court. In order to resolve this question, the Rules of the Supreme Court required the House of Lords to decide whether the contract had been made in England. As John Wightman has observed, it is unfortunate that the technical rules of offer and acceptance are employed in cases such as *Brinkibon* to resolve jurisdictional questions. [187] This approach is also routinely followed in Australia. [188] The law of contract is not well equipped to determine where a contract has been made, since the place

180 *Express Airways v Port Augusta Air Services* [1980] Qd R 543.

181 [1983] 2 AC 34.

182 [1983] 2 AC 34, 41.

183 [1983] 2 AC 34, 42.

184 [1983] 2 AC 34, 43.

185 [1983] 2 AC 34, 43.

186 [1983] 2 AC 34, 48.

187 Wightman, "Does Acceptance Matter?" in Adams (ed), *Essays for Clive Schmitthoff* (1983).

188 See, eg, *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93.

of formation is not relevant to the general law of contract, but only to jurisdictional questions. [189] By resolving these cases by reference to technical rules of formation, the courts cannot explicitly take account of the policy considerations relevant to the underlying issue, which involve the relative convenience and expense of the case being heard in each of the two jurisdictions. The effect of applying the technical rules of contract formation to the place of formation issue will often lead to an arbitrary result, as it did in *Brinkibon*. The contract in *Brikinbon* was concluded after lengthy communications between the two countries and it just happened that the last communication was received in Vienna. The House of Lords resolved the case by applying a technical "general rule", but left the way open for future cases to be decided differently by observing that "no universal rule can cover all such cases". [190]

Modern electronic communications

[3.100] The case law relating to communication of acceptance has inevitably lagged behind developments in communication systems. [191] Telegrams and telexes were superseded by facsimile messages, and there are now many different forms of electronic data exchange which may be used in the formation of contracts. In *Reese Bros Plastics Ltd v Hamon-Sobelco Australia Pty Ltd*, [192] the New South Wales Court of Appeal held that a facsimile message, which is sent through telephone lines from one machine to another, should be treated as a form of instantaneous communication. Acceptances sent by facsimile are therefore governed by the general rule that an acceptance is effective only when received by the offeror. This general principle may be subject to exceptions in the circumstances discussed by Lord Wilberforce in *Brinkibon*. That is, a different principle may apply where the message is sent or received through a third party, is sent out of office hours or is not intended to be read immediately. Lord Wilberforce did not indicate what rule might apply in these situations. It could be that the postal rule should apply where an acceptance is sent or received through a third party. When a message is sent out of office hours or is not intended to be read immediately, it may be that it becomes effective some time after it is received by the offeror's machine. All such cases are likely to be resolved by reference to the presumed intention of the offeror.

The question of whether the postal rule should apply to communication over the internet has not been authoritatively determined, although it has been suggested by way of obiter dictum that email should be treated like other forms of instantaneous communication. [193] The two forms of internet communication most likely to be used in contracting are interactive websites and email. Communication via interactive websites is virtually instantaneous and there seems little reason to depart from the general rule that acceptance is effective only when received. Email, on the other hand, is in some ways analogous to post, as Squires explains. [194] Once a message is sent, the sender loses control of the message as it passes through the hands of intermediaries. As a result of technical problems that may be the fault of third parties, an

189 Wightman, "Does Acceptance Matter?" in Adams (ed), *Essays for Clive Schmitthoff* (1983), p 145.

190 [1983] 2 AC 34, 42.

191 See generally Furmston and Tolhurst, *Contract Formation: Law and Practice* (2010), ch 6.

192 (1988) 5 BPR 11,106.

193 *Olivaylle Pty Ltd v Flottweg AG* (No 4) [2009] FCA 522; (2009) 255 ALR 632, [25].

194 Squires, "Some Contract Issues Arising from Online Business – Consumer Agreements" (2000) 5 *Deakin Law Review* 95, 107.