

LAWS 108
Commercial Law
Lecture Notes

COMMERCIAL LAW – LECTURE NOTES

Week 1: Contract Law Revision

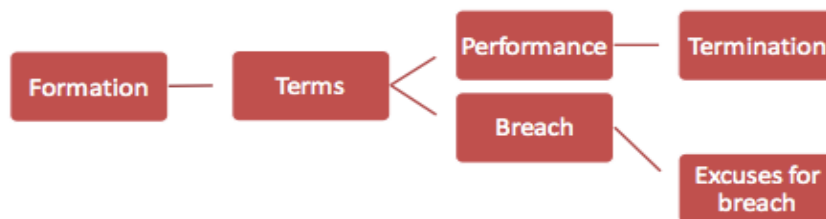
Essential Elements To a Contract:

- Intention to create legal relationship
- Offer + Acceptance = Agreement
- Certainty of Terms = Formation
- Consideration
- Capacity of the parties to activate
- Genuine consent of the parties (no unconscionable dealings)
- Legality of the objects of the agreement

What is a contract?

A contract is a promise or a set of promises which the law will enforce.

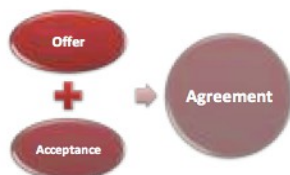
- Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation for the loss sustained by him in consequence of the breach. (Photoproductions v Securicor, per Lord Diplock)



Characteristics of an enforceable contract

- Agreement
- Intention to create legal relations
- Consideration
- Certainty
- Contents of a contract
- End of the contract – termination / Breach
- Estoppel

Agreement



Consideration

Creation of a contract requires:

- At least 2 parties
- A promise or undertaking by at least one of them
- An exchange (quid pro quo) between the 2 parties – Either a promise for a promise – bilateral contract
 - Or a promise for an act – unilateral contract

Certainty

- Certainty and completeness is required in contracts but only in relation to essential terms
- The court has wide powers to imply terms and fix meanings

Privity of Contract

- A contract between A and B cannot be enforced by C
 - Even if C is intended to benefit from the performance of the contract
 - A contract between A and B cannot be enforced against C
 - Even if the contract purports to make C liable
- See Trident General Insurance v McNeice Bros (1988)*

The rule of privity of contract may be circumvented by:

1. Converting a third party into a contracting party
 - agency
 - joint parties
2. By allowing enforcement of non-contractual rights by third parties
 - Trusts (3rd year semester 2 Core subject – equity and trusts)
 - Commercial law
 - Law of property (3rd year semester 1 core subject – Property law)

Breach of Contract

- Occurs when
 - A party fails to perform the contract as agreed
 - Manifests unwillingness or is unable to fulfill the terms of the contract as and when agreed
 - Can lead to termination of a contract

Estoppel

- Important legal doctrine based in common law and in equity
- A party may be estopped from denying liability under a contracting
- If A has lead B to reasonably believe that a contract has or will be made and B has acted on that information to their own detriments, A may be estopped from departing from the assumption
- Estoppel is not limited to assumptions about formation of contracting
- A party may be estopped from:
 - Asserting a particular construction of a contract
 - Relying on a particular excuse eg. informality
 - Asserting the termination of a contract as a result of frustration, failure of a condition or breach

Termination for Breach

- Right to terminate can be conferred by law
 - Repudiation
 - Breach of an essential term or condition
 - Breach of an intermediate term causing substantial loss off benefits
 - Non fulfilment of the contingent condition
- Termination can be by consent or at will
 - This must be communicated to the other party

Contract Construction

- Issues that are relevant to the construction of contracts
 - Unconscionable conduct
 - Excuse
 - Deceptive and Misleading Conduct
 - Misrepresentations
 - Mistake
 - Duress and Undue Influence

Remedies

- Damages
- Orders compelling performance
 - Orders for specific performance or
 - Injunctions
- It is important to specify the types of loss

Week 2: Agency

The law of agency is based on the Latin maxim “*Qui facit per alium, facit per se*” which means “he who acts through another is deemed in law to do it himself.”

What is agency?

- A relationship involving the authority or capacity in one person (the agent) to create or affect legal relations between another person (the principal) and third parties.
 - *See International Harvester Company of Australia Pty Ltd v Carrigan's Hazledene Pastoral Co (1958) HCA 16.*

Examples of Agency

- Solicitors
- Trustees
- Real Estate Agents
- Agents for Talent

Agency can be created by:

- Contract (express or implied, oral or written)
- Ratification (assent is given either to an act done by someone who had no previous authority to act or to an act that exceeded the authority granted to an agent)
- Estoppel (a person allows another to act for him/her to such an extent that a third party reasonably believes that an agency relationship exists), or
- Necessity (a person acts for another in an emergency situation without express authority to do so).

Creating Agency

- The use of the word agent does not automatically create a relationship of agency at law
YoungJ in Beazley v Seed & Grain Sales Moore Pty Ltd (1988) 4 BPR 9529 at 9532

Proving Agency

- Burden of proof rests with the person asserting the relationship of agency
- Agency depends largely on the facts of the individual case

Relationship of Agency

- *Principal*: The party conferring on another the authority to act on their behalf
- *Agent*: The party on whom the authority is conferred

Classification of Agents

A general classification of Agents is as follows

1. Special Agents
2. General Agents
3. Universal Agents

Capacity to Instruct

- A principal must have **legal capacity** to perform the act which they are performing through an agent
see Christie v Permewan, Wright & Co Ltd (1904) 1 CLR 693
- Whatever an individual has the power to do themselves they may do through an agent
 - eg. a corporation has the capacity and powers of an individual
see s124 (1) of the Corporations Act 2001 (Cth)

Capacity to Activity

- An agent does not need contractual capacity to act as the agent for another
per Watkins v Vince (1818) 2 Stark 368
- Agents may also be required to have a certain license or qualification

Sources of Agents Authority

1. Actual Authority

Actual Express Authority

- Requires the consent of the principal and the agent
- Consent may be express or implied
- May be conferred in writing or orally

Actual Implied Authority

- Also requires the consent of the principal and the agent BUT these consents are inferred from the relationship between or conduct of the parties as opposed to express words.
Hely-Hutchinson v Brayhead Ltd [1968] 1 QB 549
May arise in a number of ways:
 - Incidental authority
 - Usual authority
 - Customary authority
 - Hely-Hutchinson (Authority implied from conduct)

2. Ostensible Authority or Authority by estoppel

Ostensible Authority

- It involves the principal intentionally or negligently holding out (or representing) another to be its agent
- The principal must lead the third party to believe that the agent is authorised when in fact the agent is not
- Where the third party acts to their own detriment in reliance upon the holding out, the principal will be bound notwithstanding the fact that the agent had no actual authority to perform the act
Freeman & Lockyer v Buckhurst Park Properties (Mangal) [1964] 2 QB 480

Agency By Estoppel

- Diplock JL's four conditions for ostensible authority:
 - a) Representation
 - b) Actual
 - c) Inducement
 - d) Knowledge – Note that this condition no longer applies

Per Freeman & Lockyer v Buckhurst Park Properties (Mangal) [1964] 2 QB 480 modified in Cousens v Gayridge [2000] VSCA 96

Elements of Ostensible Authority

- Current Law – 3 Elements
 1. Representation
 2. Reliance
 3. Detriment

1. Representation

- Representation by the principal
 - Manner in which the representation was made
 - The conduct relating to the representation
 - Who made the representation (*see Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72*)
 - To whom the representation was made

2. Reliance

- There must be a casual connection between the representation to the third party and the dealing between the third party and agent
- If the third party understands that the agent is acting outside the authority bestowed by their position then they cannot establish ostensible authority (*see Alliance Acceptance Company v Oakley (1987) 48 SASR 337.*)

3. Detriment

- Sufficient to show that the third party entered into the contract or altered their position as a result of relying on the representation

Consequences of finding ostensible authority

- The principal is bound to the third party
- The principal may also recover damages from the agent for breach of duty (their failure to follow instructions)

Ratification

- Authority to act can be granted retrospectively
- Any act, irrespective of legality is capable of being ratified
- However, this does not extend to the ratification of prohibited transactions
Per Bedford Insurance Co Ltd v Instituto de Resseguros do Brasil [1985] 1 QB 966
- The act of ratification is important as the position is the same as if the agent had the authority from the outset
Per Irvine v Union Bank of Australia [1877] 2 App Cas 366
- Factual Question *per Borg v Northern Rivers Finance [2004] QSC 29*
- It is important to consider the whole circumstances surrounding the acts said to constitute ratification *Crabtree v Vickers*
- Ratification need not be effectively communicated to the third party however, if a principal does not wish to ratify then this must be communicated

- A principal can only ratify if they have full knowledge of ALL of the material facts at the time of ratification
- A principal can only ratify the whole of the contract
- Doctrine of ratification has been criticised widely, Why?

Exceptions to Ratification

- Reasonable time
- Must take place at a time when the ratifying party might have themselves done the act e.g. a principal cannot ratify an act if they lack capacity or if the act has become illegal.
- Ratification is not allowed where it would create unfair prejudice towards a third party
- Cannot contradict other duties
- Cannot be excess of an express time limit
- In some cases where there has been a breach or loss ratification cannot occur
- Where notice is required
- Once an estate has vested
- After the date for specific performance of a contract has passed

Attribution

- Relates to the operation of corporations and the attribution of the actions of certain agents to the corporation e.g. managing directors or shareholders
- Rules for attribution are usually found in the incorporation documents of the individual company

Undisclosed Principal

- The third party is not aware of the existence or identify of a principal
- Removal of the indemnity - the agent may sue and be sued
- The third party, after they become aware, may elect sue the undisclosed principal instead of the agent.
- Exception to the doctrine of privity of contract
- Main aspects of the doctrine are discussed in *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199
- See page 114 of the Traves reading

Agency by Law

Law imposed agency irrespective of the intention of the parties in 2 cases:

1. Emergency
2. Purchase of Necessaries

Duties of an Agent

- An agent is in a fiduciary relationship with their principal
- Duty to act in the bona fide interests of the principal
- Duty to avoid conflict with the agents own interests and the interests of the third party without disclosure
- Duty to perform their job with due care and skill
- founded in both tort and contract
- Duty to follow the instructions of the principal
- Duty to act in person
- Duty not to make secret profit (personal gain) see *Parker v McKenna (1874) 10 Ch App 96*
- Duty to keep accounts and have accounts ready for inspection on request

Rights of Agents

- Right to remuneration
- Rights to indemnity and reimbursement
- Right to Lien

Liability of an Agent

- An agent may incur liability to:
 - The principal – where the agent disobeys the principals instructions the agent will be liable for loss suffered as a result of the breach of agency contract
see Mitor Investment Pty Ltd v General Accident Fire & Life Assurance Corp [1984] WAR 365
 - Third parties – this depends on the agents method of contracting
- Breach of warranty of authority
- Misrepresentations
- Wrongful Acts

When an Agent may be personally liable...

An agent who contracts in writing in their own name is not exonerated from personal liability merely because the contracting party was aware that they were acting in their capacity as an agent
see Basma v Weekes [1950] AC 441

Termination of Agency

- Dependent on the terms in the original contract
 - Performance or completion of agency contract
 - Impossibility of performance
 - Agreement
 - Revocation
 - By death
 - By insanity
 - By bankruptcy

Week 3: Contracting with Government

Tender

Definition: An offer which is capable of acceptance:

Croshaw v Pritchard & Renwick (1899) 16 TLR 45

- A written offer from a tenderer to the party inviting tenders to do work, supply goods or make a purchase, in accordance with conditions set out in the invitation to tender. In commercial context, the phrase means more than 'offer': *Comalco Fabricators Ltd v Dillingham Constructions Pty Ltd (1977) 17 SASR 82.*

Sample Commonwealth Government Tender



Request for Tenders No. PRPC 01-13

REFURBISHMENT OF BRONZE COMMEMORATIVE
PLAQUES AT CEMETERIES AND GARDENS OF
REMEMBRANCE ACROSS AUSTRALIA

Lodgement Place:	AntTender www.tenders.gov.au
Lodgement Deadline:	4.00pm ACT Local Time Friday, 2 July 2013
Project Manager: E-mail address:	Damian McKinnon Ag Senior Project Officer Office of Australian War Graves wargravestenderqueries@dva.gov.au
Issue Date:	7 June 2013

Purpose and explanation

The Office of Australian War Graves is part of the Department of Veterans' Affairs and is responsible for the official commemoration in perpetuity of those whose deaths have been attributed to their war service. Those veterans whose deaths have been accepted as war related are generally commemorated by means on an individual plaque at a grave site, a Garden of Remembrance, or a crematorium.

The purpose of the request for tender is to establish a Panel Arrangement for the refurbishment of bronze commemorative plaques, and other related services required on an ad-hoc basis, to a high standard, befitting those whose deaths were attributed to their war service. A technical specification detailing the work is at Attachment A.

Agreements are sought for a period of three years, with an option for extensions up to a further two years.

Evaluation criteria and requirements

DVA will evaluate tenders against the following criteria

No	Criteria	Weighting
1	Demonstrated Experience	25%
2	Quality Standards	25%
3	Efficiency and Time Management	15%
4	Work Health & Safety Standards	15%
5	Environmental Considerations	10%
6	Staff Training	10%

The following requirements will be used in the evaluation processes

No	Requirements	Importance
7	Fees/Pricing – Price offered will be assessed in conjunction with tenderer's evaluation according to above criteria to enable selection based on value for money	Very High
8	Offer of Services Spreadsheet	Medium
9	Provision of completed details on professional referees	Medium
10	Compliance with draft agreement	Medium
11	Completion and lodgement of Tenderer's Declaration	High

Outcome of tender process

Deed of Agreement

between the

Commonwealth of Australia
(as represented by
the Department of Veterans' Affairs,
the Repatriation Commission
and
the Military Rehabilitation and
Compensation Commission)
(Australian Business Number 23 964 290 824)

and

[Insert name of Contractor]
(Australian Business Number xxxxxxxxxx)

for the provision of
REFURBISHMENT OF BRONZE COMMEMORATIVE PLAQUES AT
CEMETERIES AND GARDENS OF REMEMBRANCE ACROSS
AUSTRALIA

Version: January 2013

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THE SCHEDULE

Note: Terms are subject to the interpretation clause 28 and definitions in specific clauses and in clause 32.

Part 1

A Purpose (Relates to clause 1)

The purpose of this agreement is for the provision of in-situ refurbishment of bronze commemorative plaques at various cemeteries and gardens of remembrance across Australia and other related services required on an ad-hoc basis for the Office of Australian War Graves.

(OAWG) [redacted]

B Term of agreement (Relates to clause 1)

(1) This agreement commences on [redacted] and shall end on [redacted]. This agreement can be extended only under Schedule Part 5(2).

(2) DVA has an option to extend this agreement by periods up to a total of 100. DVA may exercise the option by giving notice in writing (clause 12) to the contractor no later than 90 days prior to the end date.

C Contractor's legal identity (Relates to clauses 1, 2, 3 and 3.2)

Full legal name of contractor	
Legal identity (eg. individual, trust, company, government etc)	
Trading or business name	
Australian Business Number (ABN)	
Australian Company Number (ACN)	
Registered office (street address)	
Registered business place (if different)	
Postal address	
Telephone number (General)	
Fax number (General)	
E-mail address (General)	

D Contractor's representative (Relates to clause 1.1 and 3.2)

Contractor's representative (name)	
Position	
Postal street address(es)	
Telephone (business) and mobile numbers	Tel:
Fax number	Fax:
E-mail address	

E Specified personnel of contractor (Relates to clause 3.2)

If applicable, the personnel listed below are specified personnel:

Full legal name of person

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Why utilise a tender process? Why can't government simply select its preferred supplier?

Health Services Act 1988 (Vic)
40B Minister may issue directions

- (1) Subject to subsection (4), the Minister may issue written directions to the board of a public hospital on any matter in relation to the public hospital that the Minister considers necessary or expedient if the Minister considers that the direction-
- (a) is in the public interest; and
 - (b) will give effect to the objectives of this Act.
- (2) A direction may be given generally in relation to public hospitals or in relation to a specified public hospital or a specified class of public hospitals
- (3) The board of a public hospital must comply with any direction issued to it.
- (4) A direction issued under this section must not-
- (a) refer to the health care or health services provided or proposed to be provided to a particular person; or
 - (b) refer to the employment or engagement of a particular person by a public hospital; or
 - (c) require the supply of goods or services to a public hospital by any particular person or organisation unless the supply is in accordance with a tender process
- (5) The Minister must cause copies of each direction issued to be made available on request to members of the public

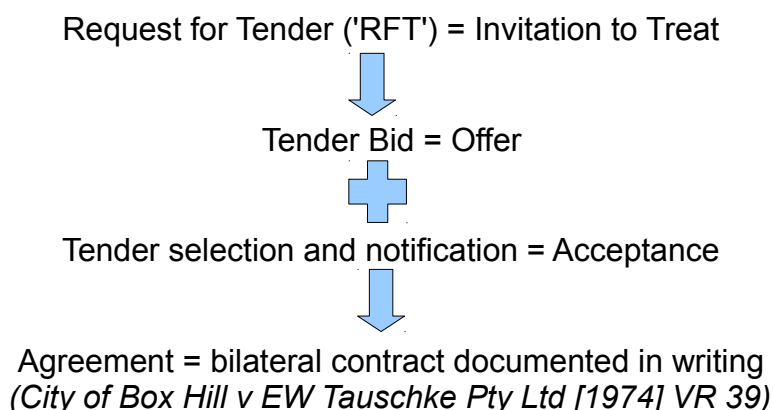
Local Government Act 1989 (Vic)
PART 9 – Specific Functions, Powers and Restrictions

Division 1- General provisions
186 Restriction on power to enter into contracts

- (1) Before a Council enters into a contract for the purchase of goods or services, or for the carrying out of works, to the value of \$100,000 (or such higher amount as may be fixed by Order in Council) or more, it must-
- (a) give public notice of the purpose of the contract and invite tenders from any person wishing to undertake the contract; or
 - (b) give public notice of the purpose of the contract or the project to which the contract relates and invite expressions of interest from any person interested in undertaking the contract or all, or any part of, the project.

Australia-United States Free Trade Agreements
Chapter 15 – Government Procurement

Traditional Contract Analysis



Contractual duty of good faith

"[T]he duty of good faith and fair dealing as applied to that particular function required that the evaluation ought to express the views honestly held by the members of the [tender evaluation committee]. The duty to act fairly meant that all the tenderers had to be treated equally. One tenderer could not be given a higher mark than another if their attributes were the same.' *Pratt Contractors Ltd v Transit New Zealand* [2003] UKPC 83, [47].

Government Contracts – Nicholas Seddon Notes

Tenders

- The sources of law for government tenders are the common law, the *Commonwealth Procurement Rules* at a Commonwealth level and possibly legislation such as the *Competition and Consumer Act 2010 (Cth)* and the Australian Consumer Law. (Governments at all levels are substantially exempt from this legislation in relation to their procurement activities)
- After outlining the regulatory framework, the tendering process is examined in terms of the contractual analysis that has traditionally applied.
- The process of tendering prior to award may itself be governed by a preliminary contract and the implications for the tendering process of imposing a pre-award contract are examined in detail.
- Estoppel may generate legally enforceable obligations
- Misrepresentations or misleading conduct may be actionable either in negligence or under the Australian Consumer Law
- The body seeking tenders is under a public responsibility to use public money in the best possible way. This responsibility involved not only securing the best deal through open and effective competition but also the protection of the public purse from collusion, fraud and extravagance
- Integrity of the entire process is maintained so that potential contractors are not put off
- It is a matter of public concern that the government's buying and selling should be properly

Week 4: Sale of Goods

Aim of this lecture is to increase understanding of:

- Provision under the *Goods Act 1958 (Vic)*
- Provision under the *Competition and Consumer Act 2010 (Cth)*
- Formation of a contract for the sale of goods
- Conditions implied in contracts of sale
- Condition as to title
- Correspondence with description
- Merchantable quality
- Fitness for purposes
- Condition and warranties
- Estoppel

Contracts for the Sale of Goods

- Governed by general principles of common law (like contract law) AND Statute
- In Victoria the *Goods Act 1958 (Vic)* and the *Competition and Consumer Act 2010 (Cth)*

What is goods?

s 3 (1) Goods Act 1958 (Vic)

- goods includes all chattels personal other than things in action and money. The term includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;