1 The Nature and Importance of Contract Law

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1 What is a contract?

A contract is a promise (or a set of promises) that is legally binding; by 'legally binding' we mean that the law will compel the person making the promise ('the promisor') to perform that promise, or to pay damages to compensate the person to whom it was made ('the promisee') for non-performance. Promises are a common feature of our lives; individuals make promises to family members and their friends, promises are made within the workplace, suppliers and their customers make promises about the supply and acquisition of goods and services, and political parties make election promises. However, only some of these promises are legally binding—and only some of those that are binding are contracts. For a promise to give rise to a contract it must in substance amount to an undertaking by the promisor that is proffered in exchange for something sought in return from the promisee; for example, a promise by A to let B have her car if B pays A $10,000. The concept of 'bargain'—I will do something if you do something in return—inherent in promises of this nature is the defining characteristic of a contract.

As we have noted, some promises are binding even though they are not contractual in nature. Thus, a promise that does not contain the element of a bargain may still give rise to legal rights and obligations if the promisee has relied upon that promise in circumstances in which it would be unjust to allow the promisor to resile with impunity. This was established for Australia by *Waltons Stores (Interstate) Ltd v Maher*,[1] the effect of which is 'that an equitable estoppel yields a remedy in order to prevent unconscionable conduct on the part of the party who, having made a promise to another who acts to his detriment, seeks to resile from the promise'.[2]

2 The importance of contract law

Contract law is important because it underpins our society;[3] without it, life as we know it could not exist. This is because in countries such as Australia most goods and services are created and distributed through markets and markets have at their heart a contract. Consider for a moment this issue from the point of view of a business: almost every transaction it will make will involve a contract; for example, it will purchase raw materials, lease premises, hire equipment, sell its products or services, and use banking and related systems to make or receive payments. Likewise, most transactions by consumers involve the purchase of goods or services facilitated by a contract. As with businesses, it is difficult to think of many transactions entered into by consumers that are not of this nature.[4] Finally, from the perspective of governments, although most of what they do derives from an act of the relevant parliament, increasingly the services they provide are being privatised and

1 (1988) 164 CLR 387. This case is extracted at p 147, below.

2 *Commonwealth of Australia v Verwayen* (1990) 170 CLR 394 at 428–429, per Brennan J.

3 A similar view was expressed by Kirby P in *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130 at 132 when his Honour said that 'the law of contract … underpins the economy'.

4 As citizens, members of the public engage in activities—such as visiting a public park or using a footpath—that are not contractual. However, when doing so they are not consumers in the conventional sense.

delivered pursuant to a contract. This is consistent with Maine's thesis that the movement of progressive societies is from 'status to contract'.[5]

The importance of contracts to our society helps to explain one of the principal reasons why the law enforces them. This reason and the moral justifications for contract law are discussed in the following extract from the work of Professor PS Atiyah, one of the leading contract scholars of the twentieth century.

Stephen A Smith, Atiyah's Introduction to the Law of Contract

Clarendon Press, Oxford, 2005

[at 3]: The Justification for Contract Law

[W]hat, if anything, is the justification for contract law? Assuming that contracts are voluntary undertakings, why should the law enforce such undertakings? Stated differently, on what basis is it legitimate for the state, acting through the courts, to sanction individuals for breaking contracts? Why lend the state's support to what is an essentially private complaint?

Virtually all societies have evolved laws for the enforcement of contracts, so it is no surprise that most commentators believe that, while certain aspects of the law may pose difficulties, in broad terms the law of contract is justifiable. More specifically, two kinds of justifications are typically given for the law of contract. The first, which is associated with 'economic' and other broadly 'utilitarian' approaches to law, justifies contract law on the basis that it facilitates mutually beneficial exchanges, and so promotes overall social welfare or social 'wealth' (broadly defined). The underlying idea is that where two parties freely agree on a contract involving, say, a simple exchange of money for goods, the seller does so because he thinks he will be better off with the money than with the goods, and the buyer does so because she prefers the goods to the money. Both parties thus emerge from the exchange better off (in one sense) than they were before, and since society's wealth is made up of the total wealth of its members, even a simple exchange of this kind can improve social wealth. In short, contract law (and the officials needed to enforce the law) is a justified use of the state's resources because it helps everyone to become better off. …

<4> … From an economic perspective, the primary reason a law of contract is needed is that most exchanges of any complexity cannot be performed simultaneously. One or both parties will have to perform in the future, which means that the other party has to have confidence that she will perform. Suppose that I want a special machine made to order for my factory. A manufacturer could make the machine, and then sell the finished product to me in a simultaneous exchange of machine for cash. But the manufacturer is likely to be worried that I might change my mind at the last minute, leaving him with a machine that is difficult to sell. I might also worry that the manufacturer will change his mind, and decide not to make the machine. Admittedly, there are many reasons aside from the law that each of us might keep to our agreement, such as our interests in our reputation >>

5 In *Ancient Law*, 14th edn, John Murray, London, 1891, Chapter V, Sir Henry Maine argued that as societies develop they progress from relying on status for their organisation to relying on contract. Thus, while in 'ancient law' individuals were bound together by status, in modern societies they are free to make contracts and form associations with whoever they chose.

or simply our sense of morality. Nonetheless, it is clear that the risk of non-performance will sometimes dissuade people from entering otherwise beneficial deferred exchanges. It is because of this risk that a law of contract is needed. The fundamental role of contract law, in the economic theory now being considered, is to facilitate the making and performing of deferred exchanges. The law fulfils this role in many ways, but the most fundamental is by providing remedies for breaches of contract, either in the form of orders that breaching parties perform or orders that they pay damages.

Thus interpreted, contract law's essential purpose is to secure cooperation in human behaviour, and particularly in exchange. In sophisticated modern societies this cooperation has led to a massive and elaborate system of credit—and 'credit' is simply another word for 'trust' or 'reliance'. In the simplest sort of case, where businesses provide goods or services on credit to consumers, they trust or rely on the consumer to pay and in the meantime they allow the consumers to have the goods. Generally, the consumers will ultimately pay, but if they fail to do so some sanction is needed: the law of contract provides that sanction. So contract law ultimately provides the backing needed to support the whole institution of credit. A moment's reflection is enough to show to what extent this is true not only in commercial matters, but in all walks of life. The value of consumers' bank accounts, their right to occupy their houses if rented or mortgaged, their employment, their insurance, their shareholdings, and many other matters of vital importance to them, all depend on the fact that the law of contract will enable them to <5> realise their rights. In the striking phrase of Roscoe Pound, 'Wealth, in a commercial age, is made up largely of promises.'

The second general justification that is commonly given for the law of contract can be described more quickly. The individualist or 'moral' justification focuses not on the social benefits of contracting, but on the rights and duties of individual contracting parties. According to this view, when courts order that contracts be performed, the reason is that the defendants have duties, *owed to the claimants* (not society), to do what they contracted to do. And when courts order that damages be paid, the reason is not merely to encourage future contracting or to bring about any other social benefit, but to remedy the injustice caused by the defendant having infringed the claimant's rights. In this view, the payment of damages reflects the idea that the defendant has *wronged* the claimant, and so must repair the harmful consequences of that wrong. Damages correct the injustice *to the individual claimant* caused by the breach. Of course, the defenders of this view do not deny that contracts are socially beneficial, and that contract law facilitates the making of contracts. But they regard these advantages merely as side-effects of an institution whose primary purpose is to ensure that justice is done between individuals.

The economic and moral justifications each provide a plausible justification for the general institution of contract law and, as we shall see in later chapters, for many specific contract law rules. It seems plausible to suppose, therefore, that the best overall justification for the law of contract combines each of these accounts. The idea that contract law is justified on two grounds—an economic ground and a moral ground—is indeed a common conclusion. And as a matter of history, it is clear that lawmakers have been influenced by both grounds (and many others as well). But it is worth noting that many contract scholars are uncomfortable defending a 'mixed' justification of this kind. The reason is straightforward: the two justifications have opposite starting points. The economic view supposes that society's interests take precedence over those of the individual, while the moral view supposes the opposite. A justification for contract law that simultaneously adopts both justifications thus might be thought to raise as many questions as it answers.

3 The nature of contract law

a Contract law is largely judge-made law

Contract law is composed almost entirely of judge-made law and as such is primarily to be found in judicial decisions accumulated over the years. As a result, most books on the subject consist largely of the author's interpretation and rationalisation of those decisions. However, scholarly books have also played an important role in ordering judicial decisions and presenting them in a coherent manner. This was especially the case with early writers such as Chitty, Pollock and Anson,[6] who played a crucial role in developing a coherent law of contract in the nineteenth century. Indeed, the doctrines they developed in that period remain central to modern contract law.

Increasingly, however, statutes are being passed that regulate, or have an impact upon, substantial areas of contract law. Examples include (at the Commonwealth level) the *Insurance Contracts Act 1984*, the *Cheques Act 1986*, the *National Consumer Credit Protection Act 2009*[7] and the *Carriage of Goods by Sea Act 1991*; and (at the state and territory level) the various Sale of Goods Acts,[8] Electronic Transactions Acts[9] and Fair Trading Acts.[10] Perhaps the most significant, at least from the perspectives of the volume of litigation and the regulation of consumer contracts, has been what is now the *Competition and Consumer Act 2010* (Cth).[11] This has revolutionised contract law in the areas such as anti-competitive agreements, misrepresentation, implied terms, manufacturers' liability, unconscionable conduct and unfair contract terms. All of these statutes affect areas that were once the sole preserve of judge-made law. As a result, although judge-made law remains the more important ingredient, especially in commercial transactions, Australian contract law is now a complex mix of both judge-made and statute law.

An important challenge presented by this mix of case and statute law is that the statutory modifications of case law are not conveniently collated in a single source and are constantly being added to. This means that English texts (upon which great reliance was placed until comparatively recently) may no longer accurately represent important areas of Australian

6 J Chitty, *The Law of Contracts*, S Sweet, London, 1826; F Pollock, *Principles of Contract at Law and in Equity*, Stevens, London, 1878; WR Anson, *Principles of the Law of Contract*, Callaghan & Co, Chicago, 1880.

7 The key provisions of this Act regulate the provision of consumer credit. They became part of the law of each state and territory, replacing state and territory Credit Acts, through reference legislation utilising s 51(xxxvii) of the *Australian Constitution*: see the *Credit (Commonwealth Powers) Act 2010* (NSW); *Credit (Commonwealth Powers) Act 2010* (Qld); *Credit (Commonwealth Powers) Act 2010* (SA); *Credit (Commonwealth Powers) Act 2009* (Tas); *Credit (Commonwealth Powers) Act 2010* (Vic); *Credit (Commonwealth Powers) Act 2010* (WA).

8 *Sale of Goods Act 1954* (ACT); *Sale of Goods Act 1923* (NSW); *Goods Act 1958* (Vic); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Sale of Goods Act 1895* (WA); *Sale of Goods Act* (NT).

9 *Electronic Transactions Act 1999* (Cth); *Electronic Transactions Act 2001* (ACT); *Electronic Transactions Act 2000* (NSW); *Electronic Transactions (Northern Territory) Act* (NT); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act 2000* (SA); *Electronic Transactions Act 2000* (Tas); *Electronic Transactions (Victoria) Act 2000* (Vic); *Electronic Transactions Act 2011* (WA).

10 *Fair Trading (Australian Consumer Law) Act 1992* (ACT); *Fair Trading Act 1987* (NSW); *Australian Consumer Law and Fair Trading Act 2012* (Vic); *Fair Trading Act 1989* (Qld); *Consumer Affairs and Fair Trading Act* (NT); *Fair Trading Act 2010* (WA); *Fair Trading Act 1987* (SA); *Australian Consumer Law (Tasmania) Act 2010* (Tas).

11 This act was originally known as the *Trade Practices Act 1974* (Cth); it was renamed the *Competition and Consumer Act 2010* (Cth), as part of a major revision of Australian consumer law in 2010, by the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010*, Schedule 5, item 2. The provisions of this Act of most relevance to contract law are: (i) those in Part IV (and associated provisions) dealing with restrictive trade practices which prohibit certain agreements because they are anti-competitive; and (ii) those in the *Australian Consumer Law*, located in Schedule 2, which prohibit certain forms of conduct and create certain rights that have either an impact on contractual dealings generally, or only on those involving consumers, or consumer goods or services.

contract law, and that Australian texts, which do integrate local statutory modifications, may soon become dated in certain areas. As a result, it is important for anyone practising or studying contract law to be alert for statutory modifications to the common law—modifications which can sometimes appear in unlikely places.

b Contractual obligations are largely self-imposed

In contrast to most other areas of law, contractual obligations are largely self-imposed. Unlike, for example, the criminal law or the law of torts, which impose obligations upon individuals whether or not they consent to them, contract law merely provides a framework within which individuals can create their own rights and obligations if, but only if, they wish to do so. In *Baltic Shipping Co v Dillon*[12] Brennan J expressed this defining characteristic of a contract succinctly when he said that it was an institution 'by which parties are empowered to create a charter of their rights and obligations *inter se*'. As a result of contract law being of this nature, generally speaking, individuals are free to decide whether or not to enter into a contract at all; and if they do so decide, they are free to determine:

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

There are, of course, limits to this freedom. Thus, in some cases it is mandatory to enter into contracts; third party personal injury insurance in relation to the use of motor vehicles[13] and workers' compensation insurance[14] are prime examples. In other cases, terms are prescribed[15] or prohibited[16] for certain contracts. More common still, inequality in bargaining position and the associated use of standard form contracts often means that, in practice, if a person wishes to enter into a contract they must do so on the terms laid down by the other party. In such cases, by entering into the contract, the former is taken to have agreed to the latter's terms notwithstanding that they felt that they had no choice about the matter. Only if the dominant party's conduct constitutes duress or undue influence, or is unconscionable in some way, or the terms in question form part of a standard form consumer contract and are judged to be 'unfair', will such a contract be unenforceable.[17]

c The law of contract, not contracts

Unlike the position in some jurisdictions, Anglo-Australian common law recognises a general law of contract that applies equally to all types of agreements; in other words, that there is a law of *contract*, rather than a law of *contracts*. However, principally as a result of legislation, special rules have been introduced to govern particular types of contracts; examples include

12 (1993) 176 CLR 344 at 369.

13 See, for example, *Motor Vehicle (Third Party Insurance) Act 1943* (WA) s 4.

14 See, for example, *Workers Compensation Act 1987* (NSW) s 155.

15 See, for example, *Home Building Act 1989* (NSW) s 7.

16 For example, it is now common for consumer protection legislation to prohibit (in the sense of making void) contractual provisions that would take away the protection given to consumers by the legislation: see the *Australian Consumer Law*, s 64.

17 For a discussion of these topics see chapters 14–17, below.

those statutes dealing with contracts for the sale of goods, insurance, consumer credit, the carriage of goods, and building and construction. Typically, the focus of these statutes is the content of the contract and they leave the general law to govern its formation and the remedies for breach. However, in other cases aspects of these matters are also covered, and in some instances the operation of the general law is eliminated almost entirely.[18]

d Relationship with other branches of law

Contract and other branches of the law are not mutually exclusive. Thus, a particular event may give rise to rights or obligations under more than one regime. For example, consumers who purchase goods or services that prove to be faulty will have a remedy for breach of contract against the supplier for any loss that this causes them and a statutory right to claim compensation from that person.[19] In addition, if the goods cause personal injury or damage to other property, as well as a contractual claim against the seller, they will have a claim for the tort of negligence[20] and a statutory claim against the manufacturer.[21]

4 Contract theory

The description of contract law in the previous section is a traditional one and reflects what is often referred to as 'classical' and 'neoclassical' contract theory. Classical contract theory enjoyed its zenith during the heyday of laissez-faire in the nineteenth century and had at its centre the doctrines of freedom of contract and sanctity of contract. According to the former, individuals are the best judges of what is in their own interests and they should be 'free', within the broad limits of the criminal law and public policy, to contract upon whatever terms they wish. In the words of Lord Diplock in *Photo Production Ltd v Securicor Ltd*,[22] it is '[a] basic principle of the common law of contract … that the parties to a contract are free to determine for themselves what primary obligations they will accept'. The doctrine of sanctity of contract takes this concept one step further by saying that a contract, once made, is 'sacred' and should, therefore, be enforced according to its terms and not rewritten by the courts because they may think that the parties have made a bargain that is unsatisfactory in some way.

Developments in the twentieth century, however, revealed the practical limitations of the classical theory. In its pure form, it could not accommodate the sympathy that developed for those who lacked the bargaining power needed to protect their own interests, or the growing desire of the courts to intervene in order to ensure just outcomes. This saw it metamorphose into neoclassical theory. This process and the relationship between the two are explained further in the following extract.

18 For example, employment law is now almost entirely governed by subject-matter-specific statutory provisions.

19 Under the *Australian Consumer Law*, a consumer has certain statutory rights against the supplier of goods or services in relation to the quality of and title to the goods or services supplied: see ss 51–63 and associated remedy provisions.

20 See *Donoghue v Stevenson* [1932] AC 562.

21 Under ss 138–141 of the *Australian Consumer Law*, a consumer has certain statutory rights against the manufacturer of goods if those goods have a safety defect that causes injury or property damage.

22 [1980] AC 827 at 848.

Jay M Feinman, 'The Significance of Contract Theory'

(1990) 58 *University of Cincinnati Law Review* 1283

[at 1285]: 1. Neoclassical Contract Law

Modern contract law is often usefully referred to as neoclassical contract law. This term aptly situates today's contract law in its historical context. The essential quality of neoclassical contract is that it is the product of the attempt to accommodate classical contract law and subsequent critiques of it. The word 'neoclassical' suggests the partial nature of the accommodation, indicating that neoclassical contract has not so far departed from classical law that a wholly new name is appropriate. …

<1286> Classical law in general was structured by a series of dichotomies which defined the relationships among legal actors. For example, the Federal government and state governments had separate spheres of authority, as did legislatures and courts. The most fundamental dichotomy was between the individual and the community. Therefore, relations among individuals were governed by private law, which was distinct from public law, which regulated relations between individuals and the state. Within private law, contract law embodied the dichotomy between individual and community by imagining a realm of private agreement in which individual freedom was protected from state coercion. The image that motivated this realm was the isolated bargain between independent, self-interested individuals. Steely-eyed bargainers carefully calculated their interests in a particular exchange, gave a promise or performance only in return for something else, and embodied their transaction in an agreement that carefully defined the terms of performance and therefore could provide the basis for a determinate remedy in case of breach.

Accordingly, as conceived by classical contract law, liability was always voluntarily assumed by the individual through his making of a promise or an agreement, unlike in tort law, in which liability was imposed by the legal system without regard for the individual's consent. Contract doctrines such as narrow formation rules and bargain consideration followed logically from these principles and assured that the individual actually had consented to a bargained-for exchange. When courts mechanically applied these abstract, formal doctrines, they protected the individual's right to assume contractual <1287> obligation or to avoid it at the same time as they provided a predictable basis for commercial transactions.

The problems of classical contract law quickly became apparent to judicial and scholarly commentators. Contractual liability, like all other legal liability, did not arise solely from the individual's choice but came from the court's imposition of legal obligation as a matter of public policy; a contract was binding because the court determined that imposing liability served social interests, not because the individual had voluntarily assumed liability through his manifestation of assent. Nor could the parties' words in creating the contract exclusively define the scope of liability; courts had to interpret, fill gaps, and even impose pre-contractual and quasi-contractual liability, either to make the parties' contract meaningful in its commercial context or to serve social interests other than individual choice, such as fairness. Because of the inherent limits of language and the infinite variability of facts, courts could not state doctrinal rules in such a way that they could be mechanically applied to all fact situations that might arise; moreover, the changing needs of commerce made it undesirable to attempt to do so. … >>

As with classical law, neoclassical law can be evoked by presenting the image of its prototypical case as well as by describing its substance, method, and social role. The prototype of neoclassical contract posits parties in an economic relationship that is neither entirely isolated nor wholly encompassing. The parties seek individual advantage through the transaction, but their individual advantage is tied to the success of their mutual venture. The relationship arises through voluntary bargaining which defines the basic terms of the agreement, but the terms can only be understood by examining the context within which the agreement is reached, so that context sometimes supplies interpretations and additional terms.

Proceeding from this image, as a matter of substantive principle neoclassical contract law attempts to balance the individualist ideals <1288> of classical contract with communal standards of responsibility to others. The core remains the principle of freedom of contract, distinguishing contract from tort and other areas, but this principle is 'tempered both within and without [contract's] formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreements'. In deciding the scope of contractual liability, courts weigh the classical values of liberty, privacy, and efficiency against the values of trust, fairness, and cooperation, which have been identified as important by post-classical scholars.

Neoclassical contract accommodates these conflicting values through a method that is flexible and pragmatic. Logic and analytic rigor remain important in contract law because they are a source of legal authority and an important element of professional culture. In contrast to classical law, though, neoclassical law tempers rigid logic by the use of policy analysis, empirical inquiry, and practical reason. Contract doctrine, more often formulated as general standards rather than mechanical rules, guides judges, sometimes quite strongly, but it allows them enough discretion in hard cases to reach just, socially desirable results.

Through this flexible body of principles and methods for their application, neoclassical contract serves the important social goal of supporting and regulating economic transactions. It does this in two general ways. First, it provides a framework for parties who engage in business planning. The framework helps them to create legal relations, to determine their content, to avoid them altogether, and to sort out difficulties when planning goes awry. Second, it provides a background set of norms for fair market relations. Even without the direct threat of enforcement, these norms are used by business people to set standards and limits for their conduct.

This description of neoclassical contract law and how it has arisen should be largely unobjectionable. Mainstream scholars believe that the neoclassical adaptation has successfully responded to the defects of earlier contract law and that it can continue to evolve as the need for further development arises.

[footnotes omitted]

A valuable summary of some of the other theories that have been advanced to explain the nature of a contract and the existence of contractual liability are contained in the following extract.

Brian Coote, 'The Essence of Contract'

(1988) 1 *Journal of Contract Law* 91

[at 99]: The theories stated

a The will theory

Under the will theory, contracts are seen as expressions of the human will and, for that reason, as being inherently worthy of respect. In that premise are found both the justification of contract law and the basis of many of its incidents. The theory asserts the liberal principle of individual self-determination and the value of individual judgment and volition. Both are thought to be enhanced when two or more wills meet in agreement.

The idea of contract as an expression of will or intention can be traced back at least to classical Greece and Rome. Later it was developed particularly by the Pandectists, the scholars who reintroduced the study of Roman law to Europe from the Renaissance onwards. Through them the theory influenced provisions of the French and German Civil Codes as well as of Scottish law. In turn, it influenced the development of the common law in the nineteenth century, through the writings of such European theorists as Pothier and Savigny.

Associated with the will theory, or derived from it, have been the concepts of contract as agreement, of consensus *ad idem,* offer and acceptance, intention to contract, privity and the *vinculum juris,* and construction and interpretation by reference to the intention of the parties. The theory has also lent support to defences such as mistake, misrepresentation, duress and undue influence and hence to the idea that consent to a contract should be full, free and true. In the common <100> law of the classical period, perhaps its best-known manifestation was freedom of contract, a doctrine which both reinforced, and was itself reinforced by the then-prevailing philosophy of laissez-faire. So pervading did that doctrine become that it found its way into the constitutions of both the United States and Germany.

Subject to a limited number of restrictions, the law of contract could be seen to have delegated to individual citizens a form of legislative authority. While this could mean that one party could place him or herself to some degree under the control of another, the power to do so was itself an expression of individual autonomy and an incident of freedom. The most often-quoted judicial statement of the freedom of contract doctrine was that of Sir George Jesse in the 1875 case of *Printing and Numerical Registering Co v Sampson* where he said:

> if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice.

In the common law context, however, the will theory has its weaknesses, both as a justification for the enforcement of contracts and as a basis for prediction. Under the postal rule, for example, it is clear that an offerer could be bound to an offer he had already attempted to withdraw. The theory is also prima facie incompatible with the existence of implied-by-law terms. The most obvious weakness is the impossibility in practice of determining what the will of the parties might be, even supposing an exact concurrence of wills could ever exist about all aspects of any particular contract. The common law response has, of course, been to apply objective tests of will and intention. The parties are bound, not by what they actually intended, but by the inferences to be drawn from what they said and did. This objective approach has meant that a search for the apparent intention of the >>

parties has been a practical possibility. But it also means that the existence of contract law can hardly be justified by reference to some mystical need to give effect to the human will, since it is not necessarily the actual will which is the determinant.

The use of standard forms which gained momentum in the nineteenth century and which has accelerated since, has also undermined the idea of consensus *ad idem.* There has, too, been a retreat from the notion of freedom of contract, coinciding with a retreat from laissez-faire <101> economics which has only recently been reversed. These matters will be adverted to again in due course.

b The bargain theory

The bargain theory is a common law development from the notion of contract as agreement. It incorporates what has been called the bargain theory of consideration, attributed in the United States to O W Holmes, which sees consideration in terms of reciprocal conventional inducement. The distinguishing feature of a contract at common law is said to be a bargain or exchange between the parties. As a theory it is necessarily confined to the common law system, which is the only one to contain, through the doctrine of consideration, any requirement of reciprocity between the parties.

… *Cheshire & Fifoot* subscribe to this theory. They are seemingly not alone. Professor C J Hanson, for example, has suggested that 'consideration, offer and acceptance are an indissoluble trinity, facets of one identical notion which is that of bargain'. The requirement of reciprocal consideration ensures that the parties make their undertakings to each other and that, since each makes a 'payment', each desires those undertakings to be made. The bargain theory, therefore, reinforces the ideas of privity, request and mutuality.

An obvious drawback to the theory is its exclusiveness. Not only has it to be confined to contracts at common law. Within the common law it fails to include contracts by deed made without consideration. On the other hand, it can also be argued in its favour that it does not exclude the possibility of gratuitous contracts. Even if simple contracts must be bargains, the common law does not require any equivalence of exchange. If the promise of a peppercorn can be a sufficient consideration, the bargain theory could be said to include the possibility of a contract being made by way of gift, otherwise than by use of a deed.

c The promise theory

The promise theory says in effect that contracts are promises, that promises should be kept, and that it is therefore appropriate that the law should enforce them.

The idea of a promise as something to be kept is an ancient one and has drawn support from the Jewish, Christian and Muslim religions. The nearest Roman law came to a general type of contract took the form of a ritual promise. In Roman times and since, the bindingness of <102> promises has been seen to be required by natural law. In England, promises were important to the Anglo-Saxons. For centuries they were also enforced by the ecclesiastical courts. In the King's courts, the writ of *assumpsit* was, in form, an action on the case for damage caused by breach of promise. In more recent times, as we have already seen, textbook definitions of contract have frequently been cast in terms of promise, as was the definition in the Restatement of Contracts.

The promise theory, then, has the advantages of reflecting a practice of some antiquity and of giving legal expression to widely held intuitions of what is fair and right. It is not confined to agreements. But as a theory of contract it, too, has its drawbacks. It assumes that contracts are enforced because they are promises but, in practice, no legal system >>

has ever enforced every promise and life would be intolerable under any system which did so, human nature being what it is. On the other hand, as has already been pointed out, some promises are nowadays enforceable which would not have been recognised as contracts under classical common law. There are problems too about what comprises a promise, why promises should be kept and why the law should intervene to enforce them.

It seems generally to be agreed that promisors place themselves under obligation to their promisees and in that sense surrender a measure of autonomy to them. Promises are seen as voluntary acts and the resultant obligation as being in some sense or another voluntarily incurred by the promisor. There is less agreement as to what constitutes a promise. Some regard it as merely an emphatic expression of intent, a statement of resolve or commitment, or a prediction. For others, it depends on an intention by the promisor to accept obligation in respect of whatever he or she has undertaken. The problem of futurity has already been mentioned.

<103> As to why promises should be kept and, in particular, why the law should intervene to enforce them, there is again an absence of agreement. In the past, morality and religion have been accepted reasons. Professor Roscoe Pound argued that the extensive modern use of common forms had, in itself, 'relaxed' the claims of morality for the enforcement of contracts. Even so, Professor Fried has recently argued the moral basis of contracts. More widely acceptable nowadays might be claims of utility and convenience. Promising can be regarded as a socially useful practice which it is in the interests of society to foster and protect. It could be said to provide facilities for its members in the form of systems of rules which give them the power, at their choice, to place themselves under obligation.

This latter view of promises, too, has its detractors, principally on the ground that it presupposes an intention to be bound on the part of the promisor. If promises depend on intention, argued Adam Smith, a promise made without an intention to perform it would never be binding. Other commentators would claim that the search for intention is an unnecessary fiction. In practice, of course, the common law derives intention objectively, on the basis of the appearance of what the promisor has said and done.

For himself, Adam Smith preferred to found obligation on the reasonable expectations induced in the promisee. Some later commentators have taken the argument a step further by basing obligation on reliance by the promisee in pursuance of his or her reasonable expectations. These approaches have both been sufficiently important in contract theory to justify separate treatment here.

d The reasonable expectations theory

Adam Smith's theory of the foundation of contract law has come down to us in transcripts made by his students of his lectures in Jurisprudence. He based the obligation to perform a contract on the reasonable expectations induced by a <104> promise and the disappointment of those obligations occasioned by breach.

In the classical period and since, views similar to those seem to have been shared very widely. In England, for example, they have appeared in such textbooks as *Pollock, Holland, Salmond, Anson* and *Cheshire and Fifoot* and to have had the endorsement of Austin and Goodhart. In the United States, they were supported by *Corbin* and were incorporated by Roscoe Pound into one of his jural postulates. In Canada they have the support of contributors to *Studies in Contract Law* and are endorsed, for example, in Professor Waddams' *Contract* text. So widespread has been their acceptance that they have been described by Professor Atiyah as being now traditional. >>

It is not immediately obvious why the reasonable expectations theory should have held so much appeal, for so long. No doubt, promises and contracts do usually raise expectations and in most cases are intended to do so. But in practice, the raising of reasonable expectations is neither sufficient nor necessary for the existence of a promise or contract. A statement that I am likely to call at your home on Saturday afternoon may well raise expectations of a visit but it would not be a promise. On the other hand a statement would not be any less a promise merely because the promisee did not believe it could or would be performed. And a promise made by deed can be a binding contract even though the beneficiary is unaware of its existence. Then, too, there is a certain circularity in the theory. What marks it as especially reasonable to base expectations on a promise or contract if not that it is regarded as binding?

There is a further problem in the nature of expectation itself. Life is full of disappointments but we do not ordinarily expect the law to make <105> provision for them to be compensated, even when the expectations themselves are reasonable. And if contract law exists to protect reasonable expectations, how are we to explain the decision of the House of Lords in *Addis v Gramophone Co Ltd,* the effect of which in most cases is to deny compensation for the 'disappointment of mind' caused by breach of contract?

It was doubtless reasons of this kind, at least in part, which led to the development of the reliance theory.

e The reliance theory

This theory, in its strongest form, is that a contract arises (or should arise) whenever a promisee has relied upon a promise in a way which would cause detriment if it were not kept. Writing in 1933 about justifications for contract liability, Professor M R Cohen described it as 'the favourite theory today'. Since then, it has attracted strong support from Fuller and Perdue in their famous 1937 article on 'The Reliance Interest in Damages' and, in more recent times, from Professors Horwitz and Atiyah in particular.

Since it is based on loss or injury to the promisee, the theory has the advantage of appearing both objective (in not depending upon the intentions of the promisor) and fair (in visiting liability on the one who by inviting reliance has caused the loss or injury). It appears, too, to draw some historical justification from the earliest actions in *assumpsit*, which could be said to have been based on loss or damage suffered as the result of reliance on the defendant's promise. Professor Cohen recognised that in basing liability on loss or damage the theory would appeal to those who wished to see contract integrated with other forms of obligation and particularly with tort.

Nevertheless, as a theory of contract it has serious limitations. For example, damages in contract characteristically are measured not by the loss suffered by the promisee in reliance on the promise but by the loss <106> resulting from the promisor's failure to perform. The promisee is entitled in general to be put in the position he or she would have occupied had the contract been performed, the so-called 'expectation' measure. Fuller and Perdue's answer to this objection was to extend their concept of 'reliance' to include failure by the promisee to make alternative contractual arrangements in reliance on the promise (lost opportunity costs). On that basis, they suggested, the expectation measure was essentially a rule-of-thumb means of assessing reliance loss, followed by the courts for the sake of efficiency and convenience.

The reliance theory also seemingly fails to explain why, as is the case, executory contracts are binding from the moment of their formation and are enforceable independently >>

of whether either party has acted to his or her detriment. Professor Atiyah would answer that the law has been wrong in this respect. A less drastic answer might be to say that, in enforcing wholly executory contracts, the object of the law is to protect not only particular acts of reliance but also the practice of relying on contracts generally.

A third difficulty is that neither reliance nor a tendency to induce reliance is either sufficient or necessary for the existence of a contract. Promises made in a social context, such as an invitation to dinner, may induce reliance but are not contracts. The same can be true of invitations to treat, such as advertisements for the holding of an auction, or offers such as tenders, which may induce reliance before being withdrawn. On the other hand, a contract by deed can bind even though it has not been communicated to, let alone been relied upon by, the promisee. Like the reasonable expectations theory the reliance theory also contains an element of circularity.

Finally, the reliance theory bases contractual obligation, not on what a promisor said or did, but on the reactions of another to those things. As such it would be a potential instrument for the imposition of obligations for which the promisor had not contracted.

f Miscellaneous

In his 1933 article on the basis of contract, Professor Cohen identified three theories in justification of contract liability apart from those already mentioned. <107>

One was a theory of O W Holmes that the parties to a contract had in effect an option to perform it or pay damages. In respect of matters outside the control of a promisor, the theory contains an element of truth. The same could be true of cases where the law does not allow for specific enforcement. But as a theory of contract generally, it is inconsistent with the availability of specific performance and of actions in debt for the recovery of contract sums.

A second theory was that the formalities associated with contracts in different cultures and at different times were not only designed to make evidence secure but were also, in large part, expressions of a fundamental human need for formality and ceremony. This theory draws attention to what may well be an important feature of formation but it does not, for example, supply any very obvious explanation of or justification for contract liability, let alone indicate what constitutes a contract.

The third theory, which Cohen put forward as his own, was that the role played by the State in contract enforcement made the law of contract part of public law. The law was justified in placing limitations on the extent of the parties' freedom to invoke the power of the State. Again, the emphasis of the theory is on just one feature of the law of contract, albeit an important one.

[footnotes omitted]

5 Australian contract law

As will be apparent from the material that follows, Australian contract law is largely derived from England. When the various colonies were established in the eighteenth and nineteenth centuries the colonists brought with them the English common law, including those statutes—such as the *Statute of Frauds 1677* (Imp)—that could be applied locally. Even after the colonies gained independence, English court decisions continued to be influential;

indeed, it was not until 1963 in *Parker v The Queen*[23] that the High Court finally decided that it was free not to follow decisions of the House of Lords. English statutes have also been influential and many local provisions are merely adaptations of them.[24] Therefore, it is not surprising that extracts from English cases appear frequently in this work. However, Australian contract law is increasingly diverging from its English counterpart. Our courts are developing the common law differently from courts in England and our statutes are creating a distinct Australian law. The significance of this for contract scholarship and practice is considered in the following extract.

MP Ellinghaus, 'An Australian Contract Law'

(1989) 2 *Journal of Contract Law* 13

[at 28]: Diminution of English influence

What is at stake is not, of course, the development of a law of contract branded with specifically Australian virtues and loaded with local colour, or isolated from outside influence, but simply one that cleaves to our own social condition. Although some similarities between English and Australian society continue to exist, rooted as they are in language <29> and modern history, and reinforced by the continuing import of English immigrants, entertainments and ideas, it is nevertheless true that there are fundamental differences between the two countries. For example, Australians inhabit a continent of 7,682,000 square kilometres with a population density of 2.1 per square kilometre; the English inhabit an island of 244,000 square kilometres at a density of 231.3 per square kilometre. In 1986 3.4 million of a total population of 16 million, or one in five, Australians were foreign born; of these, 2.2 million, or one in seven Australians, were from other than the United Kingdom, Ireland and North America, in other words, from legal systems presumably not derived from the English model. In the United Kingdom 3.3 million of a total population of 56 million, or one in 17, was foreign born.

Moreover, Australia is situated in proximity to Asia and Oceania, where its trading partners are increasingly to be found, and which supply an increasing percentage of its immigrants. The United Kingdom is an island adjunct of Europe, on the opposite side of the globe, and is now a member of the European Economic Community. Increasing divergencies in the law of contract are a certain result of their respective situations.

Such points of comparison may vary in the degree to which they manifestly bear on issues of legal order, and specifically on the issue whether the contract law of the one place should be hitched to that of the other. Nevertheless they are structurally significant for the functioning of their respective societies. Given 'the profoundly indigenous sources of social being', the differences which they reflect must have enough impact on transactions to make it unwise to apply to the contracts of one the law devised in the other. Despite this, the combined efforts of Australian judges, practitioners, and scholars have created a situation in which, notwithstanding its formal independence, much of Australian contract law continues to be made in London. We have continued to <30> accept 'ready-made solutions from the United Kingdom instead of evolving answers for ourselves'. >>

23 (1963) 111 CLR 610.

24 The state and territory Sale of Goods Acts are a prime example, each being modelled on the *Sale of Goods Act 1893* (UK).

Affirmative action is needed to accelerate the rate of change in this situation. All ex-colonial cultures must endure this irritating phase of 'self-conscious attempt to turn one's back on the parent tradition and to create a new one rooted in the native soil', before reaching a stage 'where self-consciousness has largely disappeared'.

The routine citation of English cases should therefore be dropped. This is so particularly of the 'classic decisions'. 'The classic decisions—usually English—should not be omitted merely because of their age or origin', say the authors of the most recent of our casebooks on contract. The revealing phrase in this otherwise unexceptionable proposition is that between hyphens: 'usually English'. Whose classics are we talking about? Would it not seem odd now in, say, literature, painting or history, to number Wordsworth, Constable, or Gibbon among ours?

It is not enough, moreover, merely to stipulate that 'if there is relevant Australian authority it should be cited in preference to English authority'. Contingencies which have not yet been considered by Australian courts are contingencies for which there is as yet no specific Australian rule, and for which the leeways of choice are open. The argument in such a case should be about what principle is best applied in Australia, not about the degree of persuasiveness of an English decision in point.

Above all, Australian contract lawyers need a much more vigorous and comprehensive exposure to their own case law. The space taken up in Australian reports, casebooks and texts by the discussion of English precedent is not vacant space, but could be filled many times over with Australian material. Only the full exposure of that material, and its scrutiny without the constant bifurcation of attention to English doctrine, will enable such questions to be answered as: What elements of contract law have been found to be most important for transactions in and with Australia, situated in its particular global, continental and social geography? What are the most articulate opinions, the best passages, the classic dicta, of Australian judges and commentators? Precisely to what doctrine are we committed by Australian decision, and what remains in the realm, at best, of the persuasive? In law above all, with its constant tendency to ossify, it is important that Australian lawyers realise fully the extent of their leeways of choice; without this <31> realisation the will and capacity to devise their own solutions must remain stunted.

[footnotes omitted]

6 Classification of contracts

Contracts can be classified in a number of different ways. Among the more important are the following.

a According to whether one or both parties are bound

Most contracts are two-sided transactions in which both parties make enforceable promises to each other. Such contracts are called 'bilateral' because they give rise to obligations on the part of both parties. In the case of some contracts, however, only one of the parties makes a promise. Such contracts are called 'unilateral' because, while there are still two parties involved, they impose an obligation on only one of those parties.

b According to whether the contract is under seal

If a contract is reduced to writing and sealed by the parties to be bound—that is, signed and expressed by them to be delivered as a deed—the contract may be described as a 'formal' or 'specialty' contract. All other contracts (which constitute the vast majority) are known as 'informal' or 'simple' contracts. These latter descriptions are somewhat misleading as they apply not only to contracts expressed orally, with little or no formality, but also to contracts that are recorded in writing with great care and sophistication.

c According to whether terms are express or implied

Contracts are 'express' when the parties actually articulate all, or most, of the terms of their contract. A contract is 'implied', on the other hand, when no terms are expressed by the parties but a contract is found to exist because of the parties' conduct. Few contracts are entirely 'implied' in this sense. However, it is common for an express contract to contain some implied terms.

d According to the subject matter

An enforceable contract can be made about any subject matter provided the contract is not illegal at common law or under statute. Whatever the subject matter, the contract law applicable will, to a great extent, be the same. However, special rules have been developed in relation to certain subjects with the result that it is sometimes necessary to categorise a contract as being about one subject or another. Common examples of classification in this manner include contracts for the sale of goods, contracts for the sale of land, contracts of insurance (and there are even special rules depending upon the type of insurance), contracts of employment and consumer credit contracts.

e According to their effectiveness

Because of a defect associated with its formation, a contract may be wholly, or partially, unable to create the rights and duties the parties intended. The most extreme case occurs where a contract is rendered 'void'; that is, totally ineffective. In such a case, as the contract has no effect, it will not transfer property between the parties or create any other contractual rights or obligations. The dealings between the parties may, however, give rise to rights or obligations that are non-contractual in nature. On the other hand, if a contract is merely 'voidable' it will be operative unless and until it is set aside by the party who, because of the defect involved, has the power to do so. Until that party elects to avoid the contract, it can transfer property and create other contractual rights and obligations although, in some cases, these may be reversed when avoidance occurs. Finally, a contract may be 'unenforceable'. Such a contract is valid in all respects and can transfer property and other benefits should the parties choose to ignore its unenforceability. However, should they not do so, the rights and obligations it creates cannot be enforced by one or both of them. The most common cause of a contract being unenforceable is non-compliance with a statutory formality, such as a requirement, in the case of contracts relating to land for example, that it be recorded in writing.

f According to the parties

Consumer protection legislation, such as the *Australian Consumer Law* (the *ACL*), sometimes creates a distinction between consumer contracts and commercial or business contracts, conferring protection only in relation to the former. Broadly speaking, consumer contracts are those made by private individuals seeking property or services for personal use or consumption. For example, for the purposes of the unfair contract terms provisions of the *ACL* a 'consumer contract' is defined in s 23(3) as a contract for the supply of goods or services, or a sale or grant of an interest in land, 'to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption'. However, it should be noted that there are other definitions in the *ACL* that have the effect of defining a consumer contract more broadly for the purposes of other provisions of the Act. A prime example is the definition of 'consumer' in s 3 which is broad enough to encompass some small business transactions. Commercial or business contracts, on the other hand, are contracts made by businesses seeking property or services for the purpose of resupply, or for use in some other commercial or business enterprise.

7 Key terms and abbreviations

Your study of contract law will introduce you to a number of terms, phrases and abbreviations with which you may be unfamiliar, or which have a special meaning in this area of law. To familiarise you with them quickly, a brief explanation of these terms and phrases and a reference to the corresponding pages in the book, are set out in the following table.

Term/abbreviation	Meaning	Page number
Ab initio	From the beginning. A **contract** terminated *ab initio* is terminated from the beginning and treated as if it never existed; cf ***in futuro***.	309
Acceptance	An affirmative response to an **offer**; a communication from a person (the '**offeree**') to whom an offer has been made saying, in effect, 'yes' to an offer made to them by another person (the '**offeror**').	54–78
Accrued rights	Rights that a person has acquired under a contract before it was discharged (terminated).	615
ACL	The ***Australian Consumer Law***. This is found in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). It is Australia's main consumer protection statute.	
AG	Attorney-General; the principal law officer of a state or federal government.	
Agreement	An understanding between two parties that one of them will do something, or promise to do something, if in return the other does something, or promises to do so.	32–34
Agreement under seal	An **agreement** recorded in a deed. Originally, this required the document to be 'sealed' by the person to be bound and delivered to the other person. However, what is now required is prescribed by statute in each jurisdiction.	19; 117
Anticipatory breach	A breach that occurs before the **contract** is due to be performed. It will occur if one party repudiates the contract (in effect, says that they will not perform) or if it is clear that they will be unable to perform when performance is due. It allows the other party (the innocent party) to discharge the contract.	599

Term/abbreviation	Meaning	Page number
Australian Consumer Law (*ACL*)	The statutory provisions contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), designed to protect the interests of consumers and ensure that businesses compete with each other honestly and fairly.	
Bilateral contract	A **contract** in which each party makes a promise to the other. Most contracts are of this nature; cf **unilateral contract**.	18; 82–86
Capacity	The ability to make a **contract**. For example, as a general rule, a person lacks contractual capacity until they are 18 years old.	173–191
Caveat emptor	'Let the buyer beware.' According to this maxim, a buyer cannot complain about the quality of goods they have purchased unless the seller made a promise or representation about their quality, or they are covered by a **consumer guarantee**.	
Collateral contract	A **contract** that is separate from and subordinate to another contract between the parties.	242–246
Common law	The unwritten law in each jurisdiction; that is, judge-made law—the law derived from the reasons given by judges for deciding cases, rather than from statutes made by parliament.	
Common mistake	The same mistake made by the parties to a contract; cf **unilateral mistake** and **mutual mistake**.	365–378
Condition	This term has several meanings. Its principal use is to describe a term that is so important that any breach of it by one party will allow the other to terminate the **contract**; cf **warranty** and **innominate term**.	282–284
Condition precedent	A **condition** that must be fulfilled before a **contract**, or a term of a contract, will become binding.	281
Condition subsequent	A **condition** which, should it occur, will bring the **contract** as a whole, or certain rights and obligations, to an end.	281–282
Consensus ad idem	A meeting of minds; an agreement about a certain subject matter.	32
Consideration	Something the law treats as valuable, stipulated by the **promisor** as the price for their **promise**—what they ask for in exchange for the promise. As a general rule, in common law jurisdictions (such as Australia), consideration is essential to the existence of a **contract**.	116–154
Consumer contract	For the purposes of the ***ACL***, a **contract** for the supply of goods, services or an interest in land to an individual (as distinct from a corporation) who acquires them wholly or predominantly for personal, domestic or household use or consumption: see s 23(3) of the *ACL*.	20; 491–492
Consumer guarantees	The 12 statutory guarantees about goods and services created by the ***ACL***. They impose obligations on suppliers in favour of consumers that cannot be excluded by the **contract** of supply; cf **statutory implied term**.	266
Contra proferentum	A rule of construction to the effect that, if a document is ambiguous, it will be construed against the party responsible for its drafting.	281; 297
Contract	A **promise**, or set of promises, that is legally binding.	4
Counter offer	An **offeree's** response to an **offer**, indicating a willingness to enter into a **contract** with the **offeror** but on terms different from those specified in their offer.	59
Duress	Some form of illegitimate pressure used by one party to force another into a transaction, such as a **contract** or transfer of property.	396–417

(*continued*)

Term/abbreviation	Meaning	Page number
Duress of goods	**Duress** in which the form of illegitimate pressure used is the threat by one party to wrongfully damage or withhold goods belonging to the other.	402–404
Duress of the person	**Duress** in which the form of illegitimate pressure used is the threat by one party to physically harm or falsely imprison the other person, or a near relative of that person.	400–402
Economic duress	**Duress** in which the form of illegitimate pressure used is the threat by one party to wrongfully damage the other's economic interests.	404–411
Entire contracts	**Contracts** in which the performance of each party's **promises** depends upon the other party performing theirs; in other words, if A does not perform, then B does not have to do so; cf **severable contracts**.	561–564
Equitable remedies	Remedies available in **equity**. They are discretionary; that is, a successful party can obtain them only if the court considers this necessary to achieve a just outcome.	720–749
Equity	A branch of the unwritten law concerned with achieving fair or just ('equitable') outcomes when the strict application of the **common law** might not do so.	
Exclusion (or exception or exemption) clause	A clause designed to exclude, or limit in some way, one party's liability to the other, or to exclude or limit the latter's right to take legal action against them.	290–308
Express terms	Terms that are actually articulated by the parties, orally or in writing, as they negotiate their **agreement**.	237–256
Formal (or specialty) contracts	**Contracts** recorded in a deed.	19
Freedom of contract, doctrine of	The doctrine that parties to a **contract** are the best judges of what is in their interests and therefore should be free to contract on whatever terms they chose. Its significance has been reduced where the law has intervened to protect the interests of those, such as consumers, who have little or no bargaining power.	9
Honour clause	A term in a **contract** saying that the contract is to be binding in honour only, rather than legally enforceable.	166
Illusory agreement	An **agreement** that is not a contractual agreement because it makes performance of one party's **promises** entirely a matter for their discretion.	91–94
Illusory consideration	Something proffered as **consideration** but which is not regarded as real; therefore, it is not 'good consideration'.	123; 125
Implied terms	Terms forming part of a **contract** even though they were not articulated by the parties when they reached their **agreement**. They may be implied by the **common law** or created by statute.	256–268
In futuro	For the future; a **contract** terminated *in futuro* is terminated for the future only, so that the rights and obligations it created before that time will remain.	555; 615
In pari delicto	Equally culpable.	546
Informal (or simple) contracts	**Contracts** not under seal; that is, contracts that are not recorded in a deed. Most contracts are of this nature, even though, rather than 'simple', they may be highly complex.	19

Term/abbreviation	Meaning	Page number
Intermediate (or innominate) term	A term that cannot be characterised as a **condition** or **warranty** when the **contract** is made. Whether breach of such a term will allow the innocent party to discharge the contract depends upon how serious the breach is in the circumstances of the particular case.	284–288
Invitation to deal (or treat)	A communication from one person inviting another to initiate negotiations for a possible **contract**; a request that they make an offer to enter into a contract.	37–45
Joint promisees	Two or more persons to whom an **offer** is made.	129–130
Misleading conduct	Conduct that leads into error those to whom it was directed. It is prohibited by s 18 of the ***ACL*** and in practice is the principal ground relied upon by the victims of objectionable pre-contractual conduct when seeking to have the **contract** set aside.	313–352
Misrepresentation	A false statement of fact. If it induces the representee to enter into a **contract** with the representor, the former can elect to rescind the contract from the beginning: ***ab initio***. It may be 'innocent' (where the representor was unaware of the falsity) or 'fraudulent' (where the representor was aware of the falsity or reckless about the truth).	353–357
Mutual mistake	Both parties are mistaken, but about different things.	378–380
Non est factum	'Not my deed'; a plea that a person should not be bound by a document they have signed because, as a result of suffering from some disability, they were mistaken about its very nature.	389–392
Offer	A **promise** by one person (the '**offeror**') to do something, or not to do something, if the person to whom it is addressed (the '**offeree**') responds in a stipulated manner.	35
Offeree	The person to whom an **offer** is made.	35
Offeror	A person who makes an **offer**.	35
Parol (or extrinsic) evidence	Oral evidence; evidence that is given verbally.	275
Parol (or extrinsic) evidence rule	The rule that, where the parties have recorded their agreement in writing, **parol evidence** (verbal evidence of matters extrinsic to the document) cannot be given to subtract from, or add to, or vary the written document.	375–380
Part performance, doctrine of	The **equitable remedy** allowing a **contract** to be enforced, even though the parties have not complied with the formalities required, where the party wishing to enforce the contract has acted in accordance with its terms.	203–207
Postal acceptance rule	The rule that an **offer** is **accepted** when and where a letter of acceptance is posted, rather than when and where it is received by the **offeror**. It applies only if communication of acceptance by post was contemplated by the offeror.	69–72
Privity of contract, doctrine of	The doctrine that a person who is not party to a **contract** (in other words, is 'a third party') cannot enforce the contract, or have the contract enforced against them.	211–235
Promise	An undertaking to do something if the person to whom it is addressed does something, or **promises** to do so, in return.	32
Promisee	The person to whom a **promise** has been made.	118
Promisor	A person who has made a **promise**.	118

(*continued*)

Term/abbreviation	Meaning	Page number
Quantum meruit	A claim for the value of work carried out for the benefit of another person, where the latter requested or accepted the work in circumstances making it clear that it was to be paid for.	201–202
Quid pro quo	Something given in exchange for a **promise** or something else; in effect, **consideration**.	119
Rectification	The correction of a document to make it comply with the terms of the **agreement** reached between the parties; in effect, it allows the correction of typographical errors.	376–377
Restitutio in integrum	Restoration of the parties to their original position—the position they were in before the **contract** was made.	309
Sanctity of contract, doctrine of	Once a **contract** is made, it is 'sacred' and should, therefore, be enforced according to its terms. In particular, it should not be rewritten by a court merely because it proves to be improvident for one of the parties.	9
Severable (or divisible) contracts	**Contracts** in which each party must perform their obligations regardless of whether the other party has done so; in other words, A has to perform even if B has not; cf **entire contracts**.	566–567
Severance	The excising of the objectionable parts of a **contract** from the rest, where the latter is capable of operating alone.	105; 551
Standard form contracts	A **contract**, the precise terms of which are not negotiated between the parties. Rather, one party, in effect, requires the other to agree to its prepared standard terms if they wish to enter into a contract.	492–493
Statutory implied term	Terms implied into a **contract** by a statute. Examples include the terms implied into contracts of sale by the Sale of Goods Acts. As far as consumers are concerned, the most important ones have been superseded by the consumer guarantees created by the ***ACL***.	266
Substantial performance, doctrine of	The doctrine allowing a party who is in breach of **contract** to recover what they were due under the contract, less compensation for the cost of remedying the breach.	564–566
TPA	The *Trade Practices Act 1974* (Cth). This Act deals with competition and consumer matters and was renamed the *Competition and Consumer Act* in 2010 (Cth).	7
Unconscionable conduct	Conduct against good conscience. It occurs when one party takes advantage of a special disability suffered by the other to secure the latter's participation in a transaction that is unfair to them. It will make the transaction voidable in **equity**; it is also prohibited by ss 20 and 21 of the ***ACL***.	436–487
Unfair contract terms	For the purposes of the **ACL**, an unfair **contract** term is one that would unnecessarily cause a significant imbalance in the rights and obligations of the parties to the detriment of the party disadvantaged by the term: see s 24. They are **void** if contained in a **standard form consumer contract**: see s 23.	488–512
Unilateral contract	A **contract** in which only one of the parties makes a **promise**; cf **bilateral contract**.	18; 82–86
Unilateral mistake	Where one party is mistaken about an aspect of the **contract**, but the other is not. The unmistaken party may or may not be aware of the other's mistake.	380–387
Void	A void **contract** is one that is completely ineffective. At no stage is it operative and therefore cannot create contractual rights or impose obligations; cf **voidable**.	311

Term/abbreviation	Meaning	Page number
Voidable	A voidable **contract** is one that is operative unless and until it is set aside. Being of this nature, it can create contractual rights and obligations until that time; cf **void**.	309–310
Warranty	This term is used in several different senses. It may mean any term in a **contract**; or it may mean a particular type of term, namely a term of secondary importance—the breach of which will not allow the innocent party to terminate the contract; cf **condition** and **intermediate term**.	284

INTERNATIONAL PERSPECTIVES

Because of its English origins, some international perspective is inherently part of Australian contract law. In addition, as English influences on our law have waned, those of other countries—especially those sharing our common law heritage, such as the United States, New Zealand and Canada—have increased. As a result, Australian contract law has not developed in splendid isolation and this is reflected in the materials we have selected in the following chapters. In addition, we have included specific international perspectives from India and China. There are two reasons for choosing these jurisdictions. In the first place, they are countries that are becoming increasingly important to Australia. China is now Australia's largest trading partner and our commercial links with India are destined to expand rapidly. Consequently, it will be advantageous for Australian lawyers to have some familiarity with the commercial law of those countries. Second, India and China present valuable perspectives from which to evaluate Australian law. The *Indian Contract Act, 1872* put into statutory form much of the common law of contract that India had adopted from England. Consequently, comparing and contrasting its provisions with current Australian law will deepen and enrich our understanding of the latter. This is also the case with the *Contract Law of the People's Republic of China*, adopted and promulgated in 1999. This was formulated after an extensive review of contract law regimes around the world, including Australia's, and although many of its provisions are directed towards uniquely Chinese situations it nevertheless represents one important view of what an ideal contract law would look like.

a. Background to the *Indian Contract Act, 1872*

Ancient Indian law did not recognise a separate law of contract.[25] As a result, during the period of English colonial rule, especially in the eighteenth and early nineteenth centuries, the English common law was introduced into India. However, its relationship with local law—which did regulate particular forms of commercial activity—was ambiguous; so much so that the Second and Third Law Commissions in India suggested codification of contract law. This resulted in the passage of the *Indian Contract Act, 1872*. Sections 1–75 of this Act contain general provisions that apply to all agreements. Subsequent parts then deal with indemnities and guarantees, bailment and agency. Originally, the Act also dealt with the sale of goods and partnership; these matters have since been made the subject of separate statutes.[26] The *Indian Contract Act* is not a code; that is, it does not purport to deal with all aspects of contract law, and s 1 specifically preserves 'any usage or custom of trade, [or] any incident of a contract, not inconsistent with the provisions of this Act'.[27] As a result, the common law as interpreted by Indian courts continues to apply where the Act is silent.

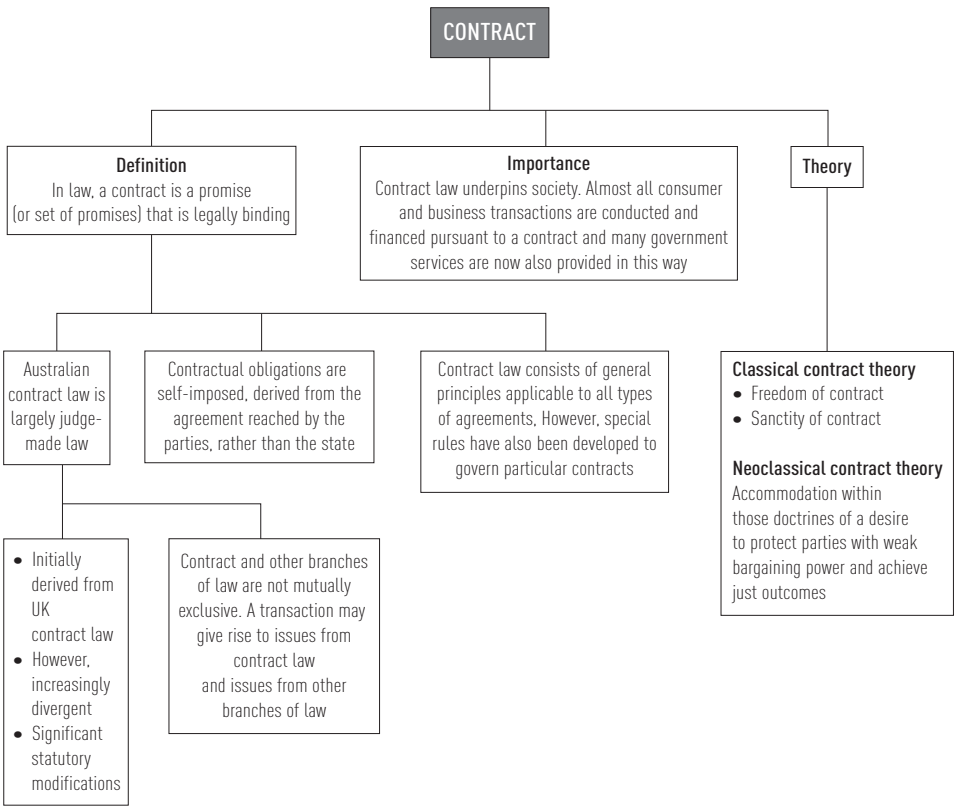
b. Background to the *Contract Law of the People's Republic of China, 1999*

The first meaningful attempt to develop contract law in China was in 1911 during the Qing Dynasty. This Draft Civil Code was largely modelled on the Japanese Civil Code and disappeared together with the last Chinese emperor when the Republic of China was established in 1912. >>

25 See generally, HK Saharay, *Dutt on Contract*, 10th edn, Eastern Law House, Kolkata, 2006.
26 See *Sale of Goods Act 1930* and *Indian Partnership Act 1932.*
27 See also the comments to s 1 of the *Indian Contract Act, 1872*.

In 1929 the Republic of China promulgated a new Civil Code, the development of which was influenced by European and Japanese codifications of contract law. However, after the establishment of the People's Republic of China (PRC) in 1949, this Code was abolished and contract law remained undeveloped during the formative years of the new regime. This situation became untenable with the rapid expansion of the Chinese economy following the reform programs and open-door policies introduced after 1978. These saw business activity grow in scale and complexity, both domestically and internationally, and necessitated significant reform. Three statutes were enacted in response—the *Economic Contract Law* (the *ECL*) in 1981, the *Foreign Economic Contract Law* (the *FECL*) in 1985 and the *Technology Contract Law* (the *TCL*) in 1987. Unfortunately, each of these statutes was drafted to deal with a particular type of economic activity and none was applicable to all commercial transactions, with the result that gaps remained in some areas and overlap and inconsistency occurred in others. This led to calls for the development of a unified contract law to accommodate China's business and social needs. After Chinese legislators had spent six years examining the contract laws of civil and common law countries and various international models, the result was the promulgation on 1 October 1999 of the *Contract Law of the People's Republic of China* and the repeal of the *ECL, FECL* and *TCL*.[28]

8 Summary



28 For a detailed account of the development of Chinese contract law, see B Ling, *Contract Law in China*, Sweet & Maxwell, Hong Kong, 2002 and Mo Zhang, *Chinese Contract Law: Theory and Practice*, Koninklijke Brill NV, Leiden, The Netherlands, 2006.

9 Questions

1 Why is contract law so important in countries with market economies? Could they operate without a law of contract? When considering this question, reflect on what contracts you have made in the past few days and whether you could have avoided making them.

2 In each of the contracts you have made, who was the promisor and who was the promisee, and what were you and they asked to do or promise?

3 What promises have you made recently that were not contracts? In each case, why were they not contracts?

4 What does it mean to say that a promise is 'legally binding'?

5 What are the doctrines of 'freedom of contract' and 'sanctity of contract'? How relevant are they today in influencing the content and nature of contractual relations?

6 What are the principal sources of Australian contract law? How are the sources of contract law different in India and China? Do these jurisdictions present any lessons for Australia? In particular, should Australian contract law be codified in some way?

7 What are the principal kinds of transactions entered into by businesses? Are any of these *not* contracts? Explain your answer.

8 What are the principal kinds of transactions entered into by consumers? Are any of these *not* contracts? Explain your answer.

9 What is a bilateral contract? What is a unilateral contract?

10 What is a formal contract? What is an informal or simple contract?

11 What does it mean to say that a contract is void? How is this different from a contract that is merely voidable?

12 What is a consumer contract as distinct from a business contract?