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Bachelor of Commerce (B2001) | Year 1 • Part A Core | Monash University

Commercial law

Course Code: BTC1110 • Module 2 Notes

Module 2: Australian Law of Contract: Formation, Terms, Vitiating Factors & Remedies

2.1 Nature of Contract and the Element of Agreement (Offer and Acceptance)

A contract is a legally enforceable agreement between two or more persons creating binding rights and obligations. Unlike statutory obligations or tortious duties imposed by general law regardless of consent, contractual obligations are voluntarily assumed by the parties. In Australian common law, a valid simple contract requires five core elements: (1) agreement (offer and acceptance), (2) intention to create legal relations, (3) consideration (unless executed as a formal deed), (4) legal capacity, and (5) genuine consent free of vitiating factors, together with legality of object.

Courts determine whether parties have reached an enforceable agreement using an **objective test**: rather than inquiring into the subjective inner thoughts of the parties, the court asks what a reasonable person in the position of each party would infer from their words, conduct, and surrounding commercial context (*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165).

Offer vs Invitation to Treat and Bilateral vs Unilateral Contracts

An **offer** is a clear, definite expression of willingness to enter a contract on specified terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed. An offer must be distinguished from an **invitation to treat**—a preliminary invitation inviting others to make offers or enter negotiations—and from a mere **supply of information** (*Harvey v Facey* [1893] AC 552).

- **Display of Goods in Retail Shops:** Price-marked goods displayed on shelves or in shop windows ordinarily constitute an invitation to treat, not an offer; the customer makes the offer by presenting the goods at the checkout, and the retailer accepts by ringing up the sale (*Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1953] 1 QB 401; *Fisher v Bell* [1961] 1 QB 394).
- **Advertisements and Catalogues:** General advertisements, brochures, and online product listings are normally invitations to treat because sellers do not intend to be bound to unlimited buyers beyond available stock (*Partridge v Crittenden* [1968] 1 WLR 1204; *Grainger & Son v Gough* [1896] AC 325).
- **Unilateral Offers ("World at Large"):** Where an advertisement clearly promises a specific reward or benefit in exchange for performing a stipulated act—backed by an objective signal of seriousness such as depositing funds—it constitutes a binding **unilateral offer** accepted by full performance (*Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256). However, the requested act must be performed *in exchange for* (and in reliance on) the promise, not merely in compliance with a discretionary government subsidy scheme (*Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424).
- **Auctions and Tenders:** At an auction with reserve, the auctioneer's call for bids is an invitation to treat; each bid is an offer, accepted on the fall of the hammer (*Payne v Cave* (1789) 3 Term Rep 148). Calls for tenders are generally invitations to treat unless the tender invitation commits to

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accepting the highest or lowest conforming bid (*Blackpool & Fylde Aero Club Ltd v Blackpool Borough Council* [1990] 1 WLR 1195; *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151).

Termination of an Offer

An offer remains open only until it is accepted or terminated through one of five mechanisms:

1. **Revocation:** The offeror may withdraw an offer at any time prior to acceptance, even if the offeror promised to keep it open for a fixed period, unless the offeree gave separate consideration for an option contract (*Routledge v Grant* (1828) 4 Bing 653; *Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674). Revocation is effective only when *actually communicated* to and received by the offeree (*Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344), though communication via a reliable third party suffices (*Dickinson v Dodds* (1876) 2 Ch D 463). For unilateral offers, while *Mobil Oil Australia Ltd v Wellcome International Pty Ltd* (1998) 81 FCR 475 rejected any universal rule barring revocation once performance has commenced, an offeror may be estopped or liable in implied contract if revocation acts unconscionably after substantial part-performance.
2. **Rejection and Counter-Offer:** Once an offeree rejects an offer—or responds with a **counter-offer** altering material terms—the original offer is destroyed and cannot subsequently be accepted (*Hyde v Wrench* (1840) 3 Beav 334). By contrast, a mere **request for further information** (such as inquiring whether credit terms are available) leaves the original offer intact (*Stevenson, Jaques & Co v McLean* (1880) 5 QBD 346).
3. **Lapse of Time:** An offer expires at the end of a stipulated deadline or, if none is specified, after a reasonable time depending on market volatility and perishability (*Ramsgate Victoria Hotel Co Ltd v Montefiore* (1866) LR 1 Ex 109).
4. **Failure of a Condition Precedent:** An offer made subject to an express or implied condition (e.g., satisfactory building inspection or finance approval) lapses automatically if the condition fails (*Financings Ltd v Stimson* [1962] 1 WLR 1184).
5. **Death:** Death of either party generally terminates an unaccepted offer involving personal services, or once the offeree receives notice of the offeror's death.

Rules of Valid Acceptance and Electronic Transactions

Acceptance must be absolute, unqualified, and correspond precisely to the offer (the "mirror image" rule). Acceptance cannot be inferred from silence imposed unilaterally by the offeror (*Felthouse v Bindley* (1862) 11 CBNS 869), unless the offeree takes the benefit of services with a reasonable opportunity to reject them in circumstances indicating assent (*Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523). Where acceptance is communicated by instantaneous or electronic means (telephone, fax, email, web checkout), the general rule applies: a contract is formed **when and where acceptance is received** by the offeror (*Entores Ltd v Miles Far East Corporation* [1955] 2 QB 327; *Brinkibon Ltd v Stahag Stahl und Stahlwarenhandelsgesellschaft mbH* [1983] 2 AC 34). Under the *Electronic Transactions Act 1999* (Cth) s 14A and the *Electronic Transactions (Victoria) Act 2000* (Vic) s 13A, an electronic acceptance is taken to be received when it becomes capable of being retrieved by the addressee at a designated electronic address. Only for traditional posted letters—where post was contemplated by the parties—does the **postal acceptance rule** apply, making acceptance effective upon posting rather than receipt (*Adams v Lindsell* (1818) 1 B & Ald 681; *Bressan v Squires* [1974] 2 NSWLR 460).

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2.2 Intention to Create Legal Relations and Consideration

Not every agreement is intended to carry legal consequences. Courts require objective proof that the parties intended their promises to be legally enforceable.

Intention to Create Legal Relations

Historically, courts applied two rebuttable presumptions: social/domestic agreements were presumed *not* legally binding (*Balfour v Balfour* [1919] 2 KB 571; *Cohen v Cohen* (1929) 42 CLR 91), whereas commercial agreements were presumed legally binding (*Edwards v Skyways Ltd* [1964] 1 WLR 349). In *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, however, the High Court of Australia cautioned against rigid reliance on presumptions in non-commercial settings, holding that courts should conduct an objective assessment of all relevant circumstances—including subject matter, formality, reliance, and relationship—without an automatic presumption against intention, while noting that commercial parties still bear a heavy evidentiary onus if they claim an ordinary business deal lacked legal intention.

In domestic contexts, agreements involving serious financial detriment, formal separation, or property transfers can demonstrate legal intention (*Merritt v Merritt* [1970] 1 WLR 1211; *Wakeling v Ripley* (1951) 51 SR (NSW) 183). In commercial contexts, parties may expressly negate legal intention through an "honour clause" (*Rose & Frank Co v JR Crompton & Bros Ltd* [1925] AC 445) or "subject to contract" wording (*Masters v Cameron* (1954) 91 CLR 353, establishing three categories—plus a fourth recognised in *Baulkham Hills Private Hospital Pty Ltd v GR Securities Pty Ltd*—determining whether parties are bound immediately or only upon executing a formal document). **Letters of comfort** issued by parent companies are construed carefully on their wording: vague assurances of "policy" are non-binding (*Kleinwort Benson Ltd v Malaysia Mining Corp Bhd* [1989] 1 WLR 379), whereas promissory undertakings to maintain subsidiary liquidity are enforceable (*Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502).

The Doctrine of Consideration

For an informal (simple) contract not executed as a deed under seal, each promise must be supported by **consideration**—some benefit conferred on the promisor or detriment suffered by the promisee at the promisor's request as the price for the promise (*Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847).

- **Consideration Must Move from the Promisee:** Only a party who provided consideration (though it need not move *to* the promisor) can enforce the promise (*Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460).
- **Sufficiency vs Adequacy:** Consideration must have some legally recognisable value ("sufficient"), even if commercially nominal such as three chocolate wrappers (*Chappell & Co Ltd v Nestle Co Ltd* [1960] AC 87), and need not match market value ("adequate").
- **Past Consideration Is No Consideration:** An act performed prior to and independently of a subsequent promise cannot support that promise (*Roscorla v Thomas* (1842) 3 QB 234), unless performed at the promisor's prior request with an understanding of remuneration (*Pao On v Lau Yiu Long* [1980] AC 614).
- **Existing Legal Duty Rule & Practical Benefit Exception:** Performing an existing public duty (*Collins v Godefroy*) or an existing contractual duty owed to the same promisor (*Stilk v Myrick*

(1809) 2 Camp 317) is not valid consideration unless the promisee exceeds the existing duty (*Hartley v Ponsonby* (1857) 7 El & Bl 872). However, in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1—adopted and refined in Australia in *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723—a promise to pay additional remuneration (or accept reduced rent) for existing contractual performance is binding if the promisor obtains a **practical benefit** (or avoids a disbenefit) and there is no economic duress or fraud.

- **Part Payment of a Debt:** Under the rule in *Pinnel's Case* (1602) 5 Co Rep 117a and *Foakes v Beer* (1884) 9 App Cas 605, payment of a lesser sum on the due date cannot discharge a larger liquidated debt unless accompanied by fresh consideration (such as early payment, payment in kind, or a deed).

Promissory Estoppel: *Waltons Stores (Interstate) Ltd v Maher*

Where a promise lacks consideration or formal writing, equity may intervene through **promissory estoppel** to prevent unconscionable departure from an induced assumption. In the landmark Australian decision *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, Brennan J articulated six elements required to establish equitable estoppel:

1. The plaintiff assumed a particular legal relationship existed or would exist between the plaintiff and defendant (and the defendant was not free to withdraw).
2. The defendant induced the plaintiff to adopt that assumption or expectation.
3. The plaintiff acts or abstains from acting in reliance on the assumption.
4. The defendant knew or intended the plaintiff to do so.
5. The plaintiff's action or inaction will occasion detriment if the assumption is not fulfilled.
6. The defendant failed to act to avoid that detriment (making departure unconscionable).

Unlike English law, Australian promissory estoppel can operate as a "sword" (an independent cause of action, not merely a defensive shield) where Waltons Stores stood silent while Maher demolished a building on his Nowra land anticipating an exchanged commercial lease.

2.3 Capacity, Legality, and Privity of Contract

Even where agreement, intention, and consideration exist, enforceability may fail for lack of legal capacity, statutory/common law illegality, or lack of privity.

Contractual Capacity

- **Minors (Persons Under 18):** Under the *Age of Majority Act 1977* (Vic), full capacity begins at age 18. At common law, contracts with minors are binding only if they are for **necessaries** (food, shelter, essential education, medical care suitable to the minor's station in life—*Nash v Inman* [1908] 2 KB 1) or **beneficial contracts of service** (apprenticeships or employment on fair terms —*Hamilton v Lethbridge* (1912) 14 CLR 236). In Victoria, ss 49–51 of the *Supreme Court Act 1986* (Vic) render contracts for repayment of money lent or goods supplied (other than necessaries) void against a minor.
- **Mental Incapacity and Intoxication:** A contract entered into by a person lacking mental capacity or severely intoxicated is voidable at that person's option only if they prove (1) they were incapable of understanding the general nature of the transaction, and (2) the other party knew or

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ought to have known of the incapacity (*Gibbons v Wright* (1954) 91 CLR 423; *Blomley v Ryan* (1956) 99 CLR 362).

- **Corporations:** Under s 124 of the *Corporations Act 2001* (Cth), a registered company possesses the full legal capacity and powers of an individual.

Legality and Restraint of Trade

A contract is unenforceable if its formation or performance is prohibited expressly or impliedly by statute (*Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410—determining whether Parliament intended merely to penalise unlicensed conduct or invalidate the underlying loans) or contravenes public policy at common law (contracts to commit crimes, defraud revenue, or oust court jurisdiction). **Restraint of trade clauses**—restricting an employee or business seller from competing within a defined radius and duration—are *prima facie* void as contrary to public policy unless the party seeking enforcement proves the restraint goes no further than reasonably necessary to protect a legitimate business interest (such as goodwill or confidential trade secrets) and is not injurious to the public (*Nordenfelt v Maxim Nordenfelt Guns & Ammunition Co* [1894] AC 535; *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126). Courts apply stricter scrutiny to employment restraints than to business-sale restraints because employees lack equal bargaining power and cannot sell their own labour goodwill.

Privity of Contract

Under the **doctrine of privity**, only persons who are parties to a contract can acquire legally enforceable rights or incur obligations under it (*Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460). A third party who stands to benefit from a contract normally cannot sue on it directly. However, major exceptions and circumventions exist in Australian law: agency (principal sues on agent's contract), trusts of contractual promises, statutory insurance exceptions (*Insurance Contracts Act 1984* (Cth) s 48), and the High Court's landmark decision in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 185 CLR 107 permitting an intended third-party beneficiary subcontractor to enforce a public liability insurance policy despite absence of privity or consideration.

2.4 Contractual Terms, Classification, and Exclusion Clauses

Once a contract is formed, a court must identify its binding contents (**express and implied terms**), classify their legal importance, and construe any clauses limiting or excluding liability.

Representations vs Contractual Terms and the Parol Evidence Rule

Pre-contractual statements made during negotiations may be mere sales puffery, non-contractual **representations** (which trigger misrepresentation or s 18 ACL remedies if false, but not breach of contract), or binding **contractual terms**. Courts apply an objective test weighing five indicators (*Oscar Chess Ltd v Williams* [1957] 1 WLR 370; *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 1 WLR 623; *Ellul & Ellul v Oakes* (1972) 3 SASR 377; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41): the time elapsed between statement and contract, the relative expertise/knowledge of the maker, whether the statement was reduced to writing, the importance attached by the parties, and the exact language used.

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Where parties record their entire agreement in writing, the **parol evidence rule** excludes extrinsic oral or documentary evidence to add to, vary, or contradict the written text (*Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252). Key exceptions include proving that the contract was partly written and partly oral, resolving ambiguity, demonstrating a condition precedent, or establishing a separate **collateral contract** where one party enters the main contract in reliance on an oral assurance that is *consistent* with the main written agreement (*De Lassalle v Guildford* [1901] 2 KB 215; *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR 133).

Incorporation of Terms and Exclusion Clauses

Method of Incorporation	Governing Legal Rules	Leading Authority
By Signature	A party signing a contractual document is bound by its terms regardless of whether they read or understood them, absent fraud, misrepresentation, or *non est factum*.	*L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805 (misrepresentation exception).
By Reasonable Notice (Unsigned Documents)	Terms on tickets, receipts, or signs bind only if (1) presented *before or at the time* of contract formation, (2) in a document reasonably expected to contain contractual terms, and (3) reasonable notice of onerous/unusual terms is given.	*Olley v Marlborough Court Ltd* [1949] 1 KB 532 (too late); *Causer v Browne* [1952] VLR 1 (dry-cleaning docket); *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 (red hand rule); *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1.
By Prior Course of Dealings	Terms from earlier transactions are incorporated if dealings between the parties were regular, uniform, and sufficiently consistent over time.	*Balmain New Ferry Co Ltd v Robertson* (1906) 4 CLR 379; *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31.

Once incorporated, an **exclusion clause** (exemption or limitation of liability clause) is interpreted according to the High Court rule in *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500: the clause is given its **natural and ordinary meaning** read in light of the contract as a whole, with any ambiguity construed strictly *contra proferentem* (against the party relying on the clause). Under the **four corners rule** (*Sydney City Council v West* (1965) 114 CLR 481), an exclusion clause will generally not protect a party who acts entirely outside the authorised scope ("four corners") of the contract. Moreover, exclusion clauses cannot exclude non-excludable consumer guarantees under s 64 of the Australian Consumer Law.

Implied Terms and Classification of Terms

Terms may also be implied into contracts by **fact**, **custom**, or **statute**. For formal written contracts, a term will be implied in fact only if it satisfies all five cumulative criteria in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266: (1) reasonable and equitable; (2) necessary to give business efficacy to the contract; (3) so obvious that "it goes without saying" (the officious bystander test); (4) capable of clear expression; and (5) not contradicting any express term. Terms implied by trade custom require proof that the custom is notorious, certain, and uniform (*Con-Stan Industries of*

Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226). Statutory implied terms—such as title, description, fitness for purpose, and merchantable quality under ss 17–20 of the *Goods Act 1958* (Vic)—remain important in commercial business-to-business sales outside the ACL.

Contractual terms are classified into three categories governing the right to terminate for breach:

- **Conditions:** Essential promises going to the root of the contract, such that the innocent party would not have entered the contract without strict performance (*Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322). Breach of a condition entitles the innocent party to **terminate** the contract and claim damages.
- **Warranties:** Minor or subsidiary terms (*Bettini v Gye* (1876) 1 QBD 183). Breach entitles the innocent party to **damages only**, not termination.
- **Intermediate (Innominate) Terms:** Terms capable of being breached in either minor or catastrophic ways (*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26; adopted by the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115). The right to terminate depends on whether the breach is **sufficiently serious** to deprive the innocent party of substantially the whole benefit intended under the contract.

2.5 Vitiating Factors: Defects in Genuine Consent

A superficially valid contract may be rendered **void** (never existed legally, passing no title to third parties) or **voidable** (valid until rescinded by the innocent party, subject to bars such as affirmation, lapse of time, impossibility of *restitutio in integrum*, or bona fide third-party acquisition of property).

Vitiating Factor	Legal Elements & Threshold	Effect on Contract	Landmark Cases
Common Mistake	Both parties share the same fundamental mistake as to existence of subject matter or title (though implied promise of existence can bind seller).	Void at common law if subject matter non-existent; rarely voidable in equity.	*McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377; *Great Peace Shipping Ltd v Tsavliris Salvage* [2003] QB 679.
Mutual & Unilateral Mistake	Mutual: parties at cross-purposes. Unilateral: one party mistaken as to fundamental term or identity, and the other party knows and unconscionably exploits it.	Mutual: void for lack of consensus. Unilateral: voidable in equity (or void for mistaken identity if written).	*Raffles v Wichelhaus* (1864) 2 H & C 906; *Taylor v Johnson* (1983) 151 CLR 422; *Shogun Finance Ltd v Hudson* [2004] 1 AC 919.

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Vitiating Factor	Legal Elements & Threshold	Effect on Contract	Landmark Cases
Non Est Factum	Signer (with disability/illiteracy/blindness) signed a document radically different in nature from what they believed, without carelessness.	Void *ab initio* (narrowly confined).	*Petelin v Cullen* (1975) 132 CLR 355; *Saunders v Anglia Building Society* [1971] AC 1004.
Misrepresentation	False statement of existing/past fact (not mere opinion or puff) inducing entry into contract. Classified as fraudulent, negligent, or innocent.	Voidable (rescission); damages in tort of deceit (fraudulent) or negligence (negligent), or s 18 ACL.	*Derry v Peek* (1889) 14 App Cas 337; *Redgrave v Hurd* (1881) 20 Ch D 1; *Edgington v Fitzmaurice* (1885) 29 Ch D 459.
Duress	Illegitimate pressure (physical, duress to goods, or unlawful economic threat) inducing entry into contract, leaving no practical alternative.	Voidable at election of coerced party.	*Barton v Armstrong* [1976] AC 104; *Crescendo Management Pty Ltd v Westpac Banking Corp* (1988) 19 NSWLR 40.
Undue Influence	Dominant party exploits a relationship of trust and confidence (presumed categories: solicitor–client, doctor–patient, parent–child; or proven actual influence).	Voidable in equity unless independent advice proved.	*Johnson v Buttress* (1936) 56 CLR 113; *Allcard v Skinner* (1887) 36 Ch D 145.
Unconscionable Conduct	Party suffers a **special disadvantage** seriously affecting judgment; stronger party knows (or ought to know) and unconscientiously exploits it.	Voidable in equity; statutory equivalents in ACL ss 20–22.	*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392; *Garcia v NAB* (1998) 194 CLR 395.

Deep Analysis: *Amadio* and *Garcia* in Banking and Guarantees

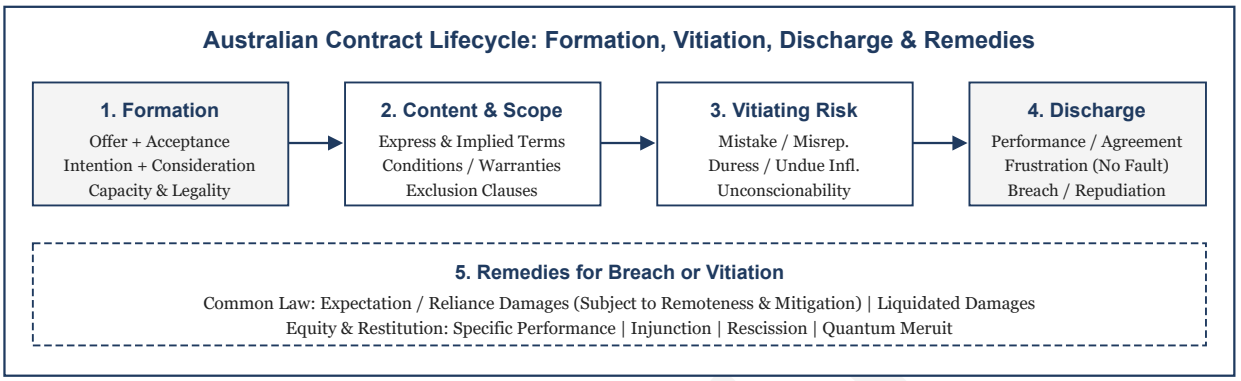
In *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, elderly Italian-born parents with limited English signed an unlimited mortgage guarantee over their office building to secure their son's failing construction company. The bank manager knew the company was insolvent and selectively omitted material limits while visiting the parents' kitchen without ensuring independent advice. The High Court set aside the guarantee for equitable unconscionable conduct: the parents suffered a special disadvantage (age, limited English, lack of business understanding, and reliance on their son) that was sufficiently evident to the bank, making enforcement unconscientious. By contrast, in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, a wealthy high-roller's gambling losses were not set aside because he had financial capacity to choose and Crown did not knowingly exploit a disabling condition.

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Separately, under *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, equity protects a "volunteer" spouse who signs a guarantee for a partner's business debts without understanding its purport and effect where the lender failed to explain the transaction or ensure independent advice.

2.6 Discharge of Contract and Remedies

Contractual obligations come to an end—are **discharged**—through performance, mutual agreement, frustration, or termination for breach.



Performance, Agreement, and Frustration

At common law, entire contracts require **exact performance** before payment falls due (*Cutter v Powell* (1795) 6 Term Rep 320), unless the contract is divisible into stages or the doctrine of **substantial performance** applies—permitting a builder who completes the work with minor defects to recover the contract price minus the cost of rectifying defects (*Hoenig v Isaacs* [1952] 2 All ER 176; contrast *Sumpter v Hedges* [1898] 1 QB 673 where abandonment barred recovery). Parties may also discharge a contract by mutual agreement (abandonment, novation, or accord and satisfaction).

Frustration discharges a contract automatically from the moment a supervening, unforeseen event—occurring without fault of either party—renders performance impossible or radically different from what was promised (*Taylor v Caldwell* (1863) 3 B & S 826; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, where unexpected injunctions restricted tunnelling shifts to two instead of three per day). Mere increased expense or commercial hardship does not frustrate a contract (*Davis Contractors Ltd v Fareham UDC* [1956] AC 696). At common law, losses lie where they fall unless there is a total failure of consideration (*Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32); in Victoria, **Part 3.2 of the *Australian Consumer Law and Fair Trading Act 2012* (Vic)** adjusts prepayments and incurred expenses equitably upon frustration.

Breach, Repudiation, and Common Law Damages

Where one party commits an actual breach of a condition, a sufficiently serious breach of an intermediate term, or **repudiates** the contract (evincing an unwillingness or inability to perform substantially—either expressly or by anticipatory breach before performance is due, as in *Hochster v De La Tour* (1853) 2 El & Bl 678), the innocent party may elect either to **affirm** the contract and insist on performance, or to **terminate** future obligations and sue for damages.

Common law contract damages aim to place the innocent party, so far as money can do so, in the same position as if the contract had been performed (*Robinson v Harman* (1848) 1 Exch 850)—known as **expectation damages**. Where expectation profit is impossible to quantify reliably, a plaintiff may instead claim **reliance damages** for wasted expenditure reasonably incurred in reliance on the contract, unless the defendant proves the contract would have been loss-making (*Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64). Recoverability is constrained by three rules:

1. **Causation:** The breach must have caused the loss on a common-sense "but for" analysis (*Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310).
2. **Remoteness (*Hadley v Baxendale* (1854) 9 Exch 341):** Losses are recoverable only if they arise (Limb 1) naturally according to the usual course of things, or (Limb 2) reasonably within the contemplation of both parties at contract formation because special circumstances were communicated (*Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528).
3. **Mitigation:** The plaintiff must take all reasonable steps to minimise loss and cannot recover losses reasonably avoidable (*Burns v MAN Automotive (Aust) Pty Ltd* (1986) 161 CLR 653).

Non-pecuniary damages for disappointment or distress are generally excluded in commercial contracts unless the contract's very object was pleasure, relaxation, or freedom from distress (*Baltic Shipping Co v Dillon* (1993) 176 CLR 344). Finally, pre-agreed **liquidated damages** clauses are enforceable if they represent a genuine pre-estimate of loss, whereas extravagant clauses out of all proportion to the legitimate commercial interest protected are unenforceable **penalties** (*Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205; *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525).

Quantitative Example: Expectation Damages and Mitigation Calculation

The net common law expectation damages recoverable by an innocent buyer following a seller's repudiation or breach of delivery can be expressed algebraically as:

$$D_{\text{net}} = \max(0,\, P_{\text{rep}} - P_{\text{con}}) + C_{\text{inc}} - S_{\text{avoid}} - L_{\text{unmit}}$$

Where:

- D_{net} = net recoverable common law expectation damages (AUD).
- P_{rep} = reasonable market replacement price required to procure substitute goods or services (AUD).
- P_{con} = original agreed contract price (AUD).
- C_{inc} = incidental, foreseeable consequential losses satisfying *Hadley v Baxendale* (such as urgent freight or lost non-remote sub-sale margin) (AUD).
- S_{avoid} = costs saved by the innocent party due to non-performance (AUD).
- L_{unmit} = portion of claimed loss that the plaintiff failed to mitigate despite reasonable opportunity (AUD).

Worked Numerical Example: Southbank Roasters Pty Ltd contracted to purchase 20 tonnes of specialty coffee beans from Gippsland Imports Pty Ltd for $P_{\text{con}} = \$140{,}000$ ($7,000 per tonne), with delivery on 1 March. On 1 March, Gippsland Imports wrongfully repudiates. Southbank Roasters

immediately buys substitute beans on the Melbourne spot market at the prevailing market price of $P_{\text{rep}} = \$166{,}000$ ($8,300 per tonne) and incurs $C_{\text{inc}} = \$3{,}500$ in urgent refrigerated courier fees to meet a café chain supply contract. Because Gippsland Imports failed to deliver, Southbank saves $S_{\text{avoid}} = \$1{,}800$ in unloading inspection fees it would otherwise have paid under the original contract. Additionally, Southbank claims $9,000 for a two-day warehouse shutdown, but evidence shows a local supplier offered immediate emergency stock on 1 March that would have prevented the shutdown ($L_{\text{unmit}} = \$9{,}000$).

1. **Step 1 (Market Price Differential):** Compute $\max(0, P_{\text{rep}} - P_{\text{con}}) = \$166{,}000 - \$140{,}000 = \$26{,}000$.
2. **Step 2 (Add Foreseeable Incidental Loss):** Add urgent courier costs: $26,000 + $3,500 = $29,500.
3. **Step 3 (Deduct Saved Costs):** Subtract saved inspection fees: $29,500 − $1,800 = $27,700.
4. **Step 4 (Exclude Unmitigated Shutdown Loss):** The $9,000 warehouse shutdown claim is disallowed for failure to mitigate, leaving net recoverable damages of $D_{\text{net}} = \$27{,}700$.

Equitable and Restitutionary Remedies

Where common law damages are an inadequate remedy—most commonly in contracts for the sale of unique land, rare chattels, or shares in a proprietary company—a court may grant discretionary equitable remedies: **specific performance** (compelling performance of a positive contractual obligation, refused for personal employment services or contracts requiring constant supervision), an **injunction** (restraining breach of a negative stipulation such as a valid restraint of trade, *Lumley v Wagner* (1852) 42 ER 687), or **rescission** (setting aside a voidable contract and restoring parties to pre-contractual positions). Where no valid contract exists or a contract is discharged for total failure of consideration, an action in **restitution** (such as *quantum meruit* for reasonable value of requested services conferred, *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221) prevents unjust enrichment.

2.7 Worked Contract Application: Incorporation, Exclusion Clauses, and Unconscionability

Commercial Scenario: Bayside Logistics Pty Ltd operates a cold-storage depot in Port Melbourne. When an elderly sole-trader orchardist, Marco, arrives to store $85,000 of perishable stone fruit, the depot manager hands him a two-page "Storage Docket" printed in dense 6-point text and states orally, "Just sign here for insurance purposes—this only confirms your delivery temperature." Relying on that assurance without reading the back page, Marco signs. Clause 14 on the reverse excludes "all liability whatsoever, whether for negligence, deliberate misdelivery, or failure to maintain refrigeration." Two days later, the depot manager negligently switches off the compressor during routine maintenance, spoiling the entire shipment.

Incorporation & Misrepresentation Analysis: Under *L'Estrange v Graucob* and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, a party who signs a contractual document is ordinarily bound by its terms regardless of whether they read it. However, under *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805, an exception applies where the proferens misrepresents the nature or scope

of the exclusion clause. Here, the depot manager orally stated the docket only confirmed delivery temperature for insurance purposes, positively misleading Marco about Clause 14. Bayside Logistics therefore cannot rely on Marco's signature to incorporate Clause 14.

Construction & Four Corners Analysis: Even if Clause 14 were incorporated, under *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 an exclusion clause is read according to its natural and ordinary meaning, construed *contra proferentem* in cases of ambiguity. Moreover, under the four corners rule (*Sydney City Council v West* (1965) 114 CLR 481), deliberately or negligently deactivating refrigeration outside authorised cold-storage custody strikes at the core purpose of a cold-storage bailment. Consequently, Bayside Logistics remains liable to Marco for expectation damages covering the lost market value of the fruit (subject to non-excludable ACL s 60 due care and skill guarantees, examined in Module 3).

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