



# Professional Practice in Engineering Management

University of Sydney Faculty of  
Engineering & Information  
Technologies

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# Contract – Consideration and privity

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# Privity and Consideration - outline

- Refresher on some general principles of contract law re consideration and privity
- Consideration – when is it needed, what is proper consideration?
- Consideration – when rules operate: variation/rescission/discharge, compromise, release, forbearance to sue.
- Privity – relationship with consideration.
- Privity – general principles, ‘exceptions’
- Privity – third party benefit contracts, benefit of exclusion clauses, remedies.
- Privity – statutory variation of rule.



# Consideration

- Important factor in determining whether an enforceable agreement exists.
- Not required for deed - a deed must comply with certain rules, compliance with those rules indicates an intention to be bound which allows it to be enforceable without need for other tests.
- However, even for a deed, lack of consideration may impact on the availability of some equitable remedies.



# Consideration

- Definition:
- Act or forbearance or promise of act or forbearance
- Involving detriment to the promisee (person to whom promise made) or benefit to the promisor
- Given by promisee to the promisor as the 'price' of the promise
- Australian position – fusing of the concept of benefit/detriment (*Currie v Misa* (1875) LR 10 Ex 153) with idea of 'bargain/exchange' or 'price' (*Dunlop Pneumatic Tyre v Selfridge & Co Ltd* [1915] AC 847).



## Consideration

- Test for valid consideration:
- Move from person to whom promise made (promisee)
- Sufficient
- Not past
- Not illusory



# Consideration

- Move from promisee:
- Consideration must 'move from' (be given by) the person to whom promise made (promisee).
- Does not need to go to the promisor – can go to a third party (eg benefit of guarantees).
- Joint promisees - either may enforce promise as long as one of them provided consideration (*Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460).



# Consideration

- Consideration must be ‘sufficient’ or ‘valuable’ (anything of value which is lawful). ‘Sufficiency’ is used in the sense of effective or valid.
- Can be ‘sufficient’ without being ‘adequate’ (compared with the objective value of promise – eg the \$ value of something acquired) - nominal consideration is OK.
- When adequacy relevant? May become relevant in enforcement – by way of specific performance, in relation to contracts in restraint of trade, where there is a vitiating factor such as duress, undue influence or unconscionability.



# Consideration

- Not past:
- A promise made after an act not connected to promise usually not enforceable.
- Not illusory:
- Not illegal, not a promise to perform an existing contractual or public duty, not accompanied by an exclusion of all liability for non-performance; (where consideration a promise) - not a discretionary promise, not a vague promise.
- Existing duty often problem with variations – are exceptions in these circumstances.



# Consideration

- Mutual promise as consideration: usually valid – bilateral.
- Act for promise: eg offer of reward for finding/returning something. Doing act invokes binding nature of promise – usually valid.
- Promise for act: if act done without related promise – past consideration or not referable to anything therefore not valid. If act done in circs where promise can be implied – may be valid. ‘Implied’ can be where there is an implied request for an act and/or implied results from doing the act as requested.



# Consideration

- Variation/rescission/discharge – must all be supported by consideration – same rules apply.
- Particular rules re: compromise, release and forbearance to sue – see Carter.
- Some cases have found ‘factual benefit’ to promisor where could be regarded as no more than existing duty. Principle not yet fully accepted in Australia.



# Privity

- The rule – only the parties to a contract can enforce and be bound by it
- Relationship between privity and consideration – Consideration: is contract enforceable? Privity: if it is enforceable, who can enforce it? Two separate, but related concepts – dealing with entitlement to make a promise binding on another.



## Privity

- *Trident General Insurance Co v McNiece Bros Ltd* (1988) 165 CLR 107 – major Australian case.
- Trident contains excellent overview of privity doctrine including its shortcomings.



## Privity

- Deeds ‘poll’ or unilateral deeds: third parties who benefit under deed poll may enforce it if they are sufficiently named by reference: *Re A& K Holdings Pty Ltd* [1964] VR 257.
- Reference to a class is sufficient as long as it is certain.
- Contrast with ‘indenture’ or deed between parties, where privity does apply).



# Privity

- ‘Exceptions’ to privity rule:
- Agent acting for undisclosed principal – by agency principal is effectively a party and either the agent or the principal can enforce, but not both.
- This situation can be avoided by use of explicit words requiring that a party executes on own behalf and not as agent for anyone else (TP Rights boilerplate) which would amount to fraud if breached.



# Privity

- ‘Exceptions’ to privity rule cont’d:
- Trusteeship – trust beneficiaries can ‘enforce’ contract made by trustee.
- trust created over the personal property that is the benefit of the contract.
- However, beneficiary cannot directly exercise the contractual rights of a party but can, through equity, compel the trustee to do so – practical effect of this is the same as an exception.



# Privity

Exceptions (cont'):

- 'Privity of estate' technical exception arising from covenants which run with the land in real property law - allows restrictive covenants to be transmitted but not positive ones. Have been attempts to argue in personal property context but most not successful.
- Valid assignment of contractual rights.
- Legislation varying privity rule (later)



## Privity

- Contract cannot burden third parties.
- Third party benefit contracts – generally a contract can be made for the benefit of a third party, but they cannot enforce the contract.
- Parties can vary and rescind 3rd party benefit contracts without ref to 3rd party but other limitations may apply (eg trust).



# Privity

- Promisee may recover damages from promisor where breach of promise to benefit 3rd party. At the moment, damages are generally referable to promisee's loss, and not that of 3rd party, though, although some suggestion that that may change – detailed discussion on quantum recoverable in Carter.
- 'Trust' exception - if promisee holding benefit as trustee for 3rd party, promisee as trustee may recover damages for beneficiary's loss, which is then held on trust.



# Privity

- May recover based on 3rd party's loss in some instances: bailment, some insurance contracts (subrogation), consignors of goods where failure to deliver, (some recent cases) construction contract where contractor knows property is to be occupied or bought by 3rd party. See research paper 'Third Party Rights' (Precs 2288), or consult Carter on Contract.
- Access to other remedies: specific performance can be awarded but in absence of trust or agency 3rd p cannot force party to enforce contract.



# Privity

- Special case –extending the benefit of exclusion clauses to third parties (eg contractors or employees):
- Usually, general principles apply – privity limits protection to contracting parties.
- Shipping-related cases where shipowner excluded liability under a contract but due to privity did not extend to 3rd parties (eg stevedores).
- Can try including an undertaking not to sue 3rd party (may be void for public policy or illegal depending on circs) or use an ‘agency’ method to bring the 3rd party into the contract for this purpose – ‘Himalaya’ clause (Warning – scope of circs where these can be used unclear).



# Privity

- Valid Himalaya clauses (*Scruttons v Midland Silicones Ltd* [1962] AC 446):
- must expressly indicate that the third party is intended to be protected by the provisions limiting liability.
- must expressly state that the promisee is contracting for the provisions both on its own behalf and as agent for the third party so that the provisions extend to them.
- promisee must have authority from the third party to contract on their behalf, or the third party may later ratify the agreement.
- third party must provide consideration. This has been as simple as providing the services.



# Privity

- Statutory variations to rule in WA, QLD Property Law Acts.
- Insurance Contracts Act 1984 (Cth) and some leg dealing with other insurance such as marine insurance, motor vehicle third party insurance.
- Bills of exchange acts – allow instruments to be passed from one person to another.
- Consumer protection - manufacturers' warranties extend to consumers (TPA Pt V Div 2A).
- Property – NSW Conveyancing Act s 36C(1) - confined to real property.