What is a contract?
A contract is a legally binding promise or agreement. A promise of agreement is not legally binding and enforceable as a contract unless the requirements for contract formation, including consideration and certainty of agreement, are satisfied.

Contract law is predominantly a creation of the courts. The law will compel its performance or award damages because it has not been performed properly or at all. The principal rationale for the existence of contract law is commercial necessity. Promises are crucial to modern commerce.

Contracts perform crucial functions in both the private and business sector through transactions. Without contracts, no party could sell or purchase goods or services, employment would also not be possible. Methods of payment also require contracts to be made. Without contracts in our society, our economy would not function.

Australian contract law is founded primarily in judicial decisions from over the years. However statutes are being used more commonly today in contract law. Statutes have precedence of common law.
In Brennan J's observation is Baltic Shipping v Dillon, it can be seen that contract law doesn't make rights or create obligations for parties involved. Contract law allows parties to enter a contract if they wish to or not, to enter on the terms they like. “The law’s role is merely to give legal effect to those terms.”

Development and Theory
- **Early Forms of Action**
  
  **Covenant** - developed in the thirteenth century as a means to enforce agreements under seal. It was for agreements other than those involving the payment of monies.

  **Debt** - this action occurred when the plaintiff argued that the defendant was detaining money that belonged to them. It allowed informal and/or oral agreements to be enforceable. The defendant needs to have received a quid pro quo before an action can be taken.

  **Assumpsit** - situations where the defendant had assumed the responsibility and duty for, or promised something for the plaintiff. It could be used for informal contracts, damages could be awarded and the trial was by jury.

  **Slade's Case (1602) 4 Co Rep 92b** - assumpsit was expanded to now include the action of debt. As a result of this case, assumpsit came to be the general remedy for contracts that were informal.

- **Classical Contract Law**
  
  During the nineteenth and twentieth centuries, many of the rules that form modern contract law were shaped. This was heightened towards the end of the 19th century due to the Industrial Revolution. Doctrines such as ‘offer and acceptance’, ‘intentions to create legal relations’, ‘mistake’, and ‘consensus ad idem’ were formed during this period in time.

- **Role of Legislature**
  
  This is known as statutory intervention in contract law. It has increased due to governments wanting and aiming to simplify the law, correct imperfections in the market, and, protect parties with limited bargaining power. It has been active in areas of contract law involving insurance, frustration, consumer protection and employment.

- **Role of the Courts (High Court)**
  
  Contract law is largely judge made. The High Court has acted to ensure continual fairness within contractual disputes. It aims to ensure that the established and accepted rules
within contract law do not interfere with just outcomes in trials. An example of this includes the Trident General Insurance case.

**Doctrinal Influences on Contract Law**

The Doctrine of Freedom refers to the idea that individuals are the best judges of what is in their own interests. Individuals should be free as such to contract upon whatever terms they decide upon. This is an aspect of the classical contract theory.

The Doctrine of Sanctity refers to the notion that a contract is sacred and should therefore be enforced in adherence to its terms. Contracts should therefore not be re-written by the courts because they think it is unsatisfactory in some way.

The 'law and economics' movement to the law of contract has contributed to three aspects. The law facilitates the making of arrangements which the parties could not as efficiently achieve on their own. A second area includes the law being gap-filling due to the burden of transactions costs. Legal rules pertaining to pre-contractual misrepresentation and the rules relating to the effect of mistake are also important in this answer.

Critical Legal Studies has had an effect on contract law by highlighting its flaws and weaknesses. They state that contract law is ‘systematically flawed, incoherent’. It also found that it is made up of principles and counter-principles that have not been adequately resolved.

The feminist perspective has provided a critique of the law of contract through arguments of contract law being a ‘male’ and developed by males. They argue that it doesn’t take into account the feminine contract theories, for example relational and co-operative transactions, but only deals with the competitive ‘economic man’ and his idea of market share etc.

**International Perspectives**

- **India**
  - Much of Indian contract law is in statute - *Indian Contract Act 1872* - whereas the majority of contract law in Australia is judge made law

- **China**
  - Contract law was very under-developed in the 1900’s, whereas contract law in Australia dates before the 19th Century
  - Chinese contract law is governed through statutes as opposed to the largely judge made Australian contract law

**Topic 2: Agreement**

(Formation 2 - 6)

**The Nature of an Agreement:**

An agreement refers to a 'consensus ad idem', which translates to mean the meeting of the minds. It is an understanding between two or more parties that one of them will do something, or will promise to do so, in return for the other doing something, or promising to.

The objective approach to the formation of an agreement refers to the basis of asking what a reasonable person would draw from the behaviour of the parties. The subjective approach refers to the courts interpreting contracts with a secret mental reservation by one party destroying the contract upon which the other party relied. The case of *Smith v Hughes* illustrates the objective reasoning approach.

**Making an Agreement:**

From Negotiations to Offers
An offer refers to a communication of a promise. The intent is that affirmative response will give rise to a formal agreement. An offer refers to a promise that is made to a party if they too will promise to do or not do something.

An offer can be made to a particular person, to a group or to the whole world at large - see Carlill. Unilateral contracts are those that include an offer that is made in the form of a promise to be accepted by the performance of an act. The performance of the act constitutes both the acceptance of the offer and the furnishing of consideration by the offeree. Examples of unilateral contracts include offers of reward for the return of lost property. Bilateral contracts are ones in which the offer made is in the form of a promise to be accepted by a counter-promise.

An invitation to deal/treat refers to a request to interested parties to make an offer. It is not an offer, as there is no intent for affirmative responses to constitute and agreement; but merely further negotiation. See Pharmaceutical Society. The difference between an invitation to treat and an offer is that an affirmative response to an offer will give rise to an agreement. This is not the case with invitations to treat. This distinction is important because it determines the point in time when a contract of sale is made.

Tests that are used to decide if a communication is an offer to an invitation to treat include:
- If the communication clearly states that the person making it does not intend to be bound by the recipient’s assent, it will not be interpreted as an offer
- The mere words ‘offer’ and ‘acceptance’ are not decisive
- The language surrounding the circumstances needs to be interpreted

Categorising Transactions:
- Advertising
  Advertisements are usually categorised as invitations to treat/deal as opposed to offers. Exceptions to this include instances whereby the advertiser has different intentions, as seen in the case of Carlill. To test for such exceptions, the facts of individual cases need to be examined.
  Section 56 of the TPA has prohibited the conduct of bait advertising. This refers to the process of advertising goods at a very low price to attract customers into the store with the intention of selling them expensive goods that were not advertised. It is necessary for legislation as such to exist to protect consumers and ensure that commercial trade remains fair.
- Auctions and Tenders
  An auction refers to a process involving an auctioneer, vendor and bidders. Auctions can have reserves; which indicate what price the property/land will be sold for. A bid is viewed upon as an offer and no contract is formed until it is accepted by the auctioneer. A contract is formed when the auctioneer accepts the offer made by the bidder. This is represented with the bang of the hammer. Doesn’t require an auction with a reserve. If no one bids up to the reserve price, no offers will be considered. See McWhirter.
  Tenders on the other hand, refer to the process whereby one party asks for tenders from other parties. Tenders can either be standing offers or fixed quantities. Standing offers are not binding; in that the person who invited the tender doesn’t have to accept all or any part of the goods/services. Fixed quantities are similar to auctions in regards to contract formation.
- Counter Offers, Requests for Information, and Statements of Possible Terms
  A request for further information is the process of asking questions in relation to the possible contract. Answers and responses to such requests are not forms of acceptance. A statement of possible terms is where a person states on which terms they may be willing to contract upon. A statement of possible terms is not an offer.
Counter offers are different to both requests for further information and statements of possible terms, in that they cancel the original offer. The original offeror becomes the offeree and can accept or decline the counteroffer. Requests for further information and statements of possible terms do not accept or cancel offers.

**Termination of Offers:**
Offers can be terminated through several ways including: revocation, counter offers, rejection, lapse of time, death, and failure of a condition.

**Revocation** refers to an offer being withdrawn. An offer must be revoked before acceptance occurs. To be effective, the offeror must communicate this to the offeree. Revocation cannot occur if the offeror has granted the offeree an option covering it. The postal rule does not apply to revocation.

**An option** refers to a promise made by the offeror not to revoke the offer, made in exchange for consideration provided by the offeree. Therefore, consideration is required to create an option.

**Rejection** refers to the communication of saying no to an offer. The offer is therefore terminated and can no longer be accepted.

A **counter offer** is a communication by the offeree indicating that the offer is acceptable in substance, but seeking to vary the terms of the proposed contract, this terminates the original offer.

**Lapse of time** will terminate an offer when the offer specifies a time for acceptance. The offer is therefore ineffective; except in situations where the offeror agrees to waive the stipulation. If there are no set time limits on an offer, it will cease to exist after a reasonable amount of time has passed.

**Death** will generally terminate an offer if the offeror has died, meaning that it can no longer be accepted. Two exceptions to this general rule include:
- If the offeree doesn’t know of the offerors death, acceptance is still possible if the circumstances permit, eg service performed.
- If the offeree doesn’t know of the death, but the offer could be performed by the offeror’s estate.

The **failure of a condition** will terminate an offer, when the offer itself is made conditional upon the occurrence or non-occurrence of an event.

**Acceptance**
An acceptance refers to an unequivocal statement or form of conduct by the offeree indicating to assent to the offer.

There is a relationship required between an offer and an acceptance for an agreement to be reached. Acceptance must be in regards to the offer made to the offeree.

If an offer is directed towards a particular person, or to the members of a particular group, it can be accepted only by that person, or by a member of that group. On the other hand, where an offer is made to the world at large, anyone can accept.

**Method and Form of Acceptance**
Acceptance need to be express; not implied. Acceptance is generally in writing, but can be oral. Acceptance can be in the form of words, oral communication, writing, following a prescribed method, and, the conduct of the other party.

The acceptance must be in accordance with any terms for acceptance outlined in the offer. The following and adherence to such terms will constitute acceptance for that particular offer.

**Communication of Acceptance**
If the offeree accepts the offer, but the offeror is unaware of this, acceptance does not occur. An agreement is reached when the offeror is notified that the offer has been accepted.

An acceptance will create an agreement when it is received by the offeror, rather than the time it is sent by the offeree.

Acceptance must always be communicated, unless there is a waiver. This means that the offeror is able to waive the need for communication so as to relieve the offeree of this burden. Communication is not required to create an agreement if a waiver exists.

The **postal rule** refers to instances where acceptance can be communicated by post, whereby the acceptance is deemed effective from the moment and place a letter of acceptance is posted. It is restricted to letters and telegrams and does not extend to instantaneous modes of communication, eg telex, facsimile, email or telephone. This rule can only be used in circumstances where the offeror has contemplated that communication will occur by post. It does not apply to the revocation of offers.

☑️ If a letter of acceptance is posted after a letter of revocation is posted, but before the latter is received by the offeree, a contract will have been formed.

**Bilateral and Unilateral Agreements:**

A **unilateral contract** refers to agreements made where A makes a promise to B in return for B behaving in a specified manner but without B promising to do so. Examples of such include rewards whereby the person offering the reward promises to pay it to whoever acts in the manner specified. However, the persons to whom the offer is directed do not promise to act in that way.

A **bilateral contract**, on the other hand, refers to agreements made whereby both parties make promises to each other. Such contracts create mutual legal rights and obligations.

**Agreements without identifiable offer and acceptance**

See case - *Brambles Holdings Ltd v Bathurst City Council*.

**International Perspective**

- **India**
  
  India requires voluntary agreement for a contract to exist. The notion of offer and acceptance is employed. Indian contract law refers to an offer as a proposal. Communication of the offer is effective when it comes to the knowledge of the offeree. Revocation is effective before the communication of acceptance. The offer may be terminated through insanity of the offeror; if known before the agreement.

- **China**
  
  China requires voluntary agreement for a contract to exist. China imposes additional requirements, which include parties needing to abide by the principles of fairness in forming contracts, and, parties needing to abide by the principles of good faith in performing the contract. The concept of offer and acceptance is employed. The termination of offers is very similar to that of the position held by Australia.

**Topic 2: Case summaries**

*Smith v Hughes.*

(1871) LR 6 QB 597, Court of the Queen’s Bench.

*Nature of an agreement*
Smith offered to sell oats to Hughes. After discovering that they were new oats, Hughes avoided paying. Smith refused and sued for the contract price. At first instance, the judge found for the defendant (Hughes). On appeal, the judge found that there was a contract. 

Held:  - Hughes conducted himself as if he was assenting to the terms  
       - There was no spelling out of the age of the oats  
       - Parties were *ad idem* as to the sale and purchase of the oats but not in regards to the age of the oats  
       - A new trial was ordered

**Carllil v Carbolic Smoke Ball Company.**

[1893] 1 QB 256, English Court of Appeal.  

An offer can be made to the world at large. 

The CSBC placed an advertisement which stated that £100 would be paid to any person who after using the smoke ball, contracted influenza or other similar conditions. Ms. Carllil contracted the disease and was denied the £100. Her claim succeeded at first instance, but was appealed.

Held:  - The judge stated that it is an offer to the world, and through the actions of  Ms Carllil performing the condition, a contract exists the moment the person fulfils the condition  
       - The appeal was then dismissed in favour of Ms Carllil.

**Pharmaceutical Society of GB v Boots Cash Chemists (Southern) Ltd.**

[1953] 1 QB 401, English Court of Appeal.  

invitations to treat/deal. 

The drug store was a self service one, whereby customers took goods off the display shelf and brought them to the counter, where a pharmacist would supervise the sale. The plaintiff argued that the display of drugs on the shelf constituted an offer, and as the pharmacist was not there, the contract is formed in breach of legislation.

Held:  - the court found that the display of goods on the shelf constituted an invitation to treat, and that the offer is made at the counter with the supervising pharmacist present.

**AGC (Advances) Ltd v McWhirter.**

(1977) 1 BPR 9454, Supreme Court of New South Wales.  

Auctions. 

AGC was auctioning a property and decided to remove the reserve. McWhirter bid the highest price, but it was not accepted. McWhirter argued that they were entitled to the land, and AGC argued that they were not in possession of the land.

Held:  - The court found that “the bidder is not a conditional purchaser, but is no more than an offeror and that consequently, no contract can come into existence unless and until his bid is accepted, usually by the fall of the hammer”.  
       - The vendor remains free to withdraw the property from sale or decline any bids.

**Blackpool & Flyde Aero Club Ltd v Blackpool Borough Council.**

[1990] 3 All ER 25, English Court of Appeal.  

Tenders  

The council invited Aero Club and others to tender for certain flights, imposing a time restraint. Aero Club submitted a tender on time, but on the fault of the council, it was recorded as being late.

Held:  - The court found that the invitation to tender was an offer and the Club’s timely submission be an acceptance.  
       - The appeal was dismissed, the Aero Club won.

**Dickinson v Dodds.**

(1876) 2 Ch D46, English Court of Appeal.  

Revocation. 

10th of June, Dodds offers to sell his house to Dickinson, stating that the offer is open until 9am 12th June. Dickinson accepted the offer on the 11th of June, but did not tell Dodds because he knew he has until the 12th of June. Dickinson was then advised by a third party that Dodds had sold the property to someone else. Dickinson tried to accept but Dodds said that it was too late.
Held: • the court found that revocation need not be direct or express, its effective if Dickinson found out through a third party
  • A promise not to revoke is only effective if supported by consideration

Byrne v Van Tienhoven.
(1880) LR 5 CPD 344, Court of Common Pleas.

Revocation.
On the 1st of October, Van Tienhoven offers to sell goods to Byrne. Before it was accepted, VT sent a letter or revocation on the 8th of October. On the 11th of October, Byrne telegraphs his acceptance of the offer. On the 20th of October, Byrne received the letter of revocation. Byrne sought to recover damages for non-delivery.

Held: • the court found that the postal rule did not apply to revocation, therefore the acceptance occurred before the revocation, meaning that a contract existed.
  • There must be communication of revocation for it to be effective.
  • Judgement was ordered for the plaintiffs.

Crown v Clarke.
(1927) 40 CLR 227, HCA.

Relationship between offer and acceptance.
The WA government (Crown) issued a 1000 reward for information in regards to the murders of two policemen. Clarke had been arrested and through his statement was released and had the murders convicted. Clarke sought to claim the reward, the Crown refused to give it to him.

Held: • the court found that Clarke was giving information to free himself, not to accept the offer of the reward
  • To be effective, the information needed to be given in exchange for the offer; hence, acceptance must occur in response to the offer.

Butler Machine Tool Co Ltd v Ex-Cell-O Corp (England) Ltd.
[1979] 1 WLR 401, English Court of Appeal.

Correspondence between offer and acceptance.
An offer was made with a price escalation clause. A counter offer was then made without the clause. The original offeror sent back the detachable receipt, but still said that they assumed it was on their terms.

Held: • the court found that there was an offer, a counter offer, and then acceptance of the counter offer
  • This made a contract on the buyer’s terms with no price escalation clause.

Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd.

Battle of the forms.
Maxitherm submitted a quotation to Pacific Dunlop for the installation of an autoclave. This quotation was expressed to be subject to terms and conditions attached; however none were attached. Subsequently, on 22nd March 1989, a fax was sent to Pacific Dunlop saying that supply would be on Maxitherm’s standard terms ‘as per previous quotations’. Eventually, when the autoclave was installed, it exploded and caused significant damage to
the premises of Pacific Dunlop. PD then sued Maxitherm for breach of contract. Maxitherm relied on an exclusion clause contained in its standard terms and conditions.

**Held:**
- Maxitherm’s standard terms were made terms of the contract because they formed part of the offer which PD accepted
- The original quotation incorporated Maxitherm’s standard terms. A reasonable reader of the quotation would have concluded that Maxitherm intended to contract in accordance with certain conditions.

**Felthouse v Bindley.**
*(1862) 11 CB (NS) 869, Court of Common Pleas.*

**Communication of acceptance.**

Paul Felthouse offered to buy a particular horse from his nephew. Felthouse stated in his written offer that ‘if I hear no more about him, I consider the horse mine at £30 15s’. His nephew did not reply but instructed the auctioneer, Bindley, not to sell the horse. The auctioneer mistakenly sold the horse and Felthouse sued the auctioneer for conversion (dealing with another person’s property in a manner inconsistent with their ownership of the goods).

The issue was whether or not Felthouse was the owner of the horse at the time the auctioneer sold it.

**Held:**
- Felthouse could not impose a sale of the horse on his nephew by requiring him to notify Felthouse if he did not wish to sell on those terms. Here there was no communication before the sale and the nephew was, therefore, not bound to sell Felthouse the horse on the day of the auction.
- It is clear that an offeror cannot, by simply stating silence will constitute consent, impose a positive obligation to reject an offer in order to avoid a contract.

**Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd.**
*(1988) 14 NSWLR 523, NSWCA.*

**Silence as acceptance.**

Empirnall engaged Machon Paull to redevelop a site it owned. After beginning work, MP submitted a written contract to E. E never signed the document, but MP continued to carry out work and E continued to make payments in accordance with the document. E went into bankruptcy, owing MP considerable sums of money. It was important to MP’s prospects of recovering these sums that they could prove a contract existed (which would give it priority over other creditors).

**Held:**
- Nevertheless, when silence is combined with other circumstances, together they may constitute a valid acceptance. ‘... More often than not the offeree will be bound because, knowing of the terms of the offer and the offeror’s intention to enter into a contract, he has exercised a choice and taken the benefit of the offer’.
- Further, ‘where an offeree with a reasonable opportunity to reject the offer of goods or services takes the benefit of them under circumstances which indicate that they were to be paid for in accordance with the offer, it is open to the tribunal of fact to hold that the offer was accepted according to its terms. ...’ In this case E’s acceptance of the work should be taken as acceptance on the terms offered by Machon; this was no mere silence, but included conduct in taking the benefit of an offer, knowing the terms.

**Bressan v Squires.**
*[1974] 2 NSWLR 460, Equity Division of the NSW Supreme Court.*

**Postal acceptance rule**

Squires gave Bressan an option to purchase land. Clause 1 provided that it could be exercised ‘by notice in writing addressed to me at any time on or before 20 December, 1972.’ On 18 December Bressan posted a notice, addressed to Squires, exercising this option. It was received on 21 December. Was the option exercised?  

**Held:**
- The parties must have contemplated the option could be exercised by post. Consequently, prima facie, the exception applied. In this case, however, there was further language in the option itself that suggested actual notice of acceptance was required by the stipulated date and, as a consequence, the plaintiff’s case failed.

**Brinkibon Ltd v Stahl und Stahl-Warendhandelsgesellschaft mbH.**
*[1983] 2 AC 34, House of Lords.*

**Postal Rule - acceptance.**

The offeror, Brinkibon (London, England) wanted to sue the offeree, Stahag
(Vienna, Austria) for breach of contract. Acceptance of Brinkibon’s offer had been by way of telex from London to Austria. Which jurisdiction’s law applied? [Note, in the absence of a stipulation by the parties about which laws will govern the contract the laws of the country/place where the contract was formed will apply. Generally this will be where the offeror receives the acceptance; however, where the postal rule applies it will be the law of the jurisdiction in which the offer was sent.]

Issue: Did the postal rule apply? If it did the contract would have been concluded in England and English law would apply; if it did not apply then the contract would have been concluded where the acceptance was received - Vienna.

Held: - The postal rule does not apply to direct/instant forms of communication (including telex) - as telex was used here the postal rule did not apply and the contract was formed in Vienna.

**Brambles Holdings Ltd v Bathurst City Council.**
(2001) 53 NSWLR 153, NSWCA.

*Agreements without offer and acceptance*

Brambles managed the Council’s solid waste for 7 years (to 1989) under a contract. A new contract was concluded mid-1990 referring to general waste and providing that part of the fees Brambles received was to be remitted to Council. Just over a year later (in September) Council wrote to Brambles saying it could increase the fees it charged for receiving liquid waste but that part should be remitted to Council. Brambles increased the fees it charged but did not remit any fees to the Council. Brambles argued that liquid waste was not covered by the 1990 contract and that no new contract had arisen in response to the Council’s September 1991 letter.

Held: - In this case, it could be inferred that, by charging higher fees, Brambles had accepted the offer contained in the September 1991 letter.

**Clarke v Dunraven.**
[1897] AC 59

*Agreements without offer and acceptance.*

P and D entered yacht race pursuant to Yacht Racing Association rules which provided that if a boat was damaged as a result of negligence, the negligent party must pay damages. Dunraven’s boat was damaged by Clarke’s negligence. Did Dunraven have to pay?

Held: By entering the race on the YRA terms the competitors entered into a contract with each other on those terms - consequently Dunraven had to pay.

**Mobil Oil Australia Ltd v Wellcome International Pty Ltd.**
(1998) 81 FCR 475, Federal Court of Australia (Full Court).

*Unilateral and bilateral contracts.*

Mobil represented to its dealers that any dealer who performed at a set level for six years would be given a franchise for a further nine years at no cost. Mobil subsequently discontinued the scheme and a number of dealers alleged (amongst other things) breach of contract.

Held: - In a unilateral agreement the act of acceptance is also the consideration and act of performance given in exchange for the offeror’s promise. In most cases the offeree’s power to complete the act sought requires no cooperation by the offeror. Here, however, Mobil’s revocation of its scheme made it impossible for the dealers to complete the act of acceptance.

- As a result, the Court concluded that there was not a ‘universal proposition that an offeror is not at liberty to revoke the offer once the offeree ‘commences’ or ‘embarks upon’ performance of the sought act of acceptance …’

**Agreement Legislation**

*Electronic Transactions (Victoria) Act 2000*

*Section 3. Definitions*

(1) In this Act— "electronic communication" means—