

Sometimes the law will try to bring 'legal obligation into closer alignment with the call of commercial morality'.²¹

Comfort letters may be enforced through other areas of law, such as by:

- (1) the prohibition of misleading or deceptive conduct (Australian Consumer Law (ACL) s 18 (¶7-250 – ¶7-281))
- (2) the law of promissory estoppel, which prevents a party going back on its word (¶5-485)
- (3) the prohibition of unconscionable conduct (¶5-730 – ¶5-760).

[¶5-070] Commercial agreements: contracts with government

Government activity at federal, state/territory and the local level plays an important role in everyday life, but government activities and the work of administrative agencies do not usually show an intention to create legal relations enforceable in law.

Case example

The Administration of the Territory of Papua and New Guinea v Leahy [1961] HCA 30

When P's cattle became infested by cattle tick, P approached the Department of Agriculture for assistance under its tick eradication scheme. An arrangement was made under which two officers of the department would spray the cattle and P would be responsible for mustering, etc.

The department officers did not do the job well, P's cattle became even more tick-infested, and P sued for breach of contract.

P was not successful in breach of contract as the spraying was part of a general policy of pest control based on an administrative arrangement. There was no contractual relationship.

An arrangement with a public authority carrying out a statutory function is not usually intended to create a contract, even if a fee is paid.

In contrast, government commercial activities, such as public-private partnerships (PPPs: ¶9-170) and contracting for the purchase and supply of goods and services usually do give rise to intention to contract.

[¶5-080] Commercial agreements: advertisements

Until the forerunner of the Australian Consumer Law (ACL) introduced the right to sue for 'misleading or deceptive conduct' in 1974,²² little could be done about exaggerated claims in advertisements regarding the benefits of advertised goods and services.

A plaintiff might attempt to enforce promises made in advertisements by showing that the advertisement influenced them to buy but the advertiser could argue that there was no intention to create legal relations and that there was no contract to enforce.

²¹ *Banque Brussels Lambert SA v Australian National Industries Ltd* (1989) 21 NSWLR 502, 505.

²² The former *Trade Practices Act 1974* (Cth) s 52; now Australian Consumer Law s 18 (¶7-250)

Case example

Carlill v Carbolic Smoke Ball Co [1892] EWCA Civ 1

The Carbolic Smoke Ball was a 19th century product to cure colds, influenza (flu) and more. It was a rubber ball containing powdered carbolic acid with a tube attached. The user put the tube into their nose and squeezed the smoke ball to inhale the powder — which resembled smoke — to flush out the cold.

The manufacturer ran an advertisement in newspapers in which it offered to pay £100 (\$200) to any person who contracted influenza after using the ball three times a day for two weeks. They added that they had deposited £1,000 at the Alliance Bank, Regent Street 'to show our sincerity in the matter'.

Mrs Carlill bought a smoke ball, used it as directed and still caught the flu. She sued in contract for the £100.

One of the defences raised was that this was an advertising 'puff' and that there was no intention to create legal relations. This defence was rejected on the basis that the £1,000 deposited at the bank was clear evidence of an intention to pay claims (to contract).

This was an offer of a unilateral contract (§5-020) — a promise accepted by performing an act.

These are ten of the issues which were raised in the *Carbolic Smoke Ball* case:

- (1) Was there an intention to create legal relations? (§5-050)
- (2) Was the advertisement a mere 'puff'?
- (3) Can an offer be made to the whole world? (§5-212)
- (4) Must acceptance or an intention to accept an offer be communicated? (§5-310)
- (5) Can performance of a condition of an offer constitute sufficient acceptance of that offer? (§5-310)
- (6) Was the contract made when the offeree did the act requested? (§5-310)
- (7) Did the offeror make notification of performance by the offeree a condition of the offer? (§5-310)
- (8) Was the advertisement too vague to form the basis of a contract? (§5-140; §6-150 – §6-170)
- (9) What was the consideration (price: §5-400) offered by the user — buying the product, or using it? If it was the latter, could that be the consideration for the seller's promise to pay?
- (10) Was this a wagering contract which was void under statute for illegality? (§5-825 – §5-827)

The *Carbolic* case does not mean that all promises in advertisements can lead to enforceable contracts — the advertiser's intention to contract is what created the contract in the *Carbolic* case. The *Carbolic* case is discussed further at §5-212.

Not all advertisements are contractual offers — most are advertising 'puffs'.

Now, advertisements must not be 'misleading or deceptive' (under ACL s 18: §7-250ff).