

Restraint of trade: (1) employer/employee restraints	¶5-850
Restraint of trade: (2) agreements between buyer and seller of a business or between partners	¶5-860
Restraint of trade: (3) trading agreements between manufacturers and retailers	¶5-870
Effects of illegal and void contracts: severance	¶5-885
Severing void restraint of trade clauses in New South Wales by going up the ladder	¶5-887

FORMATION OF A CONTRACT

(¶5-010 – ¶5-045)

211

[¶5-010] Contracts v agreements

Business is based on deals — agreements and contracts:

- agreements are not legally binding
- contracts are legally enforceable agreements which are legally binding.

In everyday language people sometimes say agreement when they mean contract. The technical difference between an agreement and a contract is important because an agreement which does not fulfil the six prerequisites of a contract is not a contract (¶5-020). In contrast, all contracts are agreements.

Understanding contracts is basic to understanding business, because there would be no business without contracts. Contract law is about the enforcement of promises.

The law of contract explains when promises and agreements become contracts. Many of the business law topics in this book are based on contracts — property, consumer law, trade practices, business structures, partnership, agency, finance, consumer credit, banking and insurance. Sometimes contract principles have been changed by legislation.

Australian contract law is made up of:

- case law decisions (judgments), which give effect to community values and current attitudes, and
- legislation (statute, Act of Parliament), for example, some legislation requires that contracts must be in writing (¶5-030).

The most important legislation affecting contract is the Australian Consumer Law (ACL) — especially s 18 (¶7-250ff) which prohibits misleading or deceptive conduct. This affects virtually every contract law topic, from intention to restitution, and no study of contract is complete without examining possible remedies for at least misleading or deceptive conduct in contract.

The ACL applies Australia-wide by agreement with the Commonwealth, state and territory governments, so it is not limited to the areas where the Commonwealth can pass laws (¶1-475; ¶7-220).

The adjustment of contract law to electronic commerce (e-commerce) is discussed at ¶5-045.

[¶5-020] Making a valid contract — six prerequisites

A contract is an agreement containing promises which the law will enforce:

- The person who makes the promise is the *promisor*.
- The person who the promise is made to is the *promisee*.

The promise might be to do something, to refrain from doing something, or to pay for something.

What does it take before the law will enforce a promise or an agreement (with mutual promises)? Must there be an agreement in writing? Must it be witnessed by a Justice of the Peace or a lawyer? Must it be made with a stern face?

None of these things are needed to make a valid contract.

CHAPTER

5

What is a contract?

There are six prerequisites to turn an agreement into a legally enforceable contract. They are necessary whether a contract is made face-to-face or whether it is made instantaneously by electronic messages without written agreements.

The following six prerequisites are not alternatives, and each is necessary to make a valid contract:

- (1) **Intention to create legal relations.** Do the parties intend to be legally bound? Or is the agreement informal, 'non-business', off-the-record? (¶5-050 – ¶5-090).
- (2) **Agreement.** Is there an offer — which has been accepted — or is there some other evidence of a final agreement? (¶5-130 – ¶5-390). An agreement needs all six prerequisites to become a contract.
- (3) **Consideration.** Is one promise paid for by 'something for something', or is it a one-sided promise which is not a legally enforceable agreement or contract? (¶5-400 – ¶5-485).
- (4) **Legal capacity.** Do the people making the agreement have the legal capacity to contract? Are they under-age or under the influence of alcohol? (¶5-510 – ¶5-570).
- (5) **Genuine consent.** What was actually agreed? What if the goods contracted for have sunk at sea? (¶5-610 – ¶5-810).
- (6) **Legality of objects.** Can you make a contract for an illegal purpose? (¶5-820 – ¶5-887)

Promises which will be enforced by the law of contract must be between different people. A person cannot 'self contract'.

Contract law uses the expression 'party' for the people involved in the contract, such as the buyer and the seller because they are part of, or take part in, the contract.

A contract may be:

- **a simple contract.**

This is an ordinary, straightforward contract — no particular formalities are needed, and the evidence of the contract is oral or written — the focus of this Chapter and Chapter 6.

- **a formal contract.**

A formal contract is signed, sealed and delivered in a deed (¶5-040), not necessarily with mutual promises (consideration).

A simple contract and a formal contract may be:

- **a bilateral contract.**

This is a promise for a promise, where the exchange of promises creates the contract: 'I will pay you if you paint my room' and the other person says 'OK'

- **a relational contract** (a contract with an ongoing relationship: ¶6-110).

- **a long-term contract** (this gives flexibility in performance, discretions, non-linear pricing, may have a reasonable endeavours clause: ¶6-110).

- **a unilateral contract.**

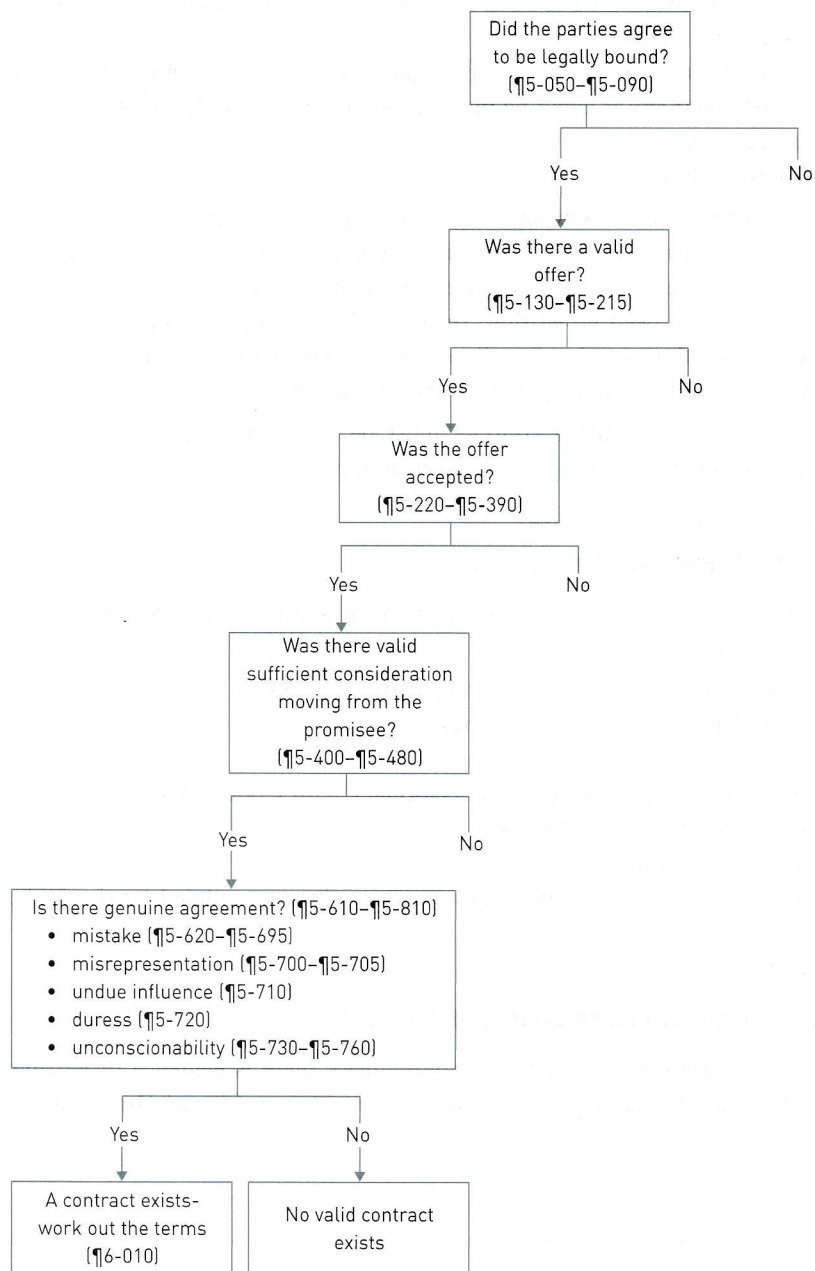
This is a promise which is accepted by doing something. Doing the act (painting the room) creates a unilateral contract: 'I will pay you if you paint my room by Easter'. There is no contract until the painter has finished the job by Easter.¹

There are two preliminaries to be considered:

- (1) whether a contract must be in writing (¶5-030), and
- (2) whether the agreement can be enforceable if it is written in a deed (¶5-040).

¹ As in *R v Clarke* (¶5-230) and the *Carbolic Smoke Ball case* (¶5-080; ¶5-212; ¶5-310).

[¶5-021] Roadmap of the law of contract



CHAPTER

5

[¶5-030] Must a contract be in writing?

Contracts do not always need to be in writing. An oral (verbal) contract creates valid and legally enforceable rights.

A contract in writing is evidence of a legally enforceable agreement. It does not have to be one document and it could be made up with a written letter of offer and a written letter of acceptance.

Contracts can be classified as:

- (1) those that must be in writing (or else they will be void: see below)
- (2) those that should be evidenced in writing under the *Statute of Frauds 1677* or equivalent (or else they will not be enforceable in court)
- (3) 'the rest' which need no writing. The general rule is that a contract entered into by word of mouth (an oral or 'parol' contract) is perfectly valid and creates enforceable contractual rights and obligations between the parties.

The question of whether a contract must be in writing must be considered with reference to the operation of the parol evidence rule (¶6-015).

Must a contract be in writing?

(1) Some contracts must be in writing

Some statutes say that certain contracts must be in writing, or they will be void — of no effect — such as:

- assignments of copyright, designs and patents (¶13-340)
- bills of exchange and promissory notes²
- cheques³
- consumer credit contracts under the National Credit Code (NCC) s 12 (¶14-180)
- contracts set out in deeds (¶5-040)
- home building contracts⁴
- mortgages of goods, guarantees and consumer leases regulated by the NCC (s 38: ¶14-180), and
- real estate contracts.⁵

(2) Some contracts must be evidenced in writing

Some contracts are not enforceable in court unless there is evidence in writing of the contract. This need for proof goes back to s 4 of the *Statute of Frauds* (Imperial).

² *Bills of Exchange Act 1909* (Cth).

³ *Cheques Act 1986* (Cth).

⁴ Eg, *Home Building Act 1989* (NSW) s 7(1).

⁵ Eg, *Civil Law (Property) Act 2006* (ACT) s 201; *Conveyancing Act 1919* (NSW); *Law of Property Act 2000* (NT); *1936* (SA); *Property Law Act 1974* (Qld); *1958* (Vic); *1969* (WA); *Conveyancing and Law of Property Act 1884* (Tas); *Instruments Act 1958* (Vic).

There are five classes of contract in the *Statute of Frauds* (or equivalents⁶), which must be evidenced in writing to be enforceable:

- (a) A promise by an executor or administrator (¶3-720) to pay the liability of a deceased person out of their own money.
- (b) A contract of guarantee — where one person promises to pay the debt of another if the other defaults (¶13-360).⁷
- (c) An agreement made in consideration of marriage.
- (d) A contract for the sale or disposition of land or any interest in land.⁸ (This includes contracts related to land such as contracts to assign a lease, to grant easements, options to purchase land or to obtain an interest in land such as an agreement to renew a lease.)
- (e) Contracts not to be performed within one year of being made. This includes contracts intended to go more than one year and those which cannot possibly be completed within one year.

Statute of Frauds s 17: contracts for the sale of goods

Only Western Australia and Tasmania have Sale of Goods legislation based on s 17 of the *Statute of Frauds* which requires evidence in writing:⁹

Contract for sale of \$20 and upwards

4(1) A contract for the sale of any goods of the value of Twenty dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

The cut-off figure of \$20 (£10) was more important in 1677. Today it means that in Western Australia and Tasmania very small contracts for the sale of goods

6 The Statute of Frauds has been repealed in its application in most Australian jurisdictions or re-enacted by local legislation:

- *Imperial Acts Application Act 1969* (NSW)
- *Law of Property Act 2000* (NT) s 221
- *Property Law Act 1974* (Qld) s 56, 59
- *Mercantile Law Act 1935* (Tas) s 6
- *Law Reform (Statute of Frauds) Act 1962* (WA) (confirms that s 4 applies in WA, but deletes executors' contracts (class 1), marriage contracts (class 3) and contracts of over one year (class 4))
- *Instruments Act 1958* (Vic) s 126 (applies only to guarantees and land contracts). See also ¶3-220; ¶9-830.

7 *Mercantile Law Act 1962* (ACT) s 12; 1935 (Tas) s 6; *Law of Property Act 2000* (NT) s 58; *Property Law Act 1974* (Qld) s 56; *Instruments Act 1958* (Vic) s 126; *Law Reform (Statute of Frauds) Act 1962* (WA) s 2.

8 Eg, *Conveyancing Act 1919* (NSW) s 54A; *Law of Property Act 2000* (NT) s 62; *Property Law Act 1974* (Qld) s 59; *Law of Property Act 1936* (SA) s 26; *Mercantile Law Act 1935* (Tas) s 6; *Conveyancing and Law of Property Act 1884* (Tas) s 36; *Instruments Act 1958* (Vic) s 126; *Law Reform (Statute of Frauds) Act 1962* (WA) s 2.

9 *Sale of Goods Act 1896* (Tas) s 9 (\$20 and upwards); 1895 (WA) s 4 (\$20 and upwards).

must be evidenced by writing with at least a signed 'note or memorandum' to be enforceable.¹⁰

Evidence in writing

The note or memorandum that is required by the *Statute of Frauds* and its equivalents does not have to be a formal legal document. Any 'note or memorandum' will do, as long as it contains:

- the names of the parties
- the subject matter
- the consideration (the price: ¶5-400 — not applicable in guarantees), and
- signatures of the parties.

The note or memorandum may be contained in several documents, and oral evidence will be admissible to show how the documents are connected.

Effect of non-compliance with Statute of Frauds at common law

If there is no note or memorandum:

- the contract is not void
- property will still pass under the contract, but if there is any dispute the contract cannot be enforced by legal action at common law because '[n]o action shall be brought'
- money or property transferred cannot be recovered at common law, but there may be a remedy in equity (¶1-010; below).

Effect of non-compliance with Statute of Frauds in equity: part performance

In equity (¶1-010), a plaintiff may be entitled to an order of:

- specific performance (¶6-400) if the plaintiff has partly performed its agreement (¶6-300) and/or
- restitution (¶6-510).

In other words, equity will not allow a statute to be used for fraud.

Under the principle of part performance, a contract which does not comply with the *Statute of Frauds* requirements of writing may be enforced in equity.

Case example: part performance

Carr v McDonald's Australia Ltd [1994] FCA 914

An alleged contract by McDonald's to appoint P a McDonald's hamburger restaurant franchisee (¶9-985) was enforceable in equity because P had undergone a year of unpaid training, had qualified for a Bachelor of Hamburgerology and had done a lot of unpaid work for McDonald's.

An alleged contract by McDonald's to appoint P to a specific restaurant was not enforceable in equity as there was no sufficient act of part performance shown by P in reliance on the offer of the restaurant to P.

¹⁰ The requirement that a sale of goods contract must be evidenced in writing set out in the Sale of Goods legislation has been repealed in the other six state and territory jurisdictions.

Effect of non-compliance: restitution

A contract may not be enforceable if it is not evidenced in writing as required by the *Statute of Frauds* (or equivalents). But a person doing something under an unenforceable contract may still be able to recover payment, not on the contract, but in *restitution* so as to stop the unjust enrichment of the other person (¶6-510).

Restitution aims to make sure that the other person should pay for the benefits received under an unenforceable contract.

[¶5-040] Deeds

A 'free' promise cannot be a simple contract (¶5-020) if there is no consideration (price: ¶5-400) and is not enforceable unless it is contained in a formal contract in a deed. A deed is a written or printed document which creates an obligation between parties, such as the creation of a trust by a trust deed (¶9-755). A deed is a '*formal*' contract — it gets its effectiveness from the intention of the parties that it will take effect as a deed (its *form*), and that form comes from the *formula* that the deed is 'signed, sealed and delivered'.

A contract contained in a deed is therefore called a 'formal contract' because it gets its effectiveness from its form.

A unilateral deed (executed by one party only) is called a deed poll.

Common law or statute law requires that several types of contract must be in the form of a deed to be valid. These include:

- a gratuitous (free) promise — ie, a promise made without consideration. The formality required in signing, sealing and delivering is considered to be sufficient to indicate that the parties intended to be legally bound (eg, some trusts: ¶9-755; ¶9-760).
- appointing an agent to have power to contract by deed. The agent must first be appointed by a deed — a power of attorney (¶11-030).

Signing a deed

The person making the deed must sign the deed,¹¹ and the signature on the deed must be witnessed (attested) by at least one witness who is not a party to the deed:

- a deed that contains promises (covenants) by one party will only need to be executed (signed, sealed and delivered) by the party making the promises
- a deed that contains promises (covenants) by several parties, as in a lease, will have to be signed, sealed and delivered by each party to be bound by the deed (eg, the landlord promises to repair and the tenant promises to pay rent).

Sealing a deed

Legislation requires that a deed is signed and witnessed (attestation). This has replaced the former need to seal a deed (originally with a wax seal or equivalent).

¹¹ Eg, *Civil Law (Property) Act 2006* (ACT) s 219; *Conveyancing Act 1919* (NSW) s 38(1); *Law of Property Act 2000* (NT) s 47; *Property Law Act 1974* (Qld) s 45; *1958* (Vic) s 73; *1969* (WA) s 9; N Seddon, *Seddon on Deeds* (Federation Press, 2015) [2.6]; ¶5-030.

A signatory to a deed no longer has to make any mark or impression on the deed so long as there is the intention to seal the deed.

Delivery of a deed

A deed does not take effect until delivery.

Delivery of a deed can be by words or by conduct — so long as the intention is to show that the person making the deed has the intention to be legally bound by the deed. Delivery now no longer involves any actual handing over of the deed or something else such as a handful of soil. A deed can therefore be ‘delivered’ without leaving the possession of the executing party.

[15-045] E-commerce and contract

Most e-commerce transactions involve contracts, and the traditional rules of contract have adapted to e-commerce where the parties may have never met, may not realise that they are contracting and may be in different countries. Electronic commerce (e-transactions) includes electronic tickets, email, online banking, online markets, online payment systems and virtual stores.

Contract law does not usually require any special method of communication (¶5-310). Contract negotiations may be carried out electronically, such as by clicking or by giving answers over the phone in response to prompts by a ‘humanoid’ computerised voice at the other end.

Electronic Transactions Act

More and more commerce is online, including contracts made by computer.¹² How often do people click ‘I agree’ to make an e-contract? The *Electronic Transactions Act 1999* (Cth)¹³ provides a legal framework to support and encourage business and consumer confidence in e-commerce by making sure that the law treats paper-based commerce and electronic commerce equally so that one is not given an advantage over the other. There may be issues with real consent in e-contracts, including the risk of clicking into an unconscionable contract (¶5-730) and/or unfair contract terms (¶5-770).

The Electronic Transactions Act is based on the principles of:

- (1) *functional equivalence* — the law should treat paper-based commerce and electronic commerce the same
- (2) *technological neutrality* — the law should not discriminate between forms of technology.

The Act supports electronic transactions so there will be business and community confidence in the use of electronic transactions.

12 P Moran, ‘The paperless contract’ (2015) 89(6) *Law Institute Journal* 38 (slow take-up of paperless contracts by Australian lawyers).

13 And parallels in all jurisdictions such as *Electronic Transactions Act 2001* (ACT), 2000 (NSW), 2000 (SA), 2011 (WA); *Electronic Transactions (Queensland) Act 2001* (Qld); *Electronic Transactions Act (Victoria) 2000* (Vic).

The Electronic Transactions Act provides that a transaction is not invalid because it took place electronically (eg, Cth s 8; NSW s 7; Qld s 8). It allows the following to be done electronically:

- giving information in writing (eg, Cth s 9; NSW, WA s 9; Qld s 11)
- providing a signature (eg, Cth s 10; NSW s 9; Qld s 14); discussed below
- producing a document in material form (eg, Cth s 11; NSW s 10; Qld s 16)
- producing information (eg, Cth s 12(1); NSW s 11), and
- retaining a document (retention; eg, Cth s 12(2); NSW s 11).

This means that electronic signatures can be used in legislation where documents must be in 'writing' or 'signed'.¹⁴

Emails may get lost and communications may be blocked by firewalls, so the Electronic Transactions Act has clarified the rules of e-contract. Electronic offer and acceptance is discussed at ¶5-320 and ¶5-335.

Electronic signatures

An electronic (or digital) signature — such as a typed name or an email footer — authenticates an electronic transmission by identifying the signer and attributing the document to the signer.

Signatures may be done electronically under s 10 of the Electronic Transactions Act and state and territory equivalents:

- an electronic signature is a technology-neutral term which includes a personal identification number (PIN: ¶16-650), a password, a scanned manuscript signature and a typed name at the bottom of an email.
- a digital signature is a technologically specific mechanism based on public key cryptography (involving two keys — a private key and a public key). Digital signatures are issued by certification authorities.

E-signature case law now confirms the following as good signatures:

- a resolution by the members of the board of a company — circulated to board members by email — and returned by members through facsimile, hand delivery and email, including an email attachment
- an electronic certificate sent by a legal practitioner which was required to authorise the making of a council by-law
- email footers on an exchange of emails, and

¹⁴ Also, some legislation provides for e-commerce, such as the Franchising Code (¶9-986), which provides that information required under the Code can be given electronically. The Electronic Transactions Act has been restricted by Regulations which exclude some law from the Act and provide that some contracts and some forms cannot be made electronically and must still be in writing, such as bills of exchange (¶16-560), cheques (¶16-190), land contracts (¶3-450), powers of attorney (¶11-030), wills (¶3-700) and witnessing a document: see, eg, *Electronic Transactions Regulations 2000* (Cth); 2002 (SA); 2011 (Tas); 2012 (WA); *Electronic Transactions Regulation 2012* (NSW); *Electronic Transactions (Northern Territory) Regulations 2001* (NT); *Electronic Transactions (Victoria) Regulations 2010* (Vic). The Commonwealth Regulations provide that National Consumer Code notices or documents (Chapter 14) may be given electronically.

- a signature by computer with a digital pen (moving a digital pen over a laptop's trackpad) on an electronic version of a document.¹⁵

It is up to users to guard against the risk of forgery of email signatures.

The legislation provides that you are not bound by an email you did not send and has introduced a reverse onus of proof that you must prove that you did not send the email (attribution of electronic communications (eg, Cth s 15(1), NSW s 14(1), Qld s 26(1)).

The Evidence Acts generally accept as valid the identity of the sender, the date and the identity of the addressee in the case of documents which have been sent by email, or by fax, telegram, lettergram or telex.¹⁶

INTENTION TO CREATE LEGAL RELATIONS (¶5-050 – ¶5-090)

[¶5-050] Importance of intention to contract

The existence of an agreement — mutual promises — is not enough to make a contract. Contract law requires evidence (express or implied) that the parties intended to do more than make an agreement and that they intended to make a contract.

Two objective assessments help to work out whether the parties intended to make a contract:

- (1) Parties to a business agreement usually intend to make a contract (¶5-060 – ¶5-080).
- (2) Parties to a family, domestic, social or voluntary agreement usually do not intend to make a contract (¶5-090).¹⁷

The test of intention is objective, not subjective — it is not what the parties had in mind but what conclusions can be drawn from their words or conduct.¹⁸

Normal contract rules apply to e-contracts (¶5-045), so a person accessing an online supplier with intention to buy something is taken to intend to make a contract. This may include 'programmed intention', where a contract is formed if a human programs a computer to respond to input in a particular way such as by accepting an offer.

¹⁵ See, eg, A Smyth, 'Signatures in a digital world' (2012) 32(11) *Proctor* 48.

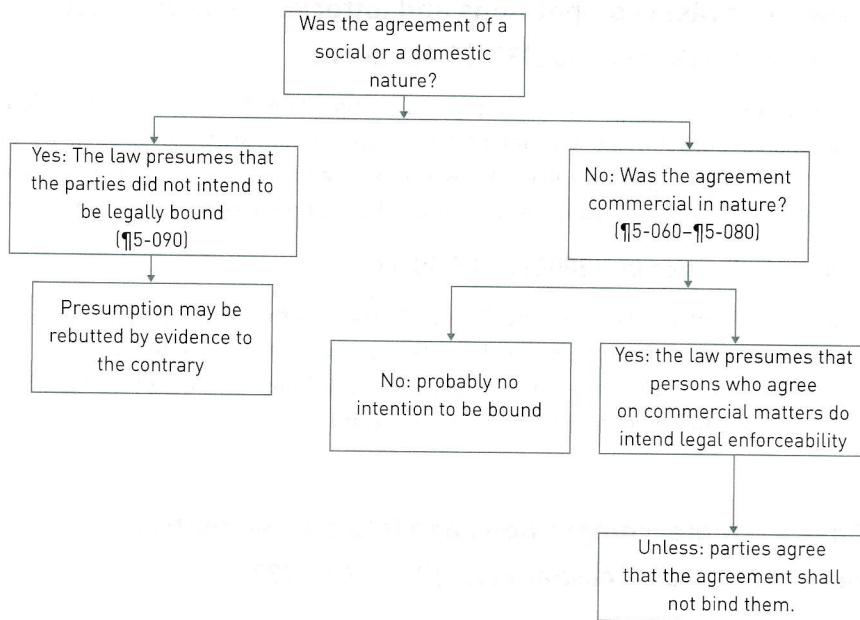
¹⁶ Eg, *Evidence Act 1995* (Cth) s 71; 1995 (NSW) s 71.

¹⁷ These used to be called 'presumptions' until the High Court in the *Ermogenous case* (¶5-090 at [26]–[27]) rejected the use of the word 'presumption'. The court said that all that a 'presumption' showed was which party had to prove that there was a contract (ie, which party had the onus of proof). The court also said that the word presumption may be a distraction from an objective assessment of the state of affairs between the parties — such as the context in which they were dealing, the subject matter of the agreement, the status of the parties to the agreement, their relationship to one another and the surrounding circumstances.

¹⁸ Not carrying out the intention as understood by the other party may be actionable under Australian Consumer Law (ACL) s 4, 18, 29 (¶5-010; ¶7-250; ¶7-290).

[15-051] Roadmap to intention to create legal relations

Did the parties intend the agreement to be legally binding? (15-050)



CHAPTER
5

[15-060] Business or commercial agreements

Parties to a business agreement usually intend to make a contract — depending on an objective assessment of the situation. In contrast, the parties may also agree that their agreement is binding ‘in honour only’ — that it is an agreement, not a contract.

Case example: no contract

Rose & Frank Company v JR Crompton & Bros Ltd [1924] UKHL 2

A contract for the supply of goods said:

This arrangement is not entered into ... as a formal or legal agreement ... but it is only a definite record of the purpose and intention of the ... parties ... to which they each honourably pledge themselves ... that it will be carried through ... with mutual loyalty and friendly co-operation.

D terminated the agreement without giving the notice required and P sued for damages for breach of contract. The action failed — there was no contract but only an agreement binding in honour:

The intention clearly expressed is that the arrangement set out in the document is only an honourable pledge, and that all legal consequences and remedies are excluded from it.

An agreement — even a commercial agreement which would normally be a contract — may not be a contract depending on the words, actions or intentions of the parties.

Case examples: competitions and lotteries — no contract

Jones v Vernon's Pools Ltd [1938] 2 All ER 626

Some competitions say that entering the competition does not create a legal relationship between the entrant and the competition organisers, such as the statement appearing on an entry ticket which read 'entry to this competition does not constitute a legal relationship between the entrant and the competition organisers'.

Leonard v Pepsico Inc (2000) 210 F 3d 88

'Harrier Jet Fighter, 7 000 000 Pepsi Points'. P collected the required points and cash and sent the order form to Pepsi. The US court held that this advertisement was no more than an attention-grabbing joke and that Pepsi was under no liability in contract to supply a fighter plane (worth US\$23m).

Case example: competitions and lotteries — contract

Hurley v McDonald's Australia Ltd [1999] FCA 1728

Entering the 'Monopoly McMatch and Win Competition' in 1999 did create a valid contract between the entrant and McDonald's under which McDonald's would be contractually bound to award a prize to the winner, but the contract contained two conditions:

- (1) claims for prizes were ineligible if they failed McDonald's security and verification checks, and
- (2) McDonald's decision on all matters arising would be final. McDonald's was entitled to reject ineligible claims for prizes.

Comfort letters

A letter of comfort is an expression of expectation or hope or intention designed to provide some moral responsibility, support or 'comfort'.¹⁹ A comfort letter raises the question whether it is intended to create legal relations — to go from an agreement to provide comfort to become a contract. The test is whether the terms of the comfort letter are sufficiently promissory to be contractual. Does the promisor take on legal responsibility, or does the comfort letter only contain statements of intention which are non-contractual (representational)?

It is a common business practice that parties can — and often do — rely on non-binding letters of comfort as a basis to conclude that debts will be paid.²⁰

19 A comfort letter is also called a letter of assurance, letter of awareness, letter of intent, letter of negotiation, letter of responsibility or letter of support.

20 Eg, *Atco Controls Pty Ltd (in liq) v Newtronics Pty Ltd (recs & mgrs apptd) (in liq)* [2009] VSCA 238 [54] (letters of support by parent company of debts of the subsidiary held not legally binding).

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)