

# DRAFTING AND CREATING CONTRACTS

**Robin Lonergan**  
**Partner**

**14 October 2009**

## **Introduction**

Any review of a list of judgments of the Supreme Court shows the number of disputes revolving around the construction and interpretation of contracts. In the last month there were more than 14 judgments delivered where the primary catchword was construction and interpretation.

While Contract Law is one of the earliest subjects studied in a law degree (or perhaps it is because it is one of the earliest subjects studied!) interpretation of contracts and the drafting of contracts still leads to a large number of disputes. Most of these cases arise where the parties have a different interpretation of the meaning of the words used in the contract.

## **1. What is a Contract**

In "Principles of Contract Law" <sup>1</sup> there is a discussion of the nature of contract. Basically a contract is an agreement or set of promises that the law will enforce. The book looks at the traditional meaning of a contract but also other theories including a feminist analysis, contract as a social relationship and contract as regulation. Most lawyers would not take much time considering the nature of a contract or how society views a contract – we know the legal principles of a contract and do not consider the matter further. Much of my work is involved in construction law and often my clients who are not lawyers consider they also know what a contract looks like, though their view may not reflect standard legal practice!

As lawyers, it is important we take into account societal views of the nature of a "contract".

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<sup>1</sup> Jeannie Paterson, Andrew Robertson, Peter Heffey, Thompson Law Book 2005

## 1.1 Classic View

The classic interpretation of a contract in a legalistic way is that it is an agreement between the parties that they have made voluntarily which binds their actions in relation to the subject matter of that agreement. This classic approach means that the parties determine their rights as between themselves in the contract and that the contract governs that relationship however, as we know, there are many external forces which now will influence a contract, matters such as the Trade Practices Act, rules which prevent the enforcement of a contract for an illegal activity, consumer protection laws etc.

The classic approach is based firmly on nineteenth century economic theory.

## 1.2 Promise Theory

Charles Fried<sup>2</sup> proposes that the contractual structure is based on moral principles – that the parties promise to each other that they will accept obligations which did not previously exist. The basis of this theory is that a person is morally bound to keep a promise. In some ways this is similar to the classic approach in that the parties are by their free will agreeing or promising to enter into duties between each other.

The issue with this theory is the basic question of "what is morality"? Should all promises impose moral duties which should be enforced by the courts?

The legal theory of contract differs from the promise theory because under common law only a promise which is backed up by consideration is legally enforceable. Similarly, the legal principle requires that when the parties make the promise they have the intention to be legally bound.

The promise theory of contract will more often arise in an oral contract rather than a written contract. When the parties express the promises or mutual promises in writing, it is more common that that written document expresses an intention to be legally bound.

Under the promise theory, where a friend says that he/she will fix the others car next weekend, a contract will arise. Under the classic theory and legal interpretation, this promise (while it may have moral force) it not a contract – is merely an expression of intention. The courts will not presume there is an intention to legally bound in a domestic situation.

Sometimes a client will consider that there is a contractual relationship when in fact there is only a promise or an expression of intention. There has been no consideration for the promise and the parties may not have expressed an intention to be legally bound. This can arise in a commercial situation where the parties have entered into a formal contract and consideration has been exchanged and then subsequently one party "promises" to deliver something else. For

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<sup>2</sup> Contract as Promise 1981

example that they will try to complete the building more quickly or that the software will have further functionality. If that further promise is not supported by some further consideration such as further cash or the other party agreeing to forego a right it may have (perhaps because of a breach by the party making a promise) the statement is just a promise without contractual effect.

### 1.3 Feminist Analysis of Contract Law

The authors of "Principles of Contract" then consider the feminist analysis. This has 2 approaches:-

- that the treatment of men and women under contracts is identical and therefore it is gender neutral;
- the "difference approach" that men and women are physically, socially, psychologically and politically different and that equality requires that these differences are taken into account. The feminists criticise the use of an abstract rule orientated and apparently neutral style analysis of contracts and suggest that this is associated with the cultural stereotype of men. A more feminine approach would be to look at values such as reliance, co-operation, respect for each other and compromise.

It is interesting to note that some of the "feminine" characteristics referred to in this theory are matters which are taken into account in civil law jurisdictions when interpreting contracts.

The traditional common law contract is black letter and (subject to any legislative intervention) the contract stands as it is written. If the parties are granted a right under the contract then they can enforce that right even if circumstances have changed. In civil law jurisdictions, the contract is more often interpreted as being an expression of intention of the parties but as circumstances change, the courts may vary the obligations under that contract.

We have all heard the stories of contract negotiation involving the largest civil law jurisdictions being China and Japan where the contract is negotiated with a common law lawyer from Australia or the US and then when circumstances change, the Chinese or Japanese party may seek to vary the clauses to change the price, change the output etc to reflect the surrounding circumstances. The contract may be to purchase widgets from China. The contract price may have been negotiated on the basis of steel having a certain range of cost. When the cost of steel exceeds that expected range, the Chinese party may seek to vary the contract price. The Australian or American party will consider that the Chinese party is renegeing on the contract, is breaching the contract and the actions of the Chinese party who an absence of good faith. The

Australian or American party may be under its own obligations to a third party to supply the widget at a fixed price.

In those circumstances there is no real understanding of the contractual theory of each party.

- The "subordination approach" considers whether in general there is inequality of women in terms of subordination to men and that the power relationship between men and women must be taken into account in resolving contractual disputes.

In the High Court decision of *Garcia v. National Australia Bank Limited*<sup>3</sup> considered the feminist approach to contracts in deciding that there existed a special principle protecting women who guarantee their husbands business loans where the woman has been subject to undue influence by her husband or has misunderstood the effect of the guarantee. The Court acknowledged that there is "still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties".

## 1.4 Contract as a Social Relation

This theory looks at the inter-relationship of contracting parties and that a contract is not a one-off exchange but part of the social context. Under this theory, the parties may be involved in a long term commercial relationship or even a social relationship in a small community such as a small town or where there is a relatively small industry.

The contract as a social relationship reflects that parties will often consider non-contractual implications when dealing with the dispute. These can include matters such as loss of business reputation where a large company takes action against a more economically vulnerable party. The theory is based on study in the 60's by Stewart MacAulay which found that some business people do not rely on the law of contract but instead make adjustments and resolve disputes based on the relationship between the parties. The study found that business people like to keep the transaction simple and avoid red tape and that in most cases buyers and sellers were more concerned with the basics such as quantity, specification and price rather than the "legal obligations" such as dispute resolution, interpretation etc.

The study does not reveal anything unexpected. We all have clients who ask us for a simple document, they do not want a lot of clauses and they ask why they need the "boilerplate" clauses, why the law to the contract is important or why there needs to be a notice provision. Often these are the same clients who, when provided a very simple document, will then start

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<sup>3</sup> (1998) 194CLR 395

wanting clauses dealing with other eventualities or if there is a dispute they will want to rely on complex representations made.

## 1.5 Summary of Theory

Understanding the various theories of contract can be useful in understanding how clients or non-lawyers look at contracts and also why different jurisdictions may look at the contractual relationship differently. This very brief overview puts my discussion regarding contracts into context.

## 2. A Binding Contract

While understanding the context and various theories of contract law in Australia there is a strict legal view of what forms a contract. This is based on the classic theory though there are a number of legislative overlays which will provide interpretation or impose other obligations into the contract.

The traditional contract requires:-

Offer and Acceptance.

Consideration.

Intention to be legally bound.

Certainty.

Drafting a contract or considering whether a contract exists, one needs to consider whether each of the elements has been established. If the elements have not been established then the arrangement may be a mere promise or an expression of a future intention or some other relationship which is not legally enforceable. A legal relationship may be created by a deed between the parties which does not require consideration to be legally bound.

## 3. Offer and Acceptance

The requirement for an offer and acceptance is fundamental to a common law contract. It is the time when the parties are of one mind. Some forms of contract such as the classic unilateral contract (the Carboloc Smoke Ball<sup>4</sup> case) or invitations to treat in shops and the string of ticket cases do not have a written offer and acceptance.

Even with a traditional written contract the written agreement needs to consider issues about the offer and acceptance.

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<sup>4</sup> Cahill v Carboloc Smoke Ball Co [1893] 1 QB 256

### 3.1 Acceptance

Under common law, the contract will come into effect when the offer is accepted. Generally the acceptance must be notified to the offerer, although this is not always required as with the unilateral contracts in *Carbolic Smoke Ball*. There will be issues about timing of the acceptance so that the courts developed the Postal Rule where an acceptance is deemed to have effect when it is posted even if it is received sometime later or is lost in the post. The contract is taken to have been formed at the place where the acceptance is posted. With modern forms of communication including fax and email, there are further complications. In *Reese Bros Plastics Ltd v. Hamon-Sobelco Australia Pty Ltd*<sup>5</sup> the New South Wales Court of Appeal held that a fax message should be treated as instantaneous communication and therefore acceptance is effective only when it is received by the offeree. It is not treated under the Postal Rule.

The Electronic Transactions Act in each Australian jurisdiction deals with the rules for receiving electronic communication (which is widely defined to refer to communication of information by guided or unguided electromagnetic energy) to the effect that the communication is only effective once it comes to the attention of the addressee<sup>6</sup>.

A well drafted contract will have provision for notice including address for notice whether or not notices can be served by email and also provisions for the timing of receipt. There were cases arising where the receiver's fax machine had no paper and therefore was not printed however most fax machines now have memory and clauses which refer to printing of faxes or emails are largely irrelevant.

The contract should also specify that the contract can be accepted electronically so that the acceptance can be sent by fax or email. Often the contract may be signed in various counterparts and if so the document should state that the signing of counterparts is acceptable and should deal with when the contract is formed. Is it when there is an exchange of counterparts or when the parties notify the other that their counterpart of the contract has been signed.

### 3.2 Termination of Offer

Generally an offer continues until it is withdrawn or is rejected or lapses.

In general, an offer can be revoked at any time before it is accepted. A promise to hold an offer open for a specified period is not binding unless the offeree has given consideration for that promise. Often prior to signing the contract, the parties may enter into a separate deed or other arrangement agreeing to an exclusive negotiation period.

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<sup>5</sup> (1988) 5BPR11 at 106,

<sup>6</sup> Electronic Transactions (Queensland) Act 2001 Section 24

A withdrawal of offer must be actually communicated to the offeree and the Postal Rule does not apply to a withdrawal of offer. The offeror will need to prove that the offeree was notified of the withdrawal.

If the offeree rejects the offer then the offer is terminated.

If the offeree "accepts" the offer subject to variations, that is a new offer which must be accepted by the original offeror. I often see situations where the parties have made offers and counteroffers where there is no actual acceptance of the counter offer. For example in a variation to a contract there may be changes which go backwards and forwards between the parties on a number of occasions as they are negotiating the contract. Sometimes there is no resolution of some of the issues and the parties will discover when the dispute arises when in fact there is no contract as there has been no formal offer and acceptance. The parties have been in negotiation mode and it is then necessary to look at the collateral evidence to establish what was the agreed oral contract as there is no formal written contract.

An offer will lapse on the death of the offeror or the death of the offeree though there is some judicial opinion that the death of the offeror will only cause the lapsing of the offer if the offeree is aware of that death.

The offer will also lapse, if a particular time period is stated in the offer, at the end of the time. If no period is stated, the offer will lapse after a reasonable time has passed. As the term "reasonable time" is not certain, it will vary according to the surrounding circumstances and is uncertain. The preferable position is for the offeror to make a formal offer and state the time within it is available for acceptance.

Even if the offer is made stating that unless the offer is accepted within a specified period the offer will lapse, the offeror may withdraw the offer at any time even during that period.

### 3.3 Commencement Date

Rather than relying on interpretation of when the acceptance was received by the offer and therefore the time and date of acceptance of the contract, a well drafted contract will specifically define the date of commencement. Sometimes the contract may also have an effective date of commencement which is different from the actual signing of the offer and acceptance or of the contract document.

The use of a defined commencement date clarifies subsequent dates which flow from the commencement date of the contract for example where there may be reference to something occurring 6 months after the commencement date or on the anniversary of the commencement date. rather than have uncertainty, a definition of the commencement date will clarify those future obligations.

## 4. Consideration

Consideration means that something is given in return for a promise in order to make it binding. Usually a contract is made by exchange of promises so that each party's promise is consideration to support the promise made by the other. Sometimes Party A may make a promise and Party B fails to reciprocate that promise. Party B would then not be able to enforce the contract if there is no consideration.

If the promisor has a discretion whether to perform or not, there will be no consideration. Sometimes this can also occur when the consideration is uncertain. In *Placer Development Ltd v. Commonwealth*<sup>7</sup> the contract stated that the Commonwealth would pay a subsidy of an amount or a rate determined by the Commonwealth from time to time. The High Court found that the agreement imposed no obligation on the Commonwealth to pay any subsidy and that there was therefore no consideration.

The courts have also found that past consideration is not sufficient. This means that something which is done before the promise is made cannot constitute consideration for the promise. In reaching a settlement agreement, the parties need to be careful the consideration being proposed is not past. As I have previously stated, if there is doubt whether the consideration is past, present or future, the arrangement could be structured by way of a deed rather than a contract or agreement.

The courts do not consider whether the consideration referred to in the contract is adequate. Payment of one dollar upon demand would be consideration though it may not be comparable to the promise provided.

## 5. Intention to be Legally Bound

Generally there is a presumption that the parties intend to be legally bound where there is offer and acceptance in a commercial transaction. The parties seeking to deny the enforceability of the commercial transaction bears the onus of proving that it was not intended to be binding.

The situation will be different where there is another relationship such as an agreement between family members or in other domestic situations. Usually in the domestic situation, there is a presumption that there is no intention to be legally bound. These are considered to be mutual promises rather than contracts. It is an example of where the Promise Theory relating to contracts is shown to be not correct – in the domestic situation, the mutual promises would have moral basis but the courts do not interpret this as a contract.

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<sup>7</sup> (1969) 121CLR353

Often the issue of whether the parties intend to be legally bound will arise where there is preliminary negotiations or a heads of agreement. The document may have mutual promises such as one party permitting the other to carry due diligence and the other party expending time and money doing that or there may be consideration from the seller of property withdrawing the property from sale while the buyer undertakes further enquiries. While generally a heads of agreement may not be certain, in other cases it will have all of the basis of the contract and as such may constitute a contract.

In the leading case of *Masters v. Cameron*<sup>8</sup> the parties entered into a written memorandum about a farming property. The memorandum was signed by both parties and the seller agreed to sell and the buyer agreed to buy the property for a stipulated price. The agreement was made subject to the preparation of a formal contract of sale acceptable to the sellers lawyers on these terms and conditions. Both parties acted as if the transaction was proceeding but no further documents were signed. The purchaser ran into financial difficulties and refused to complete.

The High Court considered the matter and said that in the circumstances the parties may:-

- have finalised the terms of the bargain and intend to be legally bound but proposed to restate the terms in a fuller or more precise form;
- the parties may have agreed on all the terms of the bargain and did not intend to vary those but have made performance conditional upon the execution of a formal document; or
- the parties may not intend to make a binding agreement at all unless they execute a formal contract.

In the first of these situations is there a contract, and the other two alternatives did not show an intention to be legally bound by the heads of agreement or memorandum.

In that case, the High Court found that the effect of a preliminary agreement depends on the intention disclosed in the language of the parties. Where an expression such as subject to contract or subject to a formal contract are used there is an implication that the parties have only set out the basis of a future agreement and that the preliminary agreement is not binding. On the facts, the court found that the memorandum did not constitute a binding agreement and the purchaser was free to withdraw from the transaction.

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<sup>8</sup> (1954) 91CLR353

In the case of *Baulkham Hills Private Hospital Pty Ltd v. GR Securities Pty Ltd*<sup>9</sup> the court indicated that there was a fourth category or alternative for a preliminary memorandum which is that the parties intend to be bound immediately and exclusively by the terms whilst expecting to make a further contract in substitution for the first contract containing by consent additional terms. Basically, this fourth alternative is an extension of the first – the parties exhibit an intention to be legally bound by the memorandum but also specifically acknowledge that there will be a subsequent formal agreement comprising the terms and conditions in the memorandum and that the parties by mutual agreement can vary those terms to expand on the original memorandum.

The situation with heads of agreement or memorandums of understanding etc. often arise where the parties have not indicated whether the document is intended to be legally binding. It is important that such documents clearly identify their purpose and also that the parties are aware that if the memorandum is not legally binding that either party can walk away without penalty.

Often the heads of agreement or MOU will set out the framework for the subsequent agreement and state that it is not legally binding but will also include mutual obligations which are clearly intended to be legally binding. For example a Heads of Agreement or MOU may have an exclusivity period so that one party agrees that it will not negotiate with a third party for an agreed period. The document may also include obligations of confidentiality where confidential material has been disclosed or there may be an obligation on the party to provide material so that the other party can undertake a due diligence.

The better drafting technique in such circumstances is either to have 2 separate documents, the term sheet which is stated to be not legally binding and a separate agreement between the parties containing the binding provisions. In such circumstances it is important that the document containing the binding provisions has sufficient consideration or is expressed as a deed.

The alternative is to have all of the arrangements set out in one document and then to specify which clauses are intended to be legally binding and which clauses are not. Again the issue of consideration may arise in relation to the legally binding provisions.

## **6. Certainty**

The fourth requirement for contract formation is that the agreement is certain. Certainty also goes to the issue of whether there is real acceptance of the offer and whether there is an intention to be legally bound. Basic to the issue of certainty is that the agreement is clear so that the parties can understand the terms and agree to them and agree they will be bound by them.

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<sup>9</sup> (1986) 40NSWLR 622

The issue of certainty impacts heavily on the drafting of the document which I will deal with later in this paper.

To have certainty, the parties must have agreed on the essential terms. For example the parties must agree on the price, the term of the agreement, the obligations on each party. If the parties have agreed on a price per hectare for land but have not agreed on the area of the land then there can be no certainty. If the area is not known but can be determined objectively then there may be certainty. A contract may provide that the price will be an amount per square metre of land which is suitable for cultivation of a particular crop. When drafting a clause such as that, it is preferable to have a method of resolving any dispute. In that example, it may be possible to have an independent agronomist determine whether the land is suitable for the crop. The decision of that agronomist would be as an expert and would be final. Similarly, the contract may have a formula for working out the purchase price. Again it would be useful to have a dispute resolution provision if the parties cannot agree on the calculation.

Sometimes legislation will imply terms into an agreement where it is otherwise silent. For example the Sale of Goods Act<sup>10</sup> will imply a reasonable price where the agreement is silent.

An agreement to agree is generally not certain. There can be no real acceptance or intention to be legally bound where the parties agree to determine an essential term in the future. For example if the contract has no completion date and states that the completion will occur when the parties agree.

In the recent Queensland Supreme Court decision of Maclag (No 11) Pty Ltd and Lazarides v. Chantay Too Pty Ltd<sup>11</sup> there was an argument about whether a clause in a partnership deed was certain. The defendant pleaded that the provision fixing the price of an interest in the partnership was not certain.

Justice McMurdo noted 2 points of principle:-

Firstly a contract of which there can be more than one possible meaning or which, when construed, can produce in its application more than one result is not unenforceable for uncertainty. Secondly in the search for the contractual intention "no narrow or pedantic approach is warranted particularly in the case of commercial arrangements". In particular where parties have agreed on an arbitration or valuation clause full weight should be given to the manifest intention of the parties to create continuing legal relationships and that "arguments invoking alleged uncertainty or alleged inadequacy in the machinery available to the courts for making contractual rights effective exert minimal attraction".

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<sup>10</sup> Sale of Goods Act 1896 Section 11

<sup>11</sup> BS9219 of 2008 Delivered on 22 September 2009

The judge considered each of the allegations of uncertainty in the partnership agreement and determined that each was able to be resolved in a practical way and that the reference to an expert determination meant that the expert could engage his/her own reports from valuers etc so that the expert could determine the value of the former partner's interest in the partnership.

In another recent decision of the Queensland Supreme Court, HIGB Pty Ltd v. Townsville City Council<sup>12</sup> Justice Lyons considered the time at which monies were to be paid under a redevelopment agreement.

The agreement related to the construction of a stormwater drain as part of a redevelopment of the Townsville North Rail Yards. The cost of the stormwater drainage was estimated at \$1.2 million to be constructed in 4 stages. HIGB sent a draft infrastructure agreement to the council proposing that council contribute \$820,000.00 towards the total cost "on a staged basis". Following subsequent negotiations, the draft stated the Council was to contribute \$600,000.00 towards the cost which was deductible from headworks payable on a stage by stage basis. Council proposed significant changes to the agreement and the estimated cost of the drainage infrastructure was deleted. The new agreement provided that the "council will upon satisfactory completion of (the infrastructure) works or part thereof reimburse HIGB \$600,000.00....such reimbursement if sought incrementally will be proportional to the amount of works in each stage".

HIGB claimed the whole of the reimbursement after it had constructed some of the infrastructure. HIGB contended that the effect of the agreement was that as soon as it had constructed part of the infrastructure at a cost of at least \$600,000.00 it was entitled to be reimbursed that amount. Council contended that HIGB is entitled to be reimbursed \$600,000.00 after construction of the whole infrastructure and if it seeks to be paid before then it could only receive a proportionate part of the \$600,000.00.

HIGB had relied on various drafts of the infrastructure agreement relying on a passage quoted by Chesterman J in Queensland Power Co Ltd v. Downer EDI Mining Pty Ltd<sup>13</sup> which states that:-

"If a contract contains words capable of more than one meaning and if it is alleged that the parties have negotiated on an agreed basis that the words bore only one of 2 possible meanings then it is permissible for the court to examine the extrinsic evidence to see whether the parties have in fact used the words in question in one sense only so that they have in effect given their own dictionary meaning to the word as a result of their common intention".

The judge found that the material in this case did not demonstrate an agreement by the parties that the words had one meaning. He stated that the previous drafts did not demonstrate that the

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<sup>12</sup> SC5119 of 2009 Delivered on 11 September 2009

<sup>13</sup> [2009] QSC6 at 71

parties had united in rejecting a meaning of particular words but instead the various drafts have different meanings about whether the payments would be on a stage by stage basis. Accordingly, the judge found that the earlier drafts were not admissible. The judge found that the agreement "is to be construed in a way which identifies what a reasonable person would understand by the language in which the parties expressed their agreement". Commercial contracts should be given a "businesslike interpretation" a construction that makes commercial sense and reflects business commonsense is to be preferred".

After considering the drafting of the agreement the judge found that it is likely the parties intended that each contribute progressively towards the cost of the works. Accordingly he did not accept the construction intended by HIGB.

These cases show the courts willingness to review and interpret contracts where there may be some uncertainty but where that uncertainty does not go to the core of the agreement. The courts will interpret the provisions of the agreement reflecting business commonsense, but the courts will not have regard to extrinsic evidence.

## 7. Drafting

In Australia, most contracts are drafted in plain English using a style which makes reading the agreement easy, clearly defining terms in a definition section either at the commencement or as an appendix to the agreement but not defining terms within the body of the agreement and using a setout which is easy to read by having clauses and sub-clauses using a consistent numbering style.

The structure of contracts drafted by most law firms follows a similar style. There are other styles of drafting used for contracts. In the US, contracts have a quite different structure and are drafted in a way which is often the opposite of plain English using long complex sentences and a numbering protocol which does not easily identify where a clause falls within the document.

Some commercial documents such as terms and conditions of sale of goods will have different drafting imperatives. These documents are often drafted to a specific size of paper so that the font size may be significantly smaller than would be optimum and not all of the standard "boilerplate" clauses found in a legal contract may be present.

There are a number of guides about drafting. For example, the Commonwealth Government has published a style manual<sup>14</sup>. There are also various books about plain English and use of punctuation including Eats Shoots and Leaves<sup>15</sup>.

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<sup>14</sup> Style Manual for Authors Editors and Printers 6th Edition, John Wiley & Sons Australia Limited 2002

<sup>15</sup> Eats Shoots and Leaves The Zero Tolerance Approach to Punctuation, Lynne Truss, Profile Books 2003

## 7.1 Instructions

Fundamental to drafting a good contract is to obtain clear instructions about what the parties intend in the contract – what has been agreed and needs to be expressed in the contract and more importantly the implications of the agreed terms to identify what has not been agreed.

As part of the process, it is important to consider the life of the contract. Often the parties will have discussed the initial involvement – when that will occur, the cost, and the subject matter of the contract – but the parties have not considered issues which will arise during the term of the contract such as is there a process for increasing the price and how is that calculated, can the term be extended and on what grounds, what is the process for introducing new parties to the contract either by way of assignment by one party or by introducing another party. Most importantly, the contract needs to deal with termination. This may be by default by one party but there may also need to be the ability to terminate the arrangement if the relationship falls over. In the case of a partnership contract or shareholders agreement, the parties may need to consider how to resolve disputes particularly "terminal disputes".

## 7.2 Consistency

As one of the fundamental requirements for a contract is certainty, the document must be consistent. The best way to ensure consistency is to use definitions, clearly identified defined terms for example by using capital letters, italics etc., and to identify the drafting protocol used to note defined terms and to make sure that when a term is defined that it is used in that defined way throughout the document.

I have seen contracts where the same word may be used in a general sense and in a defined way using a capital. This is difficult to interpret and can lead to uncertainty and confusion between the parties. Often a word as such "day" may be used in different ways – calendar day or business day. The use of "day" can be vital in calculating periods of notice or in defining when a notification is received.

Where the contract deals with industry specific jargon, it can often be difficult for a lawyer to define the terms and it may be better for the parties to agree on the scientific/chemical etc definition.

It is also very important to review the contract for cross-referencing and to ensure that the same numbering protocol is used in all clauses. Many computer programs will have automatic numbering when used in legal offices but when a client or another party attempts to amend the document or if a section is cut and pasted into the document, often the numbering will lose its consistency.

Similarly, it is important to ensure that annexures are correctly numbered and include the correct information.

## 7.3 Boilerplate Clauses

In addition to the operative section of the contract, there are many matters which are dealt with as "boilerplate" clauses. These are the clauses which cover matters which arise in many contracts such as the issuing of notices, law of the contract, confidentiality, costs, publicity, signing in counterparts etc. Many of the boilerplate clauses can be omitted from a contract without affecting its certainty because the various acts will imply the clauses into the document. As is always preferable for the document to stand alone and to be able to be interpreted by itself, it is preferable not to rely on statutory interpretation or implications.

Two of the general clauses which need to be considered in detail are the dispute resolution provision and the default or termination provision. Often generic clauses are used for these but care should be taken to ensure that the proposed clause reflects the intention and understanding of the parties.

Most dispute resolutions provisions will refer to some form of negotiation between the parties with meetings by senior executives. The theory is that the dispute should be taken away from the people who are personally involved and to elevate it to a level where the people discussing the dispute can look at it in a more commercial context to consider the contract in its social relation rather than in its strictly legal relation. If that meeting is unsuccessful, then the parties need to consider what is the best form of dispute resolution for this contract – should there be formal mediation, should an expert be appointed, should it go to arbitration or should it go to litigation.

Many contracts I see automatically refer to an expert determination without really considering the range of disputes which may arise and the expertise of the nominated expert. In a building contract, an expert architect may be nominated however the dispute may arise from contract interpretation, an area in which the expert architect would have no expertise. The parties should also be aware that there is no appeal from an expert determination unless the contract specifically provides for a mechanism, for example appeals are only allowed above a certain level.

## 7.4 Simplicity

Consistent with using plain English, contracts should be drafted in as simple a manner as possible. Even where the subject matter of the contract is complex, the contract itself should be simple to understand.

A contract is more easily understood where the language is simple, where it is set out in a clear way with paragraphs, sub-paragraphs and sub-sub-paragraphs clearly numbered in a consistent way and where any special terms are defined separately.

As I have previously stated, the contract should stand alone. Where other documents are referred to, it is preferable to annex those documents or at least to review the document to make sure that it is available to both parties and that the document states what it is intended to state and that it is not inconsistent with the contract.

Where there is a number of different documents, it is important that the contract sets out the hierarchy of those documents so the parties can be certain what is the intention if there is any inconsistency between the documents. It is particularly important where there has been a heads of agreement or MOU and perhaps there is a reference to a standard document such as one of the standard building contracts. Some contracts may have reference to workplace health and safety guidelines or environmental guidelines with which the parties must comply. Those guidelines or manuals should be annexed or clearly identified and should be reviewed to make sure that they are not inconsistent with provisions of the contract and in particular that they do not impose further obligations on a party which were not expected or intended.

## 7.5 Review

After drafting the contract, it needs to be reviewed to ensure that it incorporates the matters required by the client, for consistency, grammar etc. It is important that the parties actually read the contract and understand the implications.

Particularly where there has been lengthy negotiations over the terms of a contract, it is important to undertake a final review to ensure that the contract remains consistent and that the process described in the contract will work in practice.

It is also obviously necessary to review the contract as drafts as exchanged to ensure that no unexpected changes have been made by doing comparisons rather than simply relying on tracking.

## 8. Summary

A binding contract must have:-

- offer and acceptance
- consideration
- intention to be legally bound
- certainty.

The drafting of the document must consider the four fundamentals to ensure that the parties are entering into a legally binding contract.

The parties need to take time to agree on the basis of the contract and to use the negotiation process in drafting the contract to clearly identify what they want during the life of the contract not just at its commencement date.

The drafting should reflect the fundamentals of a contract so that it must clearly identify that there is offer and acceptance, what is being offered and what is being accepted is the same, that the parties understand the terms of the contract and that there is a meeting of minds, that there is consideration for the promises being given and if there is no consideration then the arrangement should be restructured, in which case the promisor needs to consider why he/she is making the promise for no consideration. Finally the contract should show that the parties intend to be legally bound – at its simplest level, the contract should be legal itself so that the subject matter should not be illegal but also the fundamentals of the contract should not conflict with obligations or responsibilities implied by statute particularly the *Trade Practices Act*.

Clients often say that the contract is signed and then put in the bottom drawer and only pulled out when there is a terminal dispute. It is preferable that if the contract forms a working document which can be used by the parties on a regular basis to understand their relationship and, where circumstances change, the contract should be formally varied to reflect the change.