

Contract Law in Australia - 2019

What is Civil Law?

Civil cases involve a plaintiff (the person bringing the claim in court) and a defendant (the person arguing against the claim) and are decided on the balance of probabilities. When deciding on a civil case, the court must consider the evidence on the basis of what a reasonable person would think of what the parties have done or not done, as well as taking into account all of the surrounding circumstances.

The Rule of Law and Contract Law

The rule of law (see the Rule of Law Pyramid below) provides stability and predictability in the legal system. For contracts to be binding and enforceable a society needs a stable civil law system. Equality before the law under the rule of law allows for legal mechanisms to ensure parties to a contract are treated equally before the law and vulnerable members of the community are protected when entering into contracts.

Contract Law

A contract is a **binding agreement** between parties.

For a **contract or legal agreement** to be formed it must have several legal elements. These are:

1. An offer made by one party;

An **Offer** - is a communication (verbal or in writing) amounting to a promise to do something (or not do something) if the person to whom the offer is directed accepts the offer

2. Acceptance of the offer by another party;

The **Acceptance** - is an statement (oral, written or by conduct) by person accepting the offer. An offer may only be accepted by the person to whom it is directed and must show it is a valid acceptance by also promising to do or not do something in exchange.

3. Intention to create a legal relationship by the parties.

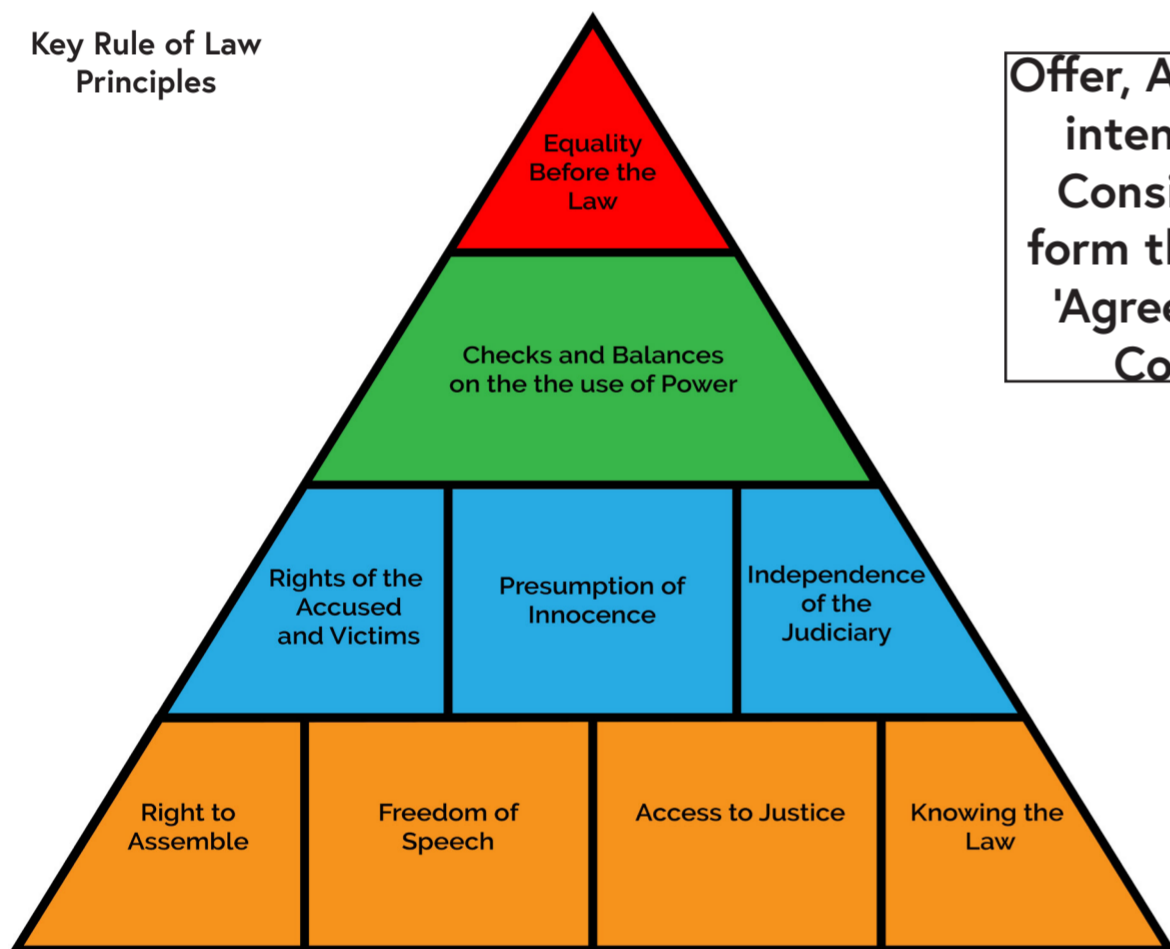
There are certain categories where there is a presumption that the parties are not intending that their agreement will be a contract. This includes families and some social relationships.

The **Intention** to form legal relations - the presence of **consideration** (offer & acceptance) usually demonstrates intention to form legal relations. Attached to this intention is the presumption the parties are capable of forming legal relations.

4. Consideration for the offer (that is a payment given in exchange for the promise, can be known as the price paid for the offer).

Consideration - the common law requires that, for an agreement to be binding, the offer and acceptance must provide consideration (payment of some kind) for the promise they have received. There has to be evidence both parties to the contract must receive a benefit.

Key Rule of Law Principles



Offer, Acceptance, intention and Consideration form the binding 'Agreement' or Contract

Terms of a Contract

A contract or agreement will usually have terms. They can either be oral or in writing. They say what the agreement is about and what each party should do to make that agreement work. These are clauses in contracts that deal with, for example, what each person should do, how they should do it, how long that should take, how much will be paid, who will pay and when to pay.

In some circumstances the law will presume that something is true unless it is proven otherwise with evidence. Eg: that a person who is aged 12 years old is under 18yrs old (a minor) and therefore unable to enter into a contract.

Express and Implied Contract Terms

In contract law an agreement can be formed in writing, through a discussion by parties (oral), or implied. If a contract is written down it often contains express terms (words) that set out the details of the contract.

Implied contract terms can be determined by fact, Law, dealing, custom or usage.

Express contract examples are:

- a mobile phone contract
- a contract to buy a house
- an employment contract

Implied contracts can include:

- ordering food from a waiter in a restaurant - it is understood that the food will be delivered in a timely manner, be edible and that you will pay for the food before leaving the restaurant.
- hailing a taxi and riding to your destination - it is understood that you will pay the driver once you arrive

No Legal Contract

The courts have decided that in certain cases there should be a **'rebuttable presumption'** * against the formation of a contract. This means that the court will assume there is no contract in specific cases unless evidence is presented to the court that shows the contract is legally binding.

There is a **'rebuttable presumption'** that there is no binding legal contract between family members or people in social relationships.

A person needs to have **capacity** to form an agreement.

Capacity is a legal word that means that a person must be able to understand the significance of what they are doing when entering into a contract.

Assessing legal **capacity** is different for every situation. A person may have capacity for some types of legal decisions and not others. Eg: 16 yr olds can consent to their own medical treatment but are not able to purchase property.

There is also a **'rebuttable presumption'** * that there is no contract when one or more of the parties:

- has an intellectual disability
- is a minor
- is elderly and lacking capacity
- is friends with the other party
- suffers some form of impairment such as being intoxicated or affected by drugs

*An example could include a party proving they did not know a person was a minor or had an intellectual disability when they signed the contract and they think the contract should be legally binding

Breach of Contract

If one of the parties does not do what one or more of the terms of a contract say they must do, it can lead to what is called a breach of contract. In that case the other party can take them to court and ask for damages to be paid to them, because they have not honoured the terms of the contract.

Damages (money) as compensation will only be ordered by the court, if the wronged party can show that they have suffered a loss. The damages are then awarded in an amount that will put that wronged party in the same position they would have been in, if the other party did not breach the contract.

Student Activities - Contract Law

Questions:

1. In your own words, what is a contract?
2. What are the 4 key elements of a binding contract?
3. Define each of the key elements for a binding contract.
4. What are the age requirements for a person to be competent?
5. When can a person be under the age of majority and enter contracts legally?
6. Does a contract always have to be in writing?
7. List 3 examples of when contracts must be in writing.
8. What you feel is the most valuable part of a contract and why.

Scenario Activity

Find the case *Carlill v Carbolic Smoke Ball Co Court of Appeal [1893] 1 QB 256; [1892] EWCA Civ 1* <https://www.australiancontractlaw.com/cases/carlill.html>

Refer to the case when answering questions based on the following scenario:

It is March 2019. Tasmin who is very health conscious is shopping one day and sees in the local chemist a product called 'Flu Stop'. The advertisement says:

Flu Stop is a healthy alternative to the flu injection without needing to go to the doctor for a needle. We offer a money back guarantee and a weekend for two at the famous 'Blue Mountains Health Connections' to any person who contracts the flu within a reasonable time, after having used the Flu Stop every day for two months according to the printed directions supplied with each bottle. Proof of receipt of purchase is also required.

Tasmin doesn't believe in vaccinations and doesn't want to have a flu injection. The 'Flu Stop' costs \$70.00. Tasmin buys the product. She follows the instructions for 2 months. In June 2019, after swimming at Icebergs in Bondi, Tasmin succumbs to a cold and then pneumonia. She was very ill and was hospitalised for several weeks. Tasmin returns to the chemist in September to claim her refund.

The shop refuses to pay.

1. Was there a valid offer?
2. Was there valid acceptance?
3. What was the consideration?
4. Was there an intention to form legal relations?
5. What if Tasmin didn't keep her receipt and returns to claim the refund?
6. Can a cold and pneumonia be classed as 'flu'?
7. What if Tasmin returns without her receipt?
8. What if Tasmin was drunk when she bought the Flu Stop?
9. What if Tasmin was 14 years old when she bought the Flu Stop?

Other Activities

1. A shop assistant asks you to open your bags for checking when you leave a shop. You look around and there is no sign that indicates that it is a condition of entry that you open bags for inspection when leaving the shop?

- Do you need to open your bag for inspection? Why/why not?

2. You go to a store and see a red dress that you know your mother will love as a gift for her birthday, as red is her favourite colour. It is not in her size, but you order the red dress in your mother's size, pay for it and arrange to collect it the following week.

- When you return the following week the shop assistant says that there were no red dresses, so she got you a blue one? Do you have to take the dress? Why, why not?

Case Study 1- Winter v Nemeth [2018] NSWSC 644 - When is an agreement not a contract.

This case study concerns contract law and the alleged making of a contractual agreement between friends. The case was heard in the Supreme Court of New South Wales before Justice Campbell.

The Facts of the Case

The Agreement

In this case the plaintiff said that the defendant had promised in 2010 that if the plaintiff did clerical services for her in relation to the defendant's family court proceedings, she would buy the plaintiff a small house in the suburb of Double Bay in Sydney.

The plaintiff was a single woman aged 77 years. The defendant was a married woman in her mid-50's. The parties met prior to late 2008, but it appears that they became friends about 2008 and remained so until the friendship broke down in 2010.

The defendant said that she and the plaintiff had a close and personal friendship. The plaintiff agreed that the parties had a friendship and that she had voluntarily helped the defendant with her family law proceedings up to 2010.

The plaintiff said that the defendant had told her in 2009 that when her legal case was over, she would buy a house for the plaintiff. The plaintiff said this conversation occurred as a result of her being told she would have to move out of her rented unit. In 2010 the plaintiff said that the defendant entered into an agreement with her, stating that she would buy the house, if the defendant continued to perform the work she had previously done for the plaintiff.

The plaintiff said that the outline of the agreement was written on a document and that the rest of the agreement was oral (the words they said to each other) or implied by what each of the parties did. The plaintiff said that she had given that document to lawyers and it had not been returned to her. It had been lost.

In 2010 the defendant also sent an email to the plaintiff saying that she had trusted her with everything and she always thought about the future of the plaintiff and where she would live and be comfortable.

The plaintiff replied in writing and noted that the defendant had said that she would pay her enough money to buy a house. She asked when she would be paid. It appears that the defendant did not reply to the plaintiff's email.

The Consideration

As noted above, the plaintiff said that the defendant would buy her a house, if the plaintiff continued to assist her with work on her legal case. The evidence indicated that the plaintiff did work on the legal case. At one point, the defendant told a third person that the plaintiff had spent a large amount of time working on her case.

The Court's Decision

The court said that not every promise is legally enforceable. It did not accept, on the balance of probabilities, that there was a letter from the defendant in 2010 allegedly offering to buy the plaintiff a house. It accepted that the defendant probably did make a promise to buy the plaintiff a house, when the legal case was over. This was supported by the emails and particularly the defendant's failure to reply to the plaintiff's last email about the defendant providing her with money to buy a house. The court said most people would reply and deny that statement if it was false. The defendant did not. The court therefore accepted that a promise was made in 2010.

The court did not accept that there was consideration from the plaintiff for the promise made by the defendant. The court also noted that it was not very clear how much work the plaintiff had done for the defendant in her legal case. A reasonable person would consider that the value of the promised house was out of proportion with any work the plaintiff was doing for the defendant. At the time of the hearing the court noted a small house in Double Bay was worth approximately \$1,200,000.

The court also found that there was no intention to create legal relations between the parties, as they had a social relationship. A reasonable person would not consider the language used by the parties to show that there was a specific act that had to be done in exchange for the promise to buy a house.

The defendant had said that the plaintiff was helping her as a friend, just as she had done for the plaintiff by paying occasionally for meals and by paying for the plaintiff's expenses to have a total knee replacement in a hospital overseas, as well as for overseas holidays. The court found that the defendant intended only to give the plaintiff a substantial gift as a friend, if her family court proceedings went well. There was no intention to form a binding agreement. The plaintiff lost the case.

Case Study 2 - Yasmine Taylor v Camille Roberts [2018] NSWLC 9 - Verbal Contracts

This case study concerns contract law and the alleged making of a contractual agreement between friends. The case was heard in the Local Court of New South Wales by an Assessor.

Facts of the Case

Ms Taylor and Ms Roberts were good friends. From August 2016 to May 2017 the friends planned a trip together to Europe proposed for June 2017.

Another two friends Sarah and Katey decided they wanted to travel to Europe as well. On 27/09/16 the four friends attended Flight Centre Tuggerah. Kelly Dodd from Flight Centre prepared an invoice for the 4 travellers for \$17,511.00. This included tours to Greece, Croatia and Spain.

The 4 travellers then individually altered their travel arrangements regarding some of the tours, flights and flight times and destinations. During these arrangements Ms Dodd requested them to pay a deposit each for flights and some agreed tours. Ms Roberts paid \$3,520.00 and Ms Taylor paid \$6,427.00.

In May 2017 Ms Roberts informed Ms Taylor she needed to cancel the trip. Ms Roberts and Ms Taylor both incurred cancellation fees.

Ms Taylor sought to recover \$3,214.00 for lost fees from Ms Roberts, claiming a breach of contract.

The matter came before Assessor Olischlager in the Local Court.

Legal Issues

The key issues for the court:

- Was the paying of the deposit for the holiday an intention to create legal relations ie was there a contract?
- When Ms Roberts cancelled the trip was there a breach of contract?

The Court's Decision

These elements were analysed in the judgment.

The Court found that there must be an intention to create legal relations which relied on the following elements:

- The number of people to who the statement was made
- Whether the statement was in writing
- Whether there was substantial consideration offered for the promise
- The number of times the statement was made
- The context, formal or informal, in which the promise was made
- The nature of the relationship between the parties
- The certainty of the terms

The court found there was no intention to create legal relations for the following reasons:

- The offer of a holiday was not confined to Ms Roberts. Other friends were free to join in the travel plans
- In order for an agreement to have contractual force there needs to be an offer and acceptance creating binding promises. Evidence of both the offer and acceptance requires valuable consideration that moves from the promise in the offer to the promise in the acceptance. Ms Taylor made an offer to Ms Roberts to travel to Europe with her. Ms Roberts accepted the offer to travel to Europe with Ms Taylor. Ms Taylor gained a benefit from Ms Roberts accepting the offer to be her travelling companion. This means that Ms Taylor had to show she provided some valuable and practical benefit to Ms Roberts by agreeing to travel with her. For example if you travel with me I will give you xyz. Ms Taylor was unable to demonstrate the benefit for Ms Roberts.
- There was no evidence in the relationship between the parties there was a voluntary assumption of a legally enforceable duty (*Ermogenous v Greek Orthodox Community of SA (2002)*). The idea of the holiday was no more than a loose 'social' or 'domestic' agreement between friends that was part of an ongoing friendship. This was evidenced in the conversations which were casual and informal between friends planning a holiday for the sole purpose of spending time together.
- There were no evidence the travel plan was a contract that could be enforceable by a court because the travel plans were fluid and evolving. Some of the essential terms of the agreement such as actual destinations, length of holiday and budget had not been fully determined and were still vague and uncertain even as late as April 2017. This appeared to be a deliberate intention between the parties to keep the plan informal and flexible which strengthens the case that the parties didn't want to be legally bound.

Ms Taylor argued she had suffered a huge financial loss when Ms Roberts cancelled the trip. The court did not consider the cancellation fee to be construed as a business loss or a business loss of significant proportions.

Ms Taylor had a choice to continue her travel plans and not rely solely on Ms Roberts to accompany her. Ms Taylor was prepared to make changes to her travel plan without informing Ms Roberts which demonstrated an intention not to enter into a binding contract.

This matter was more about personal trust and honour rather than legal relations.

Assessor Olischlager found for the defendant Ms Roberts and ordered Ms Taylor to pay legal fees of \$602.00.

Case Study 3 - Kingsbridge Holdings Pty Ltd v Max Watt's Operating Pty Ltd (Civil Claims) [2018] VCAT 1674 (26 October 2018) - Written contracts

This case study concerns contract law and a contract for the hire of a venue. The case was heard in the Victorian Civil and Administrative Tribunal.

The Facts of the Case

The Agreement

In this case the plaintiff, Kingsbridge Holdings Pty Ltd (Kingsbridge) was an entertainment company and promoter that brought international artists to Australia for concerts. They entered into a contract with Max Watts Operating Pty Ltd (Watts) to hire a venue in Sydney owned by Watts. The contract was entered into on 17 January 2017 and included terms about ticketing, staffing, event safety and closure (the Contract). The venue hire was for a performance by a Jamaican reggae and dancehall artist known as Beenie Man, who was doing a tour around Australia arranged by Kingsbridge. The Sydney performance was to take place on 23 March 2017.

The Alleged Breach

On 21 March Watts sent Kingsbridge an email noting their concerns about poor ticket sales, the late appearance of the performer on stage, and safety issues for staff and patrons. They advised that Kingsbridge had not satisfied the Contract. Watts cancelled the venue hire for the Sydney performance.

Watts later said that Kingsbridge had also breached the law, as it had been involved in fraudulent ticket sales.

Kingsbridge found another venue for the Sydney performance. They later sued Watts in the Victorian Civil and Administrative Tribunal for damages for breach of contract, due to the cancellation of the venue hire. Kingsbridge is a corporation registered in Victoria and it is therefore likely this is the reason they sued in Victoria (the Tribunal's decision is silent on this).

The Court's Decision

The Tribunal said there were two issues to consider:

1. Was Watts entitled to cancel the venue booking, because it had concerns about safety and security or a breach of the law?
2. If Watts was not entitled to cancel, what loss did Kingsbridge suffer due to that cancellation?

Clause 24 of the Contract between Kingsbridge and Watts read as follows:

Event Closure - MWO [Max Watts] may without any liability or penalty, at its sole discretion and without prior notice, close or suspend the event at any time, for safety or security reasons or any other breach of applicable law or code which has occurred or is about to occur.

In the Tribunal's view, clause 24 referred to the closure or suspension of an event. This meant that the event had to have started, before it could be 'closed' or 'suspended'. This then did not give Watts the right to cancel the event before it had started. Their action was outside the agreement in that term of the Contract and was therefore a breach of the Contract by Watts.

The Tribunal also found that there was no evidence that Kingsbridge had otherwise breached any other law, as there was no evidence that it had taken part in fraudulent ticket sales.

The Court's Decision

Kingsbridge claimed damages of \$93,951.40 for, amongst other things, the cost of hiring a new venue, expenses in using a new venue and lost ticket sales for Sydney and Melbourne (their next concert venue). Kingsbridge said there would be a flow-on effect from the negative publicity, due to the cancellation and this would greatly affect their Melbourne ticket sales.

The Tribunal found that there was evidence that Kingsbridge had lost ticket sales in Sydney, but not Melbourne. They had also suffered loss from having to pay additional expenses to run the Sydney performance at the new venue, but not a significant amount. The Tribunal ordered that Watts pay Kingsbridge damages of \$9,284.22.