

Implied terms

- In fact
 - Give effect to presumed (objective) intention of the parties
 - Similar to construing terms
 - Test *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council*
 - Reasonable and equitable
 - Not when it benefits one party and significantly detracts from the other
 - Necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it
 - Obvious *Byrne v Australian Airlines; Frew v Australian Airlines*
 - Capable of clear expression
 - Must not contradict the express terms of the contract
 - Test can be more flexible for informal contracts e.g. oral or partly oral
 - Reasonableness, efficacy and obviousness *Hawkins v Clayton*
- In law
 - Necessity test *University of Western Australia v Gray*
 - Will be applied if it greatly diminishes one of the parties' rights
 - Not based on the intentions but rather the considerations of policy *University of Western Australia v Gray*
 - Different to necessity terms in business
 - Implied on all contracts to a particular type of contract
 - Can also be implied by statute *Australian Consumer Law*
- From custom *Con-Stan Industries of Aust v Norwich Winterhuts Ins (Aust)*
 - "Well known and acquiesced in" such that anyone entering these contracts would have reasonably be presumed to know
 - Does not have to be universally accepted
 - Irrelevant if the parties did not know because if it was so well known, the parties should have known
 - Cannot be contrary to the terms of the agreement
 - Parol evidence rule
 - Contract should give rise to objective intention