

Introduction to Incorporation

- A contract is not a physical thing, it is a concept. It may be oral, written, or it may be both.
- A contract must have “terms”, whereby each party is required to do one thing.
 - If it were only one party doing something, it would be a gift / no consideration.
- How do things become terms of the contract?
 - For oral contracts, any oral promise becomes a term.
 - For contracts which are at least partially in writing:
 - A written term can be incorporated:
 - By a signature; or
 - By notice
 - An oral/verbal term can be incorporated into the contract if (a) a reasonable person would assume a promise was made and (b) it survives the parol evidence rule.

Incorporation of Terms

A must show that the term (x) has been expressly incorporated into the contract, to enforce a legally binding relationship between A and B regarding (x).

Is the contract signed?

1. If signed, go to signature
2. If unsigned, go to notice

1. By Signature

Parties are bound by their signature to the document **known to contain contractual terms** if there is no **vitiating factor (Toll)**.

- **Reasonable expectation:** A reasonable reader of a signed document that is known and intended to affect legal relations would believe that the signatory has read and approved the contents of the document.
- **Knowledge of contractual terms and legal relations**
 - **Toll:** application for credit instructions such as “please see overleaf” and location of instruction above signature indicate presence of contractual terms
 - **Curtis:** “a reasonable person would assume a receipt normally is not contractual”
 - **L’Estrance:** order form was clearly a contractual document
- **Is there misrepresentation (vitiating factors)?**
 - If misleading, signature rules do not apply
 - Misleading a party through conveying a false impression is enough (**Curtis**)
 - Can be misleading even if innocent and unknowing (**Curtis**) subjective intention does not apply
 - Can arise from mere document headings
 - **Curtis:** attendant **failed to draw attention** to extent of exemption - mislead Curtis into believing liability would only not cover damage to sequins
 - i. **Is it an unusual/onerous term?**

By Pre-Contractual Statement (statements made during negotiations)

Are there pre-contractual statements or negotiations which could amount to terms we want to get in or exclude?

1. **Is the pre-contractual statement promissory?**
2. **Is the pre-contractual statement admissible?**

[Intro] In order for A to enforce (x), they must prove that the pre-contractual statement amounts to a term of binding effect against B. **[Rule]** The first limb of this argument is to establish that an intelligent bystander would reasonably infer the statement to be of promissory effect (**Oscar**).

This is an objective test which looks to the totality of evidence at hand (**Oscar**). **[Application]**

1. Promissory

- a. **Rule:** For a statement to have a binding effect, or capable of being breached, must show promissory effect (will, shall, promise) (**Oscar, JJ Savage**)
- b. Contrary to mere representation of fact (estimations, facts, belief)
- c. **Rule: Objective Test:** Whether an intelligent bystander would reasonably infer that a warranty was intended (**Oscar**)
- d. **Look to 'totality of evidence'**
 - i. Conduct
 - ii. Words and behavior
 1. **JJ Savage:** precise language, an estimated speed is a statement of fact
 2. **Oscar:** 'I believe this is a 1948 Morris' based on registration book is a statement of belief, not a contractual term
 - iii. **Party identity**
 1. Experience of statement maker (**are they business savvy?**)
 2. **Oscar:** W had no personal knowledge of year car was made

[Intro] Once the promissory nature of the statement is argued, it must then be argued as admissible evidence under the Parol Evidence Rule (**Codelfa**). **[Rule]** The Parol Evidence Rule operates to block evidence that subtracts from, adds to, varies, or contradicts the language of the wholly written contract. **[Application]** A can argue various exceptions to the Parol Evidence Rule, to admit the pre-contractual statement...

2. Admissibility (PER)

- a. Can the term get passed or blocked by the Parol Evidence Rule?
- b. **PER RULE:** evidence that subtracts from, adds to, varies or contradicts the language of a contract cannot be used (**Codelfa**)
- c. Note that PER is standing in the way, then explain why you are analyzing how to avoid it
- d. **Exceptions (try arguing all of them if facts permit)**
 - i. Part oral part written
 - ii. Collateral contract

Duty to Cooperate (implied in all contracts, don't worry about fact/law)

1. Did one of the parties cooperate in a way that stopped the other party from getting the contract's benefits?
2. Parties must do all that is necessary to enable the other party to have the benefit of the contract (**Griffith CJ, Butt v McDonald**)
3. **Scope** is limited to cooperation based on only what is **reasonable (Secured Income)**
 - a. Parties need only to do all things which are **reasonably necessary** to ensure the other party derives their rights or benefits under the contract
4. Does the party have **influence/control** over another party?
 - a. Is it the objective intention of the duty to cooperate to extend to enabling those anticipated beliefs?
 - b. If duty to cooperate covers this benefit, it may likely extend to not acting capriciously, arbitrarily or for extraneous reasons (**Secured Income**)
 - c. What would a duty to cooperate, in relation to those benefits, look like?
5. **Was the implied term breached?**
 - a. Is that duty breached by unreasonable, extraneous conduct? (still have regard for reasonableness and legitimate interests)

Consumer Guarantees

This regime gives consumers **statutory rights they can enforce** when they **purchase goods or services** that are **faulty, not fit for the purpose for which they were bought, or unsafe**.

- These rights **supplement any express contractual warranty** offered by the supplier
- These rights are **mandatory** and **cannot be excluded, restricted or modified by contract: s 64 ACL**
- Remedial provisions are found in Ch 5, Pt 5-4, Divs 1-3

[Intro] A must show that B was in breach of a consumer guarantee (x) under Australian Consumer Law (ACL) to obtain a potential remedy against B regarding their legally binding relationship.

→ Is the potential consumer guarantee regarding either **GOODS** or **SERVICES**?

[Intro] A must first meet the hurdle requirement that the contracting of goods or services is not excluded from the consumer guarantee under the regime.

1. Exclusions

- a. Consumer guarantees don't apply to the supply or possible supply of services that are financial services or financial products (s 131A) [dealt with in ASIC]

b. Service exclusions s 63, s 61

- c. Does not apply to services that are supplied in relation to transportation or storage of goods for purpose of business of trade (s 63(1)(a))
 - i. This does not apply if the buyer of the goods is not carrying on or engaged in the business, trade, profession, or occupation relating to the goods (s 63(2))
- d. Does not apply to services supplied under contracts of insurance (s 63(1)(b))
- e. Does not apply to professional services from qualified architects or engineers (s 61(4))

f. Contract exclusions (s 65)

- i. Does not apply to a supply of gas, electricity, or telecommunications services (s 65(1))
 - ii. Telecommunications service is a service for carrying communications by means of guided or unguided electromagnetic energy or both (s 65(2))
- g. Some guarantees do not apply to goods sold by auction

[Intro] To pursue a consumer guarantee for (x), A must prove they are a consumer within the meaning of s 3 in relation to goods/services. There is a rebuttable presumption here that A is a consumer of goods/services, unless the contrary can be established by B (s 3(10)).