

IT BYTES

ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

IS AN UNSIGNED CONTRACT ENFORCEABLE?



WHEN DOES THIS QUESTION TEND TO ARISE?

Things were going great: you had just won an important tender with a big new customer, and it was going to take your business to the next level. The contract terms were settled and safely stowed away in your bottom desk drawer. The work was proceeding smoothly from your perspective, with your invoices being issued and paid in accordance with the contract terms. But then you ran into a few road bumps and the customer stopped cooperating. When you referred to the contract terms to try to bring things back on track, the customer just laughed and told you that the contract had never been signed and, therefore, wasn't worth the paper it was written on. Your heart drops when you retrieve the contract from the desk drawer and realise that the customer is right – in the rush of activity following the end of the tender, neither party actually got around to signing the documents. So where does that leave you; is the contract still enforceable?

WHAT DOES THE LAW SAY?

In order to form a legally binding contract, there must be an agreement between two or more parties supported by consideration from each of those parties. The framework of offer and acceptance is often used as an analytical device to determine whether or not the parties have reached an agreement. In these cases, where the terms of the contract have been reduced to writing, a signature is often relied upon as an indication of acceptance. However, a signature is not the only way in which the acceptance of an offer may be communicated. And indeed the framework of offer and acceptance as a whole, while sometimes convenient, is not the only way in which an agreement may be made. The ultimate legal test is whether, based on an objective assessment, the parties should be considered to have reached an agreement. If so, then the lack of a signature in order to communicate acceptance of an offer will not of itself be a barrier to a legally binding contract coming into effect.

This is neatly illustrated by the decision by the Victorian Court of Appeal in *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd & Anor* [2007] VSCA 310 (***PRA Electrical***), which applied principles established by the House of Lords in *Brogden v Metropolitan Railway Co* (1877) 2 App Cas 666. That case closely followed our opening hypothetical: PRA was an electrical contractor who successfully tendered to carry out some work for Perseverance, with written contract terms negotiated as part of the tender process. PRA started work and for some months the parties acted in accordance with the terms of the contract, including in relation to the provision of bank guarantees by PRA as security and the payment of progress claims. However, a dispute arose and Perseverance argued that there was in fact no binding agreement between the parties because the written terms of contract had not been executed, and there was a formal condition in the document that said the contract would not come into effect until the document was signed. The Court of Appeal disagreed with this, and said that a contract had been formed by the conduct of the parties, irrespective of the proviso in the written terms.

The Court said that “where, subsequent to the preparation of an unexecuted document - which the parties intend should constitute a contract between them – those parties act consistently with its provisions, it may be concluded that they have entered into an informal or implied contract in the terms of that document”. Whether there is a sufficient basis to show that an agreement has

been reached based on conduct will necessarily require a close consideration of the factual circumstances. It may also lead to some doubt as to the precise time at which the agreement was formed, as it will depend on the date of the conduct that is said to evidence the fact that an agreement had been reached. However, in the case of *PRA Electrical*, the Court found that the giving and acceptance of the bank guarantees as required by the contract terms was sufficient as “unequivocal evidence” of an agreement having been reached. The Court also observed that even if that was not the case, the subsequent making and payment of the progress payments in accordance with the contract terms would have resulted in the same conclusion. In each case, the Court said that an objective observer would have concluded that an agreement had been reached between the parties, on the written terms they had exchanged, subject only to the exclusion of the proviso that no contract would come into effect until the document was executed.

This pragmatic approach shows that the courts may still find a way to enforce a contractual bargain, even if not all of the execution formalities have been completed. In particular, the conduct of the parties may provide sufficient basis to conclude that a binding agreement had been reached. For completeness, even if that is not the case, if one of the parties has led the other to believe that a binding contract was in place, and the other party has acted to their detriment in reliance on that representation, then there may also be a basis to argue that they should as a matter of equity be estopped from denying that there was a binding contract.

Beware!

While a contract may still be binding even if not signed, you still need to take care in specific cases where the law requires a signature for other reasons. For example, if your contract is being executed as a deed, then in order to satisfy execution formalities a signature will typically be required. As such, an unsigned deed may not be effective. Similarly, the *Copyright Act 1968* (Cth) provides that an assignment of copyright does not have effect unless it is in writing signed by or on behalf of the assignor. As such, a copyright assignment provision in an unsigned contract may not be effective. Accordingly, while a signature may not be legally required in all cases for a contract to come into being, any laxity around contract execution can still have significant legal implications.



WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

While it may be possible to show, based on the conduct of the parties, that a written contract has been agreed even if the contract was not signed by both parties, the lack of signature will inevitably introduce some uncertainty (including as to the precise time at which the contract came into effect, which may be an important reference point for the performance of obligations under the contract). It is always better to avoid doubt by making sure that all written contracts are properly executed by both parties before starting work. This also has the advantage of ensuring that any contract provisions that require a signature to take effect – such as a copyright assignment – will operate as intended from a legal perspective.

If you intend that written contract terms not become binding until all execution formalities have been fulfilled, then you should be wary of engaging in any conduct that suggests otherwise (e.g., making payments or referencing rights arising in accordance with the written terms). In this case, if work absolutely must begin before the contract is executed, it is best to expressly deal with the basis on which that work will be undertaken through separate correspondence, so that the overall contractual position remains clear and the conduct remains consistent with the position that the broader contract will not take effect until it is signed.

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