

IS IT A CONTRACT, IF IT HAS ANOTHER NAME?

In business you may see kinds of documents you are not clear about. This paper may help.

Agreement under seal

A contract executed as, and meeting the requirements of, a deed. The “seal” refers to the wax seal a person would affix to the document when signing (now not required).

Deed or Indenture

A deed is a document executed under seal. An indenture is a deed with two or more parties.

Heads of Agreement (or Memorandum of Understanding or Letter of Intent)

A simple expression of the parties’ intentions, less formal or complete than one might expect from a full commercial contract.

It can however be legally binding on the parties, even if subjectively any of them did not intend to be legally bound; the question of intention is objective. The title of the document does not decide the issue. The document need not be signed to be legally binding.

So it is best if the document expressly deals with its own status, such as, “This document is an expression of commercial intention only and is not intended to be legally binding.” Or, perhaps even, “This document is legally binding on the parties, while expecting to make a further contract in substitution for this document, containing, by consent, additional or contrary terms”.

A document not binding as a contract can still have legal consequences. A person who makes a preliminary document with no real intention of proceeding to a binding contract may be guilty of misleading or deceptive conduct under the *Trade Practices Act*.

Simple Agreement

A contract between parties that is not in the form of a deed or indenture.

Most contracts are simple agreements. There are very few occasions when the law requires a simple agreement to be in writing at all, so it can be oral or partly in writing and partly oral.

Terms Sheet

An outline of the terms of a proposed contract, most likely with some fleshing out of the key definitions and terms. If for a patent licence for example, it might merely say that the proposed licence will be exclusive, world-wide and for a term of say 10 years, then go on in some detail about how royalties will be calculated from sales of licensed products.

A Terms Sheet allows the parties to identify and negotiate the key terms, before drafting of the full contract. It also guides the author of the full contract in its drafting.

It is best if a Terms Sheet expressly deals with its status as only a tool in negotiations and that it is not intended to bind the parties, otherwise the document might be argued to be evidence of a concluded and binding contract formed at the end of negotiations.

A joint publication of Adam Gamble (partner) (mobile 0439 384 298; agamble@crawfordlegal.com.au) and Mark Sallis (barrister) (mobile 0438 834 430; msallis@senet.com.au).