

Does one size really fit all?

Choosing the most suitable contract for a transaction



If there was such a thing as the 'perfect contract' which could be used for every transaction, then commercial lawyers would simply need to draft a document each time that resembled that perfect contract as closely as possible. In reality, however, every transaction is different so that a contract which is most suited to one transaction does not necessarily provide the best solution for the next one. It is obviously important to ensure that legal documentation is drafted in a way so as to implement commercial arrangements in the most effective manner. Choosing the most suitable contract type will assist with this task.

Different contract types

Contracts can be drafted in many different ways, including as short form contracts, letter agreements, long form or standard form contracts.

Letter agreements

Letter agreements are contracts written in the form of a letter from one party to the other. Letter agreements appear less formal and 'legalistic' and are therefore particularly suited for dealings with individuals or less sophisticated businesses. Letter agreements are also commonly used for documenting minor amendments to an existing contract or recording agreed commercial parameters for subsequent negotiations (sometimes known as a Letter of Intent) which may or may not be binding.

Short form contracts

Short form contracts do not comprehensively deal with every aspect of a transaction but rather focus on the most important elements or deal with elements in less detail. For example, a short form contract may provide for joint ownership of

IP without going into the details of how such jointly owned IP is to be managed. As such, short form contracts generally provide less protection than comprehensive, long form contracts. Nevertheless, short form contracts have several advantages, as they generally require less time to prepare and review, are easier to understand by inexperienced parties, and lead to shorter negotiation periods. Short form contracts may therefore be preferable from a commercial point of view for one-off, short term arrangements which do not involve large sums of money or risk.

Long form contracts

Long form contracts deal more comprehensively with all aspects of a commercial arrangement and therefore usually provide maximum protection. However, the preparation, review and negotiation of long form contracts is usually much more time consuming and expensive with several rounds of amendments by both parties required before a final version can be agreed.

Standard form contracts

Standard form contracts contain an organisation's preferred terms for a certain type of transaction from which it is generally reluctant to depart. Confidentiality agreements and general terms and conditions of sale are commonly in standard form.

Standard form contracts often consist of a schedule which contains the commercial variables for each transaction (such as the start and end dates, price, description of goods and services and delivery dates) and a separate section containing the operative provisions of the contract.

Choosing the most appropriate contract type

When deciding on the most appropriate contract type for a particular transaction, all relevant circumstances need to be taken into account. Some of the factors which may indicate whether a short form or a long form contract would be more suitable are set out in the table [below].

Short Form Contract	Long Form Contract
Low dollar value / risk	High dollar value / risk
Low strategic importance	High strategic importance
Short term arrangement	Long term arrangement
Past dealings with other party	No past dealings with other
Availability of external reference terms	No external reference terms available
Unsophisticated other party	Sophisticated other party
Negotiation by commercial managers	Negotiation with legal adviser or legal assistance
Short timeframe for execution	Longer timeframe for execution

Sharing the blame

Contributory infringement after Collins

In some cases, it may be obvious which contract type to use. For example, for a multi-million dollar worldwide, exclusive patent licence nothing short of a comprehensive long form licence agreement will usually do. Likewise, when entering into similar commercial arrangements with numerous third parties, the preparation of template or standard form documents may be the logical move forward.

However, in other cases, the choice may be less obvious. For example, a one-off short term research services agreement with low fees may nevertheless be strategically significant as it could constitute the basis for future collaborations or licensing deals between the parties. Similarly, a material transfer agreement with a public sector research organisation where no money changes hands may lead to the creation of commercially valuable inventions. In such cases, the time, effort and expense involved in negotiating a long form contract may not seem justified at first glance, but on closer consideration a short form contract may not be sufficient.

One should always take care to consider not only the monetary value of the transaction but also the possible risk – often low ‘value’ contracts may still have substantial downsides if things do not go to plan.

In any event, the choice of contract type should be undertaken with care and only after consideration of all relevant issues. Sometimes this may require digging below the surface and considering what may happen if things do not proceed as expected!



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If you are a patentee wishing to defend your rights, or if you want to operate in an area that is subject to someone else's patent and you need to avoid infringing, you should understand the principles of both direct and contributory infringement.

The recent set of Australian cases (Collins^{1,2}) involved a patent for methods of obtaining oil from the tree species *Callitris Intratropica*. The Northern Territory Government ('NTG') issued licences to Australian Cypress Oil Company Pty Ltd ('ACOC') authorising ACOC to take this type of timber from Crown Lands. Mr and Mrs Collins, owners of the patent, alleged that by issuing the licences the NTG infringed their patent as a contributory infringer.

Background

Australian courts have traditionally been reluctant to extend the scope of patent monopoly beyond direct infringement. This has been based on the premise that the vendor of a product who by selling that product “merely” facilitates infringement, should not be subject to infringement proceedings, even if vendor sells the product knowing that the purchaser intends to use that product to infringe a patent.³

Contributory infringement under statute

A 1984 review of Australia's patent regime⁴ found that patentees had significant difficulty trying to enforce their patent rights when infringed by consumers supplied by an unauthorised third party with the means to infringe. Section 117, which extends the statutory concept of infringement to include “contributory infringement”, was subsequently introduced into the Australian Patents Act.

A partial paraphrase of s 117 states that ... *if the use of a product by a person would infringe a patent, (and) ... if the product is not a staple commercial product, then the supply of that product by one person to another is an infringement of the patent by the supplier ...*

The Collins cases and s 117

The aspect of “supply”

At first instance Mansfield J found that “there is no positive act of the Territory which, in terms of the definition of “supply”, amounted to the “sale, exchange, lease, hire or hire-purchase” or the offer to supply by way of sale etc of the timber”. Accordingly, the grant of the licences to ACOC did not amount to the “supply” of the timber by the NTG to ACOC for the purposes of s 117(1). However, on appeal Branson and Sundberg JJ of the Full Federal Court (French J dissenting) found that what ACOC had was not so much a licence to enter upon land and take timber but an obligation to do so. There was no doubt that ACOC was in need of the NTG's timber. It was unable to obtain it without the NTG's consent. In those circumstances the NTG provided or furnished the timber to ACOC, and thus “supplied” it to ACOC.

The aspect of “staple commercial product”

At first instance the primary judge noted that “... but for one feature, the timber was a “staple commercial product”. The distinguishing feature was that the NTG had “written off” the trees on the land in question as a commercial crop for use as timber”. His Honour found that the decision of the NTG ... not to maintain the plan to allow further growth of the trees ... for harvesting for timber (did not result) in the timber from those trees losing that character (as a staple commercial product). Accordingly, the timber was a “staple commercial product” for the purposes of s 117(2)(b). However, on appeal the Full Court, by majority, found that a quality of a ‘staple commercial product’ is that it is an item of commerce in the sense that it is ordinarily available for purchase from an entity that trades in that product. Their Honours noted that no evidence was presented showing that the trees in question could be purchased without difficulty by a person wishing to obtain a supply thereof.

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