

Australian contract law

[Parts of the World](#), [Australia](#)



Law of Contract II Semester 2, 2011 Word Count: 1932 A party's right to terminate a contract arises from a particular type of breach of contract by another party. The facts of the breach and the nature of the term breached in each case inform the party with whose contract has been terminated, as to whether it is lawful or not. Common law rights to terminate arise in one or more of the following three ways: * Any breach of a condition of the contract; A serious breach of an intermediate term of the contract; or * Conduct that shows that a party is unable or unwilling to comply with the contract. Australian Courts have for sometime recognised a tripartite classification of terms in analysing whether or not a breach gives rise to a common law right to terminate. Australian courts have accepted that there is a category of term, known as a condition or essential term, for which strict performance is required, and that an aggrieved party is entitled to terminate for any breach of a condition, however slight.

Contractual rights to terminate are of two main types: * Termination of the contract in total; or * Termination of the engagement of a contractor, in both cases arising from actual conduct, as described in either the contract's termination clause or a term arising under statute. Frequently, the common law right to terminate is the most important consideration.

In classifying whether a term is seen as a condition of a contract; a term may be classified as a condition by statute, by the parties or by the courts on the basis of the construction of the contract. A term may be classified as a condition on the basis of the express words used by the parties. However, before courts will conclude a particular term is a condition, with the consequences that any breach will entitle the aggrieved party to terminate,

the parties must clearly have expressed their intention for the term to have this status.

In assessing whether or not a term should be classified as a condition, the High Court has approved the statement of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park Ltd*: ‘ The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or substantial performance of the promise ... and this ought to have been apparent to the promisor.

’ In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd*, Stephen, Mason and Jacobs JJ provided further explanation of the relevant test: ‘ The quality of essentiality depends ... on a judgement which is made of the general nature of the contract and its particular provisions, a judgment which takes close account of the importance which the parties have attached to the provision as evidenced by the contract itself as applied to the surrounding circumstances. Accordingly, in assessing whether or not a term is a condition, courts will consider whether or not the parties would only have entered into a contract on the understanding that there would be strict compliance with the term. Where a term is intermediate, the right to terminate depends on the nature of the breach and its foreseeable consequences. Although the High Court had previously hinted at accepting the doctrine of intermediate terms into Australian law, *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* was the first case in which the High Court did so expressly.

The first recognised authority to introduce intermediate terms was Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, a decision of the English Court of Appeal. Hong Kong Fir was decided in 1961 and passed into the mainstream law of contract as understood and practised in Australia, although not formally adopted by the High Court until Koompahtoo. Any right to terminate under a provision of the contract terms requires careful consideration of the meaning of the words, particularly if the contract is unclear as to the meaning of the words.

Additionally, even if the contract includes a termination clause, unless there is clear express exclusion of the common law right to terminate, the common law right remains active and equivalent to any contractual right to terminate. In the facts given, the contract between the Federal Government and the Australian Coastal Patrol Pty Ltd (ACP) has been partly performed. If a contract has been in large part performed, it is less likely that the breach will be substantial enough to warrant termination. In Carr v J. A. Berriman Pty Ltd, the principal entered into a contract with a builder for the construction of a factory.

Two breaches by the principal caused the builder to seek to terminate the contract; a failure to deliver the site in the condition specified in the contract and a unilateral decision to remove from the contract the fabrication of steel framing. It was the second breach that was decisive in the view of the High Court in finding that the termination was effective. In its reasons, the Court noted that the loss of the fabrication represented about one quarter of the builder's estimated profit on the entire project and the removal from the contract of that percentage of the overall value was a substantial breach.

However, in *Fairbanks Soap Co. Ltd v Sheppard* the parties contracted for the construction of a machine for \$10, 000. The machine was almost completed when the builder refused to finish the machine unless he was paid a large proportion of the price, contractually agreed to be paid on completion. The builder was concerned that once he made the machine operational that the purchaser would not pay the contract sum. The purchaser refused to pay and terminated the agreement.

The builder complained that he had only to undertake about \$600 worth of work to complete and was therefore justified in insisting on the payment. But the court said that faced with such a deliberate breach of the contract terms the termination was legal. For ACP they had largely performed the terms of the contract by having four to five vessels active within the first year. They did however, have the minimum of seven boats by the start of the second year as declared in the contract.

As well as the correct personnel and had continued to be paid by the Federal Government. It is not uncommon for those wanting to terminate a contract, to allow another opportunity for the party that breached the contract to ‘mend their ways’. Mason J proposed that: “ If a party to a contract, aware of a serious breach, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. This in turn meant that the Federal Government should have brought to a standstill the work of the ACP until it had decided whether or not to continue the contract with ACP after their breach of the contract. However, as the Federal Government had continued to pay the

amount specified in term four of the contract then ACP would be unaware of the suggestions to terminate their contract. It would therefore be unlikely that termination of contract due to this reason would be upheld in court.

Overall, the Federal Government would be very unlikely in terminating the contract due to the breach of term 1, as it continued to pay ACP when it only had 4 to 5 vessels in service in which they had knowledge of this breach, but continued with the contract. During the period of May to July 2011, some vessels were put to sea without the required minimum of 8 personnel per vessel, many of which did not wear correct uniform during their deployment. Terms 2 and 3 had specified in the contract that each vessel have a minimum of 8 personnel and that they were to wear correct uniform whilst on active duty.

These terms would be seen as conditions if they were discussed during the formation of the contract as being significant to the contract. In turn, this would allow for the Federal Government to terminate the contract with Australian Coastal Patrol Pty Ltd. These terms however could also be seen as trivial matters in the court and as stated in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, it was considered ‘unthinkable that all relatively trivial matters could be regarded as conditions of the contract ... It would ultimately be up to the courts to decide on the importance of these terms and whether they impaired the performance of the overall contract.

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61 [3]. Glanville Williams. Learning the Law. Eleventh Edition. Stevens. 1982. p. 9 [4].

Ltd v Tramways Advertising Pty Lt (1938) 61 CLR 28 [5]. DTR Nominees Pty Ltd v Mona Homes Pty Ltd [1978] HCA 12 [6]. [1978] HCA 12 [7]. Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited [2007] HCA 61 [8]. Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha [1962] 2 QB 26 [9]. [1962] 2 QB 26 [10]. [2007] HCA 61 [11]. Carr v JA Berriman Pty Ltd (1953) 89 CLR 327 [12]. Fairbanks Soap Co. Ltd. v. Sheppard, [1953] 1 S. C. R [13]. Fairbanks Soap Co. Ltd. v. Sheppard, [1953] 1 S. C. R