

*August 2023*  
**Communique**

We are looking forward to the end of Winter and a looming beautiful Spring. To those fortunate and had attended our successful sister company HA-Assist conference in the warmth of Bali recently, thank you. Lock in now for next year's dates August 1 and 2, 2024. In the meantime, we bring you some topics, presented at the HA-Assist Bali conference. And save the date for our annual Helm Gala, happening on 30 November 2023.

Reflecting back on current businesses, appointments appear to be on the rise with court appointments, CVL's, VA's and SBR's all on the increase. Some interesting articles to follow.....

## THE ESSENTIAL ELEMENTS OF A CONTRACT



The first element is Offer and Acceptance. There needs to be a general agreement between the parties where one party makes an offer and the other party accepts that offer. It may involve a negotiation on the terms of the agreement. Acceptance may not necessarily be expressed as it may be inferred by the party's conduct or in some cases silence.

The second element of a contract is Consideration or quid pro quo (“Something for something”). Once the parties to a contract have formed an agreement there must be consideration exchanged for a contract to be valid. The agreement essentially represents a promise of an act or forbearance by one party in exchange for a voluntary liability or detriment from the other party. Consideration usually takes a monetary form but this does not always have to be the case. Nominal consideration such as one dollar will still give rise to a contract. Note that without consideration a contract cannot be validly formed.

The third element of a contract is Intention. The parties to the contract must manifest their intention to be legally bound by its terms. There may be circumstances where the first two elements of a contract exist but there is no intention to create a legally binding contract. Intention needs to be carefully considered as not all agreements give rise to legally enforceable rights under a contract.

The final element for the formation of a contract is Certainty. It must be sufficiently certain and complete. The obligations and rights of the parties to the contract must be clearly identifiable and enforceable. The element of Certainty encompasses three main issues:

1. The parties may have failed to reach an agreement on all the essential elements or may have decided that an essential element is to be decided by a future agreement;
2. The terms may be too vague or ambiguous for the Court to attribute meaning; and
3. A promise may be illusory by giving unfettered discretion as to whether they actually perform their obligations under the contract.

A contract must be complete and the terms certain for it to be legally binding. A contract must be expressed in precise and clear terms for a Court to give it meaning.

## FIXTURES V CHATTELS



We often have to make decisions regarding whether an asset is a fixture or a chattel, and there are differences.

What is a fixture? At its most basic level a fixture is something that is attached to the land in such a manner that it becomes part of the land. When the land is sold the title to the land will also include all fixtures however there are many considerations that need to be taken into account when determining whether an asset is a fixture or a chattel.

How is a fixture determined? To illustrate the difficulty in ascertaining the answer on whether a piece of property is a fixture or chattel, can be demonstrated in *Australian Provincial Assurance Co Ltd v Coroneo*, where the New South Wales Supreme Court had to decide whether or not seats bolted to the floor, and attached with one another in a theatre were to be considered as fixtures or chattels. Ultimately, the Court decided that the seats were not fixtures but chattels, with Jordan CJ saying:

- *“A fixture is a thing once a chattel which has become in law land through having been fixed to land. The question whether a chattel has become a fixture depends upon whether it has been fixed to land, and if so for what purpose. If a chattel is actually fixed to land to any extent, by any means other than its own weight, then prima facie it is a fixture; and the burden of proof is upon anyone who asserts that it is not: if it is not otherwise fixed but is kept in position by its own weight, then prima facie it is not a fixture; and the burden of proof is on anyone who asserts that it is...”*

Jordan CJ also outlined the test which is to be applied, with his Honour stating:

*“The test of whether a chattel which has been to some extent fixed to land is a fixture is whether it has been fixed with the intention that it shall remain in position permanently or for an indefinite or substantial period... or whether it has been fixed with the intent that it shall remain in position only for some temporary purpose...”*

What about agricultural fixtures? In some jurisdictions legislation has been created allowing a tenant certain rights in relation to agricultural fixtures that have been attached to the land. Generally speaking, a tenant may be able to retain title to the property which is affixed and also has the right to removal on the proviso that no damage is caused, or that the property can be restored after removal.

What is a chattel? Chattels are personal property that can be moved, such as furniture or household appliances for example.

Additionally, chattels can be included in the sale of land or moved, and in some cases, a chattel can become a fixture, with the ability to be moved by a third party if they are the actual rights holder of the property.

How is a chattel determined? In order to make a determination on whether something is a fixture or a chattel, is dependent on the intention of the affixer, as well as the object which is annexed and the purpose of the annexation. In broad terms, if the property can be easily moved without causing too much damage to the land or property in which it is affixed, then an argument can be made that it is a chattel. However, if removal of the property can cause damage, then it can be argued that it is a fixture.

Ultimately, when making a decision on whether a piece of property is a chattel or fixture, it is dependent on the surrounding facts of the case, and the answers to the questions of intention, object, purpose, and the degree of annexation – which is the general starting off point.

The main test is the intention of the person placing it. Intention can be determined by a number of factors including:

- degree of annexation;
- ease of removal;
- any damage caused by removal;
- the normal function of the chattel; and
- normal usage – i.e., whether a reasonable person would normally consider it to be part of the land.



# WORKING FROM HOME – THE CURRENT DEBATE



Working from home can be great for employees but it can also have its problems.

What are the benefits for employees?

1. It is great for parents of families;
2. No commuting time or costs;
3. Flexible hours; and
4. Huge Savings.

What are the benefits of working at the office?

1. No distractions (though I question this one in an open-plan office)
2. Team building;
3. Grow a business;
4. Good for business culture; and
5. Spark colleague creativity.

What are the issues with working from home?

1. Lack of separation between work and home life;
2. Distractions from pets, children and other family members;
3. Temptation to overeat and slack off;
4. Lack of social interaction;
5. Isolation and loneliness.

Some safety tips for working from home:

1. Make sure that your pets are properly trained and do not climb on your desk;
2. Do not wear your pyjamas all day as you need to create a true work environment;
3. If you have a video call, make sure that the background is clean and uncluttered;
4. Have planned routine breaks throughout the day to move around and stretch in order to prevent back pain and other health problems.



## NIGHT AT THE MUSEUM



Helm is organising its annual black tie event on 30 November 2023 at the Australian Museum. Put a note in your diary now to save the date. More information to follow.

# We can help you now

If you have clients who are experiencing difficulty in paying their debts and/or need to restructure their business, please contact me.



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