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## THE INTENTION TO CREATE LEGAL RELATIONS

As every student of the law of contract knows, Williston<sup>1</sup> argued that *animus contrahendi* as a concept is a product of Continental jurisprudence and that it should be excised from the common law as alien and unnecessary, since there already exists another test of legal enforceability: the doctrine of consideration. Once consideration has been shown to exist, so the argument runs, it no longer matters what the parties themselves may have thought about questions of legal enforceability (a matter to which they rarely advert). Cheshire and Fifoot<sup>2</sup> have answered these arguments effectively so far as English and Australian law is concerned and have successfully demonstrated that both the *animus contrahendi* and consideration are prerequisites to contract. They base their view primarily on authority; however, it seems equally correct when put to the test of basic principle. The *animus contrahendi* is simply another name for the agreed intention to be legally bound by contract, and to argue that a contract can exist without this element is to deny the distinction, fundamental in any system of contract law, between a mere negotiation and a fully concluded bargain.

Merely to know that the *animus contrahendi* and consideration exist side by side is not enough. In the practical application of the law a further problem arises: should the courts find an *animus contrahendi* first and then examine in the light of its existence the question of consideration, or should they pursue the often elusive quest for consideration and only then proceed to examine the *animus contrahendi*. Occasionally, it is true, consideration, particularly nominal consideration, is meant by the parties to symbolize their *animus contrahendi*, and in such cases the difficulty does not arise. But in doubtful situations the courts may need to know whether to give primacy to the one or the other element. A well-known decision of the High Court illustrates the problem: *Australian Woollen Mills Pty. Ltd. v. Commonwealth*<sup>3</sup>.

During the Second World War the Commonwealth acquired the whole of the Australian wool clip, using part of it for export, and selling part at fixed prices to Australian manufacturers of woollen and worsted goods. The Commonwealth also controlled the prices at which those manufacturers were allowed to sell their products on the Australian market. The prices had been fixed so as to allow a reasonable profit margin. However, in June 1946 the Commonwealth re-introduced wool auctions, thus freeing the price of raw wool, while still maintaining price control over manufacturers' products. Since the price for raw

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1. See *Williston on Contracts* (3rd ed., 1957) s.21; Tuck, "Intent to contract and mutuality of consent" (1943) 21 *Canadian Bar Review* 123.
2. *Cheshire and Fifoot on Contract* (2nd Aust. ed., 1969) 189 *et seq.*
3. (1954) 92 C.L.R. 424.

wool soon rose, manufacturers' profit-margins were in jeopardy. To meet this problem the Commonwealth offered to pay a subsidy on all woollen goods sold on the home market, to make up the difference between the earlier (controlled) price for raw wool and the average market price prevailing from time to time at wool auctions. The Australian Woollen Mills claimed to have fulfilled the conditions on which the right to payment under the scheme depended; the Commonwealth maintained that the subsidy scheme was outside the realm of private contract and that, at any rate, any undertaking the Commonwealth might have given was not supported by consideration. It is clear from the joint judgment of their Honours that the doctrine of consideration was regarded as providing the essential clues. Although their Honours mentioned in passing that there had been no "voluntary assumption of a legally enforceable duty"<sup>4</sup>, the Court's main concern was the problem of consideration: "The position has been stated in terms of the technical doctrine of consideration, and this is, in our opinion, the correct way of stating it"<sup>5</sup>. The question, as the High Court saw it, was whether the announcement of the subsidy scheme by the Commonwealth and the manufacture of wool in accordance with the scheme stood in the relation of *quid pro quo*. This is not the place for a detailed examination of the tests the High Court discussed and applied to determine this question. Suffice it to say, with great respect, that the whole inquiry bears a highly elusive and artificial character. It is respectfully submitted that the High Court should not have regarded the inquiry into the element of consideration as more important than the *animus contrahendi*, rightly referred to in the judgment as "a principle which is fundamental to any conception of contract". What was overlooked in the *Australian Woollen Mills Case* is that the absence or presence of a synallagmatic connection between a promise and an act, relied upon as consideration, must be established, not as a question of psychological fact but as a question of interpretation or construction. Once the *animus contrahendi* has been established, the courts will need to apply the rule that efficacy is preferred to inefficacy (*ut res magis valeat quam pereat*) and assess with the help of that rule the legal significance of de facto sacrifices and/or undertakings. This rule of construction is surely capable of turning into consideration acts, omissions and promises which would otherwise be legally irrelevant. With great respect to the judges who decided the *Australian Woollen Mills Case*, the legal primacy of the *animus contrahendi* was overlooked. Had it been clear that the parties intended to create contractual relations, there would have been little difficulty in regarding the purchase of wool, the manufacture of woollen goods and their sale on the home market, as an agreed exchange by the plaintiffs for the undertaking by the Commonwealth to pay a subsidy.

Express statements by the parties, particularly when they appear in writing, are the clearest evidence possible of the presence or absence of the intention to create legal relations. Even a commercial contract which is normally protected by the law, can be rendered unenforceable by the insertion of an appropriate clause. In a leading English case an agency agreement provided, *inter alia*: "This arrangement is not entered into . . . as a formal or legal agreement . . . it is only a definite expression and record of the purpose and

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4. *Ibid.*, at 457.

5. *Ibid.*

intention of the parties concerned to which they honourably pledge themselves"<sup>6</sup>. Although the agreement was a perfectly genuine business transaction, the Court regarded this clause as a clear denial of the *animus contrahendi* and held the whole arrangement unenforceable. However, the Courts do not, or should not, treat the *animus contrahendi* as if it were one of the terms of the contract. Rather, its presence or absence is a question of conclusion. It follows that such clauses are not subject to the strict rules of construction and do not exclude resort to extrinsic evidence. Accordingly, the Courts have felt free to ignore such clauses when their meaning is hidden or obscure. In *Ellison v. Bignold*<sup>7</sup> the parties stated in a contract under seal that they "resolved and agreed and did by way of declaration and not of covenant, spontaneously and fully consent and agree". Lord Eldon decided to ignore "the nonsense about agreeing and declaring without covenanting"<sup>8</sup>. Although the courts will rarely allow obscure expressions used by the parties to interfere with enforcement where the nature of the arrangement and the circumstances of its conclusion suggest legal enforceability, no particular form of words is required to exclude the *animus contrahendi*. Where, for example, a promise however solemn, goes hand in hand with the promisor's statement that he "must decline to put [his] name to paper for any amount whatever"<sup>9</sup> the contractual intent will probably be found wanting. Where a performance is promised but expressly described as a "present", the *animus contrahendi* may be lacking even though, if it existed, a consideration could be spelled out<sup>10</sup>.

Cases in which express statements by the parties put the problem beyond doubt are, unfortunately, not very frequent. In most situations the parties will, in fact, have given no thought to the question of legal sanction: contracts are usually concluded with their performance rather than their breach and legal enforcement in mind. However, it is a familiar function of the law of contract to render legally articulate matters which the parties have expressed imperfectly or even considered insufficiently. In pursuance of this policy the *animus contrahendi* is often supplied by means of a presumption. It has become accepted that the law in this area can be summed up in the double (rebuttable) presumption that business deals are, and that social and domestic arrangements are not, intended to be legally enforceable<sup>11</sup>.

This twofold presumption no doubt represents the law, but its weakness lies in the fact that it solves only obvious cases, such as those involving mercantile transactions on the one hand and arrangements to hold dinner parties and other social functions on the other, situations in which the *animus contrahendi* rarely becomes controversial in litigation. It leaves unresolved a large number of atypical cases which do not fit into either category. It is with reference to such cases that Mayo J. observed: "There can be no definite rule or formula for deducing the purpose or intention entertained, that is to

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6. *Rose and Frank Co. v. Crompton Bros. Ltd.* [1925] A.C. 445.

7. (1821) 2 Jac. & W. 503. See also *Trustees Executors & Agency Co. Ltd. v. Peters* (1959) 102 C.L.R. 537, particularly by Menzies J. at 551-552.

8. (1821) 2 Jac. & W. 503, at 510.

9. *Boord v. Boord* (1866) 0 S.A.L.R. 58, at 63.

10. *Ibid.*

11. See *Cheshire and Fifoot on Contract* (2nd Aust. ed., 1969) 190 *et seq.*

say, whether enforcement of a plan is to depend on trust or legal sanction. The process of elucidation will be empirical<sup>12</sup>. Factors which throw doubt on the enforceability of an arrangement are, for example, that the parties are closely related<sup>13</sup>, that a government is involved as a party<sup>14</sup>, that the arrangement is virtually gratuitous for one party, even though it may be possible to spell out a consideration<sup>15</sup>, that the arrangement has not been reduced to writing, even though writing was required by law as a prerequisite to enforceability<sup>16</sup>, that agreements of the type involved are not legally enforceable because of customs established in the community to which the parties belong<sup>17</sup>.

Factors which, on the other hand, tend to weigh in favour of enforceability of an arrangement are, for example, that it involves substantial sacrifices made in reliance upon benefits held out by the other party<sup>18</sup>, that a symbolic consideration (earnest), such as a small sum of option money, has been paid<sup>19</sup>, that the parties intended to involve solicitors in its conclusion or its implementation<sup>20</sup>, that the parties, even if closely related, distrust each other<sup>21</sup>.

The Australian cases on this subject are fairly numerous and their detailed examination yields results of some practical significance.

#### *Arrangements concerning family relations*

Domestic arrangements concerning the ordinary course of family life are rarely enforceable by legal action. In the leading English case of *Balfour v. Balfour*<sup>22</sup> a husband who was about to take up a position in Ceylon, promised to his wife, who stayed behind in England for medical reasons, that he would pay her a monthly allowance of £30. Her action, based on this promise, failed: "[These agreements] are not contracts . . . because the parties did not intend that they should be attended by legal consequences"<sup>23</sup>. It was on the same basis that Dixon J. held in *Cohen v. Cohen*<sup>24</sup> that an arrangement between husband and wife for a dress allowance to be paid to the wife, was unenforceable: "The parties did no more . . . than discuss and concur in a proposal for the regular allowance to the wife of a sum which they considered appropriate to their circumstances at the time of marriage"<sup>25</sup>.

Whether made before<sup>26</sup> or after marriage, arrangements which concern household management must not be presumed enforceable: it would be artificial

12. *Todd v. Nicol* [1957] S.A.S.R. 72, at 79.

13. *Cf. Taverner v. Swanbury* [1944] S.A.S.R. 194; *Raffaele v. Raffaele* [1962] W.A.R. 29.

14. *Cf. Australian Woollen Mills Case* (1954) 92 C.L.R. 424.

15. *Cf. Murphy v. Simpson* [1957] V.R. 598; *Leahy's Case* (1961) 105 C.L.R. 6.

16. *Cf. Turner v. Turner* (1918) 25 C.L.R. 569.

17. *Cf. Taverner v. Swanbury* [1944] S.A.S.R. 194.

18. *Cf. Todd v. Nicol* [1957] S.A.S.R. 72, at 79.

19. *Niesmann v. Collingridge* (1929) 29 C.L.R. 177.

20. *Popiw v. Popiw* [1959] V.R. 197.

21. *Ibid.*

22. [1919] 2 K.B. 571.

23. *Ibid.*, at 579, *per* Atkin L.J.

24. (1929) 42 C.L.R. 91.

25. *Ibid.*, at 96.

26. *Ibid.*

and inappropriate to attribute to the partners of a happy marriage an agreed threat of legal sanction; moreover the intervention of the law would be futile since it would help to destroy rather than regulate the parties' joint ménage. Arrangements not relating to household management, for instance a business partnership or an employment contract, are not presumed unenforceable merely because the parties thereto are man and wife. The presumption of unenforceability also tends to disappear when the matrimonial relationship has broken down or is seriously disrupted. This is shown by *Popiw v. Popiw*<sup>27</sup>. A wife who had left her husband because she had been beaten by him, agreed to return on the strength of his promise that he would put the title to the matrimonial home in their joint names. Hudson J. distinguished this arrangement from those "made in the ordinary course of the matrimonial relationship": "The promise made in the present case was given after the relationship had broken down and was made in an effort to restore it and related to a matter that had been one of the causes of dissension"<sup>28</sup>.

Domestic arrangements concerned with the daily running of a joint ménage can be distinguished from arrangements aimed at establishing one. In *Parker v. Clark*<sup>29</sup> Devlin J. observed that the two types of arrangement may invite the same legal treatment. This is not true, however, of the contract of engagement which is traditionally treated as enforceable, no matter how delicate the feelings and attitudes of the parties may have been when they became engaged. Moreover, the Australian cases suggest a further qualification: arrangements to share a home will be treated as enforceable whenever substantial sacrifices are made in anticipation of their faithful performance.

A typical situation which has led to litigation repeatedly is as follows: An elderly and lonely, but well-to-do Australian induces relatives from Europe (whom he or she may never have met) to emigrate to Australia and live with him by holding out prospects of cheap accommodation, easy living and, not infrequently, of a substantial inheritance. Attempts to enforce such private "assisted migration schemes" may fail because the newcomer lacked capacity to contract<sup>30</sup>, or because the parties have expressly agreed not to be bound in law<sup>31</sup>; but, such special cases apart, the courts are usually ready to enforce them, since they involve the prospective immigrants in potentially disastrous prejudice if their hopes for an easy start in Australia are disappointed: usually such persons will have sold part of their possessions and given up secure employment at home before coming out<sup>32</sup>.

Related to the arrangement to establish a joint ménage is another, also of frequent occurrence in Australia: the arrangement to live in close proximity, though not in a joint household. The best example, perhaps, is the agreement between a young family and an aging parent that a "granny's flat" be made

27. [1959] V.R. 197.

28. *Ibid.*, at 198.

29. [1960] 1 All E.R. 93, at 100; referred to in *Raffaele v. Raffaele* [1962] W.A.R. 29, at 31, *per D'Arcy J.*

30. *Bojczuk v. Gregorcowicz* [1961] S.A.S.R. 128.

31. *Boord v. Boord* (1866) 0 S.A.L.R. 58.

32. Cases in point are *Todd v. Nicol* [1957] S.A.S.R. 72; *Wakeling v. Ripley* (1951) 51 S.R.(N.S.W.) 183.

available to the latter. Such arrangements are rarely drawn up formally although they may occasionally be evidenced by correspondence. Again the courts will be inclined to enforce undertakings given as part of such an arrangement, at least when the promisee has altered his position substantially in reliance on the undertaking. The objection that such a contract is not evidenced by writing can sometimes be overcome by a somewhat generous application of the doctrine of part performance<sup>33</sup>.

It seems clear that an ordinary commercial contract or contract of employment is not rendered unenforceable by the mere fact that the parties happen to be closely related; but care must always be taken not to spell out such a contract from material which is too scanty and is compatible with a finding that a "conversational assurance" was all that was intended. Higgins J. gave the following warning in *McBride v. Sandland*<sup>34</sup>: "In dealing with conversations between near relatives great care has to be taken lest words of unguarded speech should be construed as creating legal obligations. They should be scrutinized most closely before the conclusion is drawn that the parties intended to bind themselves in conversation by legal bonds". Even where a distinct arrangement is arrived at, evidence of local usages and customs may still warrant a finding that legal relations were not intended, particularly where the parties have not settled the question of price or remuneration by express agreement. As Barton J. stated in *Turner v. Turner*<sup>35</sup>: "... people who are settlers on the land are in the habit of utilizing the labours of the members of their families, whether such members are infants or are of mature age, and . . . the question of payment or compensation for that labour seldom arises. We cannot shut our eyes to the ordinary facts of life". Even foreign custom, if imported into Australia, can become directly (i.e. without the medium of a conflicts rule) relevant. In *Taverner v. Swanbury*<sup>36</sup> a boy aged fourteen agreed to work for his father, an Italian immigrant and market gardener, for several years, his only return being his keep and a little pocket money. Reed J. held that this agreement was not meant to create legal relations, mainly because it conformed to a type customary in Italy and not normally attended by legal relations there.

#### *Arrangements to which the Crown is a party*

The fact that the Crown, as represented by the federal government or by the government of a state, is a party to an agreement does not by itself remove the agreement from the sphere of private contract<sup>37</sup>. There are provisions both of state and federal law which confer jurisdiction on the courts to hear and determine actions based on such agreements<sup>38</sup> and their very existence shows that legal enforcement may be possible. Sec. 57 of the Judiciary Act 1903-1960 (Cwth), for example, ordains that any State asserting

33. See, for example, *Raffaele v. Raffaele* [1962] W.A.R. 29.

34. (1918) 25 C.L.R. 69, at 94.

35. (1918) 25 C.L.R. 569, at 570.

36. [1944] S.A.S.R. 194.

37. Cf. *McRae v. Commonwealth Disposals Commission* (1950) 84 C.L.R. 377 (Commonwealth a co-defendant); *The Crown v. Clarke* (1927) 40 C.L.R. 227 (action in contract against state of Western Australia).

38. See, for example, Part V of the *Supreme Court Act* (S.A.) 1935-1963.

a claim against the Commonwealth in contract or tort may pursue this claim in the High Court. Sec. 64 of the Judiciary Act provides that, in a suit to which the Commonwealth or a State is a party, the rights of the parties shall as nearly as possible be the same as in a suit between subject and subject. The prevailing view seems to be that this relates not only to procedural but also to substantive rights<sup>39</sup>. However, this latter view does not imply that the fact that one or more governments are parties to a contract must be ignored; important substantive consequences flow from it. As Dixon C.J. stated in *South Australia v. The Commonwealth*<sup>40</sup>: "... it is one thing to find legislative authority for applying the law as between subject and subject to a cause concerning the rights and obligations of governments; it is another thing to say how and with what effect the principles of that law do apply in substance".

The fact that the federal or a state government is a party to an arrangement gives rise to a question of classification: is the arrangement a contract, governed by the principles of the private law, or is it an administrative or political arrangement and therefore not cognizable by courts of law? Although the High Court has once resolved this problem by relying chiefly on the doctrine of consideration<sup>41</sup>, the weight of authority favours a solution which is based directly on an analysis of the parties' intention<sup>42</sup>. This means, presumably, that an express statement in such an arrangement asserting or denying the existence of an *animus contrahendi* would be conclusive, at least in the absence of special grounds of invalidity. However, even governments rarely take such precautions. Therefore, the courts are reduced to working out the requisite intention from the terms of the arrangement and the circumstances of the case.

Where the arrangement in question fits into a clearly recognizable commercial type, the existence of an *animus contrahendi* will not usually be in doubt. This is the case, for instance, with government construction contracts let to private contractors, or with the purchase of supplies for governmental purposes. The same seems to hold for all other contracts which have acquired a clear identity in the ordinary law of contract, such as reward advertisements.

But the mere fact that it is possible to fit the arrangement in question into abstract categories, such as unilateral or bilateral contract, is clearly not enough. This is shown particularly clearly by a series of cases which have involved offers of governmental assistance on the one hand and acts of co-operation in seeking, receiving and utilizing such assistance on the other. Australian governments frequently undertake programmes for the provision of social services in the widest sense. Examples are programmes for the relief of disasters like bushfires, earthquakes, floods or droughts, for the control of pests such as weeds, insects or animal diseases, for the promotion of the production and marketing of agricultural or industrial products, and for the improvement of roads, railways and other transport facilities. Persons seeking assistance under such schemes are usually required to make application and perform other

39. See observations of Dixon C.J. in *South Australia v. The Commonwealth* (1961-1962) 108 C.L.R. 130, at 139 *et seq.*

40. (1961-1962) 108 C.L.R. 130, at 140.

41. *Australian Woollen Mills Pty. Ltd. v. Commonwealth* (1954) 92 C.L.R. 424; see also *Re Mount Tumah Blue Metals* (1963) 4 F.L.R. 478.

42. See judgment of Privy Council in *Australian Woollen Mills Case* (1956) 93 C.L.R. 546 and other cases referred to *infra*.

co-operative acts on which entitlement to the relief is made to depend. In several cases the question has arisen whether the performance of such acts creates contractual rights against the government on the authority of *Carlill v. Carbolic Smoke Ball Co.*<sup>43</sup>. The Courts have tended to uphold the government contention that such schemes are merely "statements of present government policy"<sup>44</sup> rather than contractual offers.

In *The Administration of the Territory of Papua and New Guinea v. Leahy*<sup>45</sup> the plaintiff, a grazier in New Guinea, arranged with the Department of Agriculture in the territory that the Department would eradicate cattle ticks with which his property was infested, whilst he would allow the Department's officers to enter his land, spray his cattle and take other necessary measures, and that he would make available to the Department the services of six native labourers. Two of the departmental officers, "through deficiencies of character and over-indulgence in alcohol" failed substantially in their duty, and as a result the plaintiff's cattle became more seriously affected by ticks than they had been before. The plaintiff claimed damages for, *inter alia*, alleged breach of this arrangement which, in his submission, constituted a contract. The action succeeded in the Supreme Court of the Territory, but the High Court upheld the defendant's appeal, conceding that the parties had not intended the arrangement to be legally enforceable. McTiernan J. thought that the parties had exchanged promises but that, in his Honour's view, was not enough: there had to be, in addition, a "common intention . . . to enter into legal obligations, mutually communicated, expressly or impliedly"<sup>46</sup>. Kitto J., with whose judgment Dixon C.J. agreed, defined the issue in the case in strict accordance with the overriding test of intention: "The question is whether the . . . correspondence which passed and the conversations which took place evinced an intention to make a bargain mutually binding between the Administration and the respondent in the sphere of legal rights and obligations"<sup>47</sup>. After a careful review of the correspondence and of the evidence of discussions between the parties, the High Court concluded that Leahy's attitude throughout had been that of a suppliant for government assistance, to be rendered to him as a function of government in accordance with the settled policy of cattletick eradication, not as a matter of private contract<sup>48</sup>.

Not infrequently, governmental assistance is given in cash rather than in the form of services. However, the *Australian Woollen Mills Case*<sup>49</sup> shows that this circumstance alone is not sufficient to bring the scheme in question into the realm of private contract<sup>50</sup>.

As Harrison Moore pointed out, agreements between governments in Australia are numerous, detailed, complicated and of vast scope<sup>51</sup>. Examples are

43. [1893] 1 Q.B. 256.

44. *Milne v. A. G. for Tasmania* (1956) 95 C.L.R. 460, at 472.

45. (1960-1961) 105 C.L.R. 6.

46. *Ibid.*, at 11.

47. *Ibid.*, at 13-14.

48. *Ibid.*, at 20 *et seq.*, *per* Kitto J.; at 10, *per* Dixon C.J.

49. (1954) 92 C.L.R. 424.

50. *Ibid.*, at 457.

51. "Suits between governments" (1935) 17 *Journal of Comparative Legislation* (3rd series) 163, at 182.



agreements for maintaining or restoring common boundary marks, for the utilization of inland rivers, for the execution of public works and for co-operation in administrative services<sup>52</sup>. Notorious recent examples are the agreement to build a dam at Chowilla to regulate the waters of the River Murray<sup>53</sup> and the agreement between the Commonwealth and the States concerning the search for oil on Australia's continental shelf<sup>54</sup>. Harrison Moore inferred from the formal manner in which these agreements are concluded (including their statutory ratification by the parliaments concerned) that they are accompanied by the intention "of establishing legal relations between the governments to the fullest extent that these are possible, and not merely . . . political relations . . ." <sup>55</sup>. Subsequent cases have shown this view to be mistaken. The main problem, as Harrison Moore saw it, was not to establish an *animus contrahendi* but rather to determine the limits beyond which such *animus contrahendi* could not be effective.

Harrison Moore saw two major problems:

1. One problem arose, in his view, from the possibility of a legislative repudiation of such an agreement by one of the parties to it. *Prima facie*, an earlier ratifying Act could not be said to invalidate the subsequent statutory repudiation because of the rule that a legislature cannot effectively limit its own freedom to legislate. Consequently, so Harrison Moore argued, the statutory repudiation could be open to judicial sanction only on the assumption that a law higher than the repudiating Act granted a remedy. The solution proposed by the learned author<sup>56</sup> was that the common law conflicts rules, in the federal courts at any rate, turn into a kind of constitutional guarantee, placing law attracted by such rules beyond the reach of state legislation and providing the necessary remedies.
2. An even greater difficulty, as the learned author saw it, was inherent in the court's jurisdiction over agreements between governments. Since their mandate is to adjudge disputes between governments in analogy to disputes between private persons, those agreements having as their subject the exercise of political power must of necessity be excluded. He submitted that this category comprised such matters as agreements for extradition, for the avoidance of double taxation, or for the enactment or repeal of statutes; even matters which might be the subject of private contract (such as, presumably, construction projects) might have to be treated as removed from the sphere of private contract by virtue of their comprehensive and far-reaching character.

Although Harrison Moore's valuable contribution has been referred to with great respect and apparent approval by the High Court<sup>57</sup> the law has in fact developed along somewhat different lines. So far the judges have been able to avoid the genuine complexities which the learned author has identified by

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52. *Ibid.*, at 181.

53. See River Murray Waters Act Amendment Act 1963 (S.A.).

54. See Petroleum (Submerged Lands) Act 1967 (S.A.).

55. *Loc. cit.*, at 182.

56. *Ibid.*, at 185.

57. *South Australia v. The Commonwealth* (1961-1962) 108 C.L.R. 130, at 140.

concentrating all their attention on the *animus contrahendi*. To them, the overriding question has been: did the governments involved intend that the agreement should give rise merely to political obligations, or were legal relations intended? McTiernan J. affirmed this simple test in *South Australia v. The Commonwealth*: "... the point to be decided ... is whether or not the intention of either agreement is to create obligations enforceable in a court"<sup>58</sup>. Harrison Moore's view was that the formal solemnity inherent in the process of parliamentary ratification of such agreements manifested fully the parties' contractual intent. However, the most recent case shows that there is no such presumption: in the absence of an express intent the status of the agreement depends upon careful scrutiny of all circumstances, particularly on the nature and the constitutional implications of the agreement. In *South Australia v. The Commonwealth*<sup>59</sup> the Government of South Australia, dissatisfied with the alleged failure of the Commonwealth to implement the Railways Standardization Agreement of 1949, particularly with respect to the Peterborough Division of the South Australian Railway system, sued the Commonwealth in the High Court, alleging breach of the agreement. The Full High Court unanimously allowed the demurrer of the Commonwealth against the statement of claim. Owen J. relied on a very simple consideration: the agreement provided that any question as to the time for commencement of the work was to be settled by agreement between the respective State and Commonwealth ministers; consequently, the learned judge thought, a vital term of the agreement had not yet been settled, and, on the authority of *May and Butcher v. The King*<sup>60</sup>, there could be no contract. But his Honour also seemed attracted by the alternative submission of the Commonwealth that the agreement was merely a sketch, as it were, of an administrative and financial scheme rather than a definite enforceable contract<sup>61</sup>. This second ground was strongly endorsed by McTiernan, Taylor and Windeyer JJ.<sup>62</sup>.

*South Australia v. The Commonwealth* is a decision of profound legal and political importance, as has recently been demonstrated by the controversy over the building of the proposed Chowilla Dam. In the absence of some convincing distinguishing feature, it seems that agreements between Australian governments for the execution of public works are worth little more than the paper on which they are written, or, more accurately, the political pressures which can be brought to bear to enforce their faithful implementation.

### Conclusions

The preceding survey of Australian cases concerned with problems of *animus contrahendi* can be summed up as follows.

1. The most fundamental element of contract is the parties' manifested and agreed intention, determined objectively, to be legally bound or (to use the conventional phrase) to create legal relations.

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58. (1961-1962) 108 C.L.R. 130, at 148.

59. *Ibid.*

60. [1934] 2 K.B. 17 n.

61. (1961-1962) 108 C.L.R. 130, at 157.

62. *Ibid.*, at 148 *et seq.*, 149, 153 *et seq.*

2. The rule of interpretation that efficacy be preferred over inefficacy (*ut res magis valeat quam pereat*) must be observed whenever an agreed *animus contrahendi* has been found to exist. This rule can be a major factor in determining whether mutual *de facto* undertakings and/or acts or omissions amount to an agreed exchange and therefore constitute consideration. It is submitted with respect that the seemingly contrary approach of the High Court in the *Australian Woollen Mills* case does not represent the law correctly.
3. The *animus contrahendi* poses a problem of conclusion of contract and does not relate to the determination of the terms of a contract admittedly concluded. It follows that statements in written contracts which are concerned with the *animus contrahendi* are not subject to the strict rules of construction and that extrinsic evidence, even in contradiction to such statements, is not excluded.
4. The presence of an *animus contrahendi* must be determined objectively, as an inference from all the circumstances of the case and with the help of established presumptions, notably the twofold (rebuttable) presumption that business deals are, and that social and domestic arrangements are not intended to be legally enforceable.
5. There are numerous cases which cannot be resolved with the help of a simple presumption; in such cases, the presence (or absence) of an *animus contrahendi* must be deduced from all the circumstances by a process of "empirical elucidation" (Mayo J.). There are certain frequently recurring factors which tend to count for or against the existence of an *animus contrahendi*:
  - (a) Factors which throw doubt on the enforceability of an arrangement are, for example, that the parties are closely related, that a government is involved as a party, that benefits are to be conferred on one party which are virtually gratuitous, that the arrangement has not been reduced to writing even though the law required writing, that the type of arrangement before the court is customarily regarded as unenforceable;
  - (b) Factors which tend to weigh in favour of enforceability are, for example, that the arrangement involves substantial mutual sacrifices, that symbolic consideration has been given, that the parties intended to involve solicitors in the conclusion or implementation of the arrangement, that the arrangement was avowedly made in an atmosphere of mutual distrust.
6. Arrangements to which the Crown is a party have been before the courts on many occasions and the following trends have emerged:
  - (a) Where such arrangements are of a type normally enforceable when concluded between private individuals, they will tend also to be enforceable by or against the Crown;
  - (b) Where such arrangements are part of a government assistance scheme (flood, drought or bushfire relief, pest control, financial help with emergencies in industry or commerce) they are not usually

enforceable against the government however carefully the claimant may have complied with all conditions laid down for assistance;

- (c) Agreements with political implications concluded between Australian governments, including agreements for the execution of extensive public works programmes, are likely to be regarded as political rather than contractual and therefore will not be enforceable by legal action.