

## Pharmacy Insights

### Deal or No Deal: from handshakes, heads of agreement to contracts – what’s legally binding, and what’s not?

Many court cases going back to the 1800s have considered whether real life sets of events or circumstances amount to a legally binding agreement, or, whether there is no actual binding agreement between the parties.

As a pharmacy owner or soon-to-be pharmacy owner, you will come across legal agreements in many forms. In your agreements with suppliers, software providers, nursing homes, and landlords, you will be entering into contracts with the expectation that they will be legally binding on the parties.

However, the question of whether a legally binding agreement has been struck is never more important than when selling or buying a pharmacy. The sale and purchase process should involve a series of progressive steps which evolve into a legally binding contract.

Principals Georgina Odell and Douglas Raftesath will take a deep-dive into this topic during their upcoming business session at Pharmacy Connect in Sydney on 2 September.

Following is a snapshot of the key insights they will share, providing pharmacists with a better understanding of the processes involved and legal implications that may arise when buying or selling a pharmacy, from the point of initial negotiations to the final contract of sale.

#### Negotiations

The first stage is where the seller and the buyer may be speaking to each other about the terms of a sale, whether directly, or through a business broker. Matters such as price, timing, and employees may be discussed.

Even where a price has been agreed, a completion date has been set, and other main terms of the sale have been agreed upon, it is highly unlikely at this very early stage that the parties would intend there to be a legally binding arrangement between them.

The vendor has not yet produced a written contract of sale and the purchaser has not yet undertaken its financial and legal due diligence.

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At this stage, the purchaser may not have its offer of finance to fund the purchase. Therefore it is important that even when shaking hands on a price and basic terms, the parties mention that the sale and purchase is subject to the negotiation and execution of a legally binding contract of sale, and subject to the necessary regulatory and lessor approvals being granted.

### Heads of Terms or Sales Notices

The second step involves producing documents called Heads of Terms, Heads of Agreement or Sales Notices. While most will be expressed to be non-legally binding (for the reasons set out above), every now and again we come across Heads of Terms which state that the purchaser offers to buy the pharmacy for a particular price, and the vendor accepts that offer. The document may go so far as to say that the Heads of Terms is legally binding once signed by the parties.

It is important to consult your solicitor **before** signing Heads of Terms or other similar documents, as there are many other points which need to be discussed and agreed before the transaction should be legally binding.

### Contract of sale and purchase

There will often be several iterations of a contract for sale and purchase of a pharmacy. Typically, the vendor's solicitor produces the first draft of the contract, and so it will most likely be weighted in favour of the vendor. They may try to exclude warranties or promises about the business, which could be against a purchaser's interests.

When the parties are happy with the content of the written contract of sale and purchase, the parties will sign the documents and the solicitors will exchange them. At this point the contract becomes legally binding, subject to satisfaction of any conditions precedent to completion such as the landlord's consent to assignment of the lease, and Pharmacy Council and PBS approvals.

Typically, if one of the conditions precedent to completion are not satisfied or waived by a certain date, one or both parties would have the right to rescind the contract. Rescission is different to termination of the contract, in that it typically gives a party the right to serve a notice of rescission on the other, and to walk away without liability to the other (unless a party has breached the contract, for example by failing to apply for Pharmacy Council approval in accordance with the contract). Typically the deposit is repaid to the purchaser when a contract is rescinded. However, where a contract is terminated because of the other party's breach, the deposit would not generally be returned to the purchaser if they are in default.

Every contract for the sale and purchase of a business is different and it is essential that you understand the nuances of your particular contract, particularly timescales for achievement of different steps in the process.

## Elements of a contract

Contract law is a complex area of law, but broadly speaking the following need to be present for a contract (other than contracts for the sale and purchase of real property which have additional considerations) to be legally binding:

- an offer and acceptance of that offer
- an intention to create legal relations by all parties
- consideration – something of value passed between the parties, and
- certainty – vague contract terms can cause a contract to be void for uncertainty.

## Be cautious at every stage

Caution must be exercised when negotiating the sale or purchase of pharmacies, both in the early stages and when signing off on a legally binding contract. Such transactions are an evolving process and they should become binding only when the time is right – when the fine details of the transaction have been agreed, when financial and legal due diligence has been completed, and when all parties are wholly committed to seeing the sale and purchase complete.

**This article was written by Principal [Georgina Odell](#). For further assistance in buying and selling a pharmacy please contact Georgina.**



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## Further information

In addition to providing specialist advice about buying or selling a pharmacy, our team of [pharmacy lawyers](#) regularly advises clients about their obligations in employing and managing staff, franchising, privacy, obtaining finance, partnership arrangements, dispute resolution, retail leases and Pharmacy Location Rule issues.

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