

# IT BYTES

## ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

# WHAT IS THE DIFFERENCE BETWEEN ‘SHALL’, ‘WILL’ AND ‘MUST’?



## WHEN DOES THIS QUESTION TEND TO ARISE?

**While the words ‘shall’, ‘will’ and ‘must’ are often used interchangeably in contracts, these terms all carry specific meanings. Failure to understand the subtle differences in meaning can result in ambiguous contract drafting that does not accurately reflect the intentions of the parties. Above all else, using these terms interchangeably and inconsistently in your contract can create uncertainty and suggest that they may have different meanings than what may be intended.**

## WHAT DOES THE LAW SAY?

Australian courts seek to interpret the meaning of contracts, with appropriate regard to the context of those terms and their relationship to the broader contract.

While the words ‘shall’, ‘will’ and ‘must’ can all be used to indicate contractual obligations, courts have expressed varying degrees of confidence in the strength of their use when disputes over contractual interpretation arise. As general observations:

- ‘Must’ is widely accepted as the clearest way to impose a binding obligation. There is limited ambiguity in how ‘must’ can be used in the context of imposing an obligation, which ensures parties can act with confidence that their obligation is binding.
- ‘Shall’ has been recognised as indicating a binding obligation. However, the term can be misused or applied to third party or contingent events. For example, a provision that ‘payment shall be due upon receipt of a valid invoice’ may function as a condition precedent or a description of a state of affairs rather than imposing an obligation to actually make the payment.

- ‘Will’ presents greater variability compared to ‘must’ and ‘shall’ and could be used in any of the following ways: (i) to express a promise of future performance (e.g. ‘party A will deliver the goods by 1 June’), which will ordinarily constitute an enforceable obligation; (ii) to describe future states of affairs or mechanical outcomes (e.g. ‘interest will accrue daily’), which may be declaratory rather than an immediate obligation; or (iii) to allocate risk or consequences (e.g. ‘if X occurs, Y will be liable’), which may operate as a conditional obligation triggered by an event.

The bottom line is that ‘must’ (or ‘agrees to’ as an alternative) is the most direct and unambiguous way to represent an obligation in contractual drafting. While ‘shall’ or ‘will’ can have the same effect, they are more susceptible to different readings, based on the broader context of the contract, and so may create greater ambiguity.



## WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

When drafting a contract, parties should consider the following tips to avoid a scenario where an obligation may be interpreted in a way that does not reflect the underlying intention of the terms:

- Using ‘must’ to impose obligations represents best practice to ensure clarity of intention. For example, ‘the Supplier must deliver the goods by 30 June 2024.’
- If using the word ‘shall’, ensure the relevant obligation is expressly spelled out and complete. For example, ‘the Company shall supply and deliver 60 battleships which the Government shall order and pay for over 20 annual instalments’ is more direct and explicit than ‘the Company shall supply and deliver for the use of the Government battleships at such price in such manner and subject to conditions specified’. Avoid using ‘shall’ unless you are certain of its intended effect and the context makes the obligation clear.
- If using ‘shall’ or ‘will’, consider how other terms in your contract are expressed. If you intend to use ‘shall’ or ‘will’ to indicate an obligation, use that term consistently, and use permissive language such as ‘may’ in other clauses to indicate where terms are non-mandatory. Avoid mixed use of ‘shall’, ‘will’ and ‘must’ to indicate binding obligations, as this can increase confusion and the likelihood of disputes regarding the proper interpretation of your contract.
- Reserve use of the word ‘will’ for statements of fact or intention where possible (as opposed to obligations). For example, ‘ships will be delivered within 30 days of purchase’ may be interpreted as a statement of what is expected, rather than a binding obligation to deliver a ship within a certain time frame.

Ultimately, courts tend to focus on matters of substance such as the contract’s structure and commercial context when interpreting a contract’s terms and will not elevate form over substance. However, using clear and unambiguous language is still the best way to make the interpretive exercise more straight-forward and eliminate scope for doubt about the contract’s effect.

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