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RIGHTS

CONTRACTS

What is a contract?

Put simply, a contract is a binding agreement which governs the relationship between two or more people or companies, setting out what they must and mustn't do.

Pretty much all of the commercial relationships and transactions we enter are regulated by a contract – whether it's buying a house or car, or buying the groceries. Even the relationship between an employer and employee is governed by a form of contract.

Who can make a contract?

Usually contracts are between two or more people or companies (or both).

Anyone over 18 years old can make a contract, and in some circumstances people under 18 can make a contract too.

You're usually bound to honour the terms of a contract you've made. Sometimes, however, a court or tribunal will make exceptions, for example if one of the people who's signed the contract is mentally ill or intellectually disabled.

Does a contract have to be in writing?

A lot of people think that, to be binding, a contract needs to be in writing. That's not always the case. While there are some transactions that need a written contract – such as the sale of a home or a credit arrangement – verbal contracts are usually enforceable too. That said, it's usually best to put the details of most contracts in writing so that everyone has a record of what's been agreed upon and what their obligations are.

What makes a contract?

Contracts generally all have three basic elements.

- There must be an agreement, which needs someone to offer something, and for the other person to accept that offer.

- Each party to the contract must give something of value away (known legally as consideration). This could be a sum of money, an item for sale or even someone's time or skill.
- Each party to the contract must willingly intend to enter into a legally binding agreement – although this doesn't mean you have to state that you intend to be bound. Instead, someone's intention to enter a contract can often be implied by how they behave.

Does the contract cover everything?

Usually the people or companies entering into a contract agree to its terms, sometimes by negotiating. But there are times when the law implies certain terms into a contract, even when these aren't expressly agreed on.

For instance, the law says that goods being sold for a particular purpose have to be able to be used for that purpose. That means that when you buy a clothes dryer, it's an implied term of the contract that it will actually be able to dry your clothes.

What if you didn't read a clause?

The general rule is that you're bound by all the terms of a written contract, even if you didn't read them. That means you should always take the time to read the terms and conditions of a contract, and make sure you understand them, before you sign anything.

Sometimes you can be bound by a written agreement even where you don't sign it. For instance, car park tickets and dry cleaning dockets often have terms and conditions printed on the back of them. It's usually enough for the issuer to have taken 'reasonable steps' to draw these terms and conditions to your attention.

That said, there are some occasions where you can get out of the terms of a contract you've already agreed to.



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When can you get out of a contract?

Generally, if a court finds that the terms of a contract are unfair it can rule that they shouldn't be enforced too strictly. When this happens, it can vary or even void the contract.

A court will take a number of things into account when it decides whether a contract is unfair. This includes examining how equal the parties to the contract were, as well as what scope they had to bargain over the terms and conditions.

The Australian Consumer Law also specifies some behaviour that is unfair when it comes to buying and selling goods and services. This includes:

- When a seller engages in 'misleading and deceptive conduct' about the product or service they're selling
- Where one party is unfairly disadvantaged by the terms of the contract
- Where one party does something 'unconscionable' (ie. excessively unreasonable).

When assessing consumer contracts for unfairness, a court will also examine whether the buyer understood what they were buying, as well as the amount they could have purchased similar goods or services for elsewhere.

They will also sometimes refuse to enforce terms of a contract that:

- Significantly favour one party over the other
- Aren't necessary to protect the legitimate interests of a party
- Would cause unfair harm to one party if relied on.

If you think a contract you've entered into is unfair, you should see your solicitor.

What happens when someone breaks a contract?

If someone breaches the terms of a contract – or decides not to uphold their end of the bargain – a court might choose to do a number of things. These include:

- Awarding a sum of money to compensate the innocent person for their loss, known as damages
- Ordering the party who is breaching the contract to stop doing so
- Ordering the party who has breached the contract to carry out their obligations
- Declaring the contract void and ordering the party in breach to do what it takes to put the innocent party in the same position they were in before they signed the contract.

The court or tribunal will decide which of these remedies to use based on the type of contract and also the type of breach.

How can a solicitor help?

If you're thinking of signing a contract, or if you're unclear about your rights and obligations under an existing contract, your solicitor can help.

- They can explain the terms of a contract to you before you sign, so you know the consequences of what you're entering into
- They can let you know your rights and obligations and advise you about the best course of action
- They can negotiate with the other party or their solicitor to help you get more favourable terms and conditions included
- They can draw up terms and conditions for you if you're thinking of entering into a contract
- They can advise and help you if you think someone else is breaching a contract.

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