
CONTRACTS: AN INTRODUCTION

What is a contract?

A contract is an exchange of promises ("something for something") that is legally enforceable. The "something" can be money, services, property, rights... almost anything. Contracts can also be called "agreements" or "deeds"

Throughout life you will enter into thousands of contracts without even realising it. For example: getting on a bus; subscribing to pay TV or buying a drink all amount to entering into contracts.

More about contracts

Elements of contracts

A contract requires 4 elements:

- **Offer:** a clear offer by one person or organisation to another. If an offer is rejected, that offer automatically ends;
- **Acceptance:** the other party must accept the whole offer without conditions. For example, if an art buyer offers you \$500 for your painting and you say that you would take \$600, you have not accepted the buyer's offer, but made a new offer that the buyer can accept or reject. This is referred to as a "counter offer". There can be many offers and counter offers before there is an agreement;
- **Consideration:** this is what each party gives to the other as the agreed price for the other's promises. Remember, the agreed price doesn't have to be money. It can be another benefit; and
- **Intention:** the people or organisations entering into the contract must intend to create legal relations.

A person who breaks a contractual promise may be sued. The person may have to pay the other person compensation or comply with some other court order.

How do you make a contract?

Sometimes contracts need to be written. In general, though, a contract can be:

- oral;
- in writing;
- partly oral and partly in writing; or
- made by people's actions.

This means that a contract may be made up of a number of different documents, emails and conversations.

Written contracts do not need to be the formal kind a lawyer would draft. While they can be based on a sample contract such as those available for purchase from Arts Law, generally you don't need to follow a particular form. It is always best, though, if a written agreement is in plain language so that all parties understand it.

Basic contract tips:

Steps that should be done or things that should be considered when entering into a contract include:

Do your research

The piece of paper you sign may be worthless if you are dealing with someone who is bankrupt or untrustworthy. Who is the other party? Are they a company or an individual? Who are you really entering into the contract with?

Steps you can take include searching the Australian Securities and Investment Commission's website (www.asic.gov.au) to check if the business name or company is registered. Call your local consumer affairs body to see if they have had any adverse reports. Ask around!

Also consider the terms that you are being offered. Are they consistent with any industry standard?

Consider the deal

Make sure that the deal meets your requirements and covers all your concerns.

The law generally doesn't care if you make a rotten deal for yourself. Whether or not the contract is good or bad for your business, if you have entered into it, you will probably have to perform it.

Negotiate

Sometimes you will be handed a formal-looking contract and told: "This is our standard contract - take it or leave it". You may feel that you have no bargaining power to negotiate better terms for yourself.

There is generally no legal reason why a contract cannot be negotiated. Ensure you read the contract carefully, check anything you are unsure of, make suggestions if you wish to make changes. Sometimes you will be able to convince the other person to let you strike out or add a clause or a

sentence. If they won't agree to do that, you should carefully consider whether this deal is good for you. If it isn't, then maybe you should walk away.

Get legal advice

Often you will be told that you must sign a contract within a very short time - even in front of the other party. Don't give in to this kind of pressure. It is only reasonable that you be given sufficient time to get independent legal advice so that you know exactly what you are agreeing to before you sign. It is much harder to retreat from a bad agreement once you have entered into it. You may find yourself with obligations you didn't fully understand or didn't even know about.

Don't give away more than you need to

When you are dealing with your artistic assets, such as copyright, you should make sure you keep control of them. For example, do you really need to assign all of your copyright in a work? Would a licence permitting someone else to use your work be more appropriate? You can limit licences (permissions) by narrowly defining terms such as territory, duration and type of use.

Only promise what you can deliver

You cannot give something that you do not have. Be sure that you can deliver what you say you can.

For example, if you created artwork as an employee (and your employer is actually the copyright owner rather than you) you cannot licence or sell (assign) that copyright.

Put everything in your contract

If you have a written contract, the law generally presumes that it is the whole agreement - so make sure that it is. Don't leave out things as a goodwill gesture or because you assume that they will happen anyway.

Think about the contract practically and consider what will happen under the contract if the relationship sours. Is the duration of the contract too long? Will you be paid in regular instalments or will you have to wait for a lump sum? Can you end the relationship easily?

Get it in writing

Very few contracts are required to be in writing. Exceptions include contracts containing an assignment or an exclusive licence of copyright. If, however, there is a dispute about an oral contract, it may come down to your word against the other party's. Many disputes can be avoided if the agreement is in, or is confirmed by, writing.

If someone is hesitant about putting things in writing, you should ask yourself why. Are they perhaps thinking of sliding out of the contract later? Or is it simply not their "way"? You can explain to them that having a written contract is not a sign of distrust. Rather, the purpose of a written contract is to have a clear, unambiguous document that clarifies both parties' rights and obligations and, if they wish, sets out a procedure if something goes wrong.

If the other person still resists putting things in writing, you should keep your own notes of the oral contract and then write a follow-up letter in simple, non-threatening language confirming the arrangements.

Ask the other person to check the letter over and sign it if they agree with it. If they sign it, you have proof of the contract in writing. If they dispute it, you will have flushed out the misunderstandings. You can then amend the letter until you are both happy to sign it. Even if they ignore it, you **may** still be able to argue that they agreed to it by their conduct.

The bottom line is that any written evidence of the contract, even if it is just an invoice with terms noted, will help determine what was agreed.

Keep a copy of all documents you sign and read them often!

Signing a contract is evidence that you agree to its terms. You will usually be bound to perform the contract as it is written. It is a good idea to get two identical originals of a contract signed by both parties. Each party then keeps one signed original. At the very least, make sure that you get a *copy* of the original signed agreement when it has been fully signed. The other party isn't obliged to give you a copy of the signed contract later on!

Need more help?

Contact Arts Law (www.artslaw.com.au), tel. (02) 9356 2566 or toll-free outside Sydney 1800 221 457

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The Arts Law Centre of Australia has been assisted by the Commonwealth Government through the Australia Council, its arts funding and advisory body.

