Contracts in 10 Questions

1. What is a contract?

A contract is a legally enforceable understanding or exchange of promises between two or more people or legal entities. A contract will usually refer to these people or entities as “parties”.

Regardless of whether a contract is in writing, verbal or implied by your actions, a contract requires four essential elements:

1. A clear **offer** by one of the parties.
2. **Acceptance** by the other party (or parties) of the offer.
3. An exchange of value between the parties or **consideration**.
4. An **intention** to enter into a contract to create legal relations.

2. Are contracts always in writing?

No, contracts do not always have to be in a document or in writing.

You may not realise it, but you enter into contracts every day, by buying a bus ticket, subscribing to a music streaming service, or using a social media platform. When doing these things, you are usually agreeing to terms and conditions with the service provider. It is always important to read and understand these terms and conditions.

As long as the four essential elements of a contract are present (offer, acceptance, consideration and intention), then a legally binding contract can be formed in almost any way, including:

- By having a conversation on the phone or in-person.
- Through an exchange of emails.
- By signing a formal written document.

It is always better to have contracts in writing so that the terms of the contract are clear.

3. How do I know if I’ve entered into a contract?

Since contracts aren’t always in signed written documents, it can be hard to know if you have entered into a contract.

The basic principle is that you have entered into a contract when all of the four essential elements of a contract are satisfied (offer, acceptance, consideration and intention). This may occur by clicking “I accept” on online terms, signing a document either physically or electronically (eg. by DocuSign or similar software), or even by exchange of emails where both parties agree to the key terms of the contract. For example, a client sends you an email asking you to paint an original mural of a black panther on their garage door. The client says the style is up to you, that they will pay you $800 on completion, and that they want it finished by the end of the month. If you reply agreeing to those terms, then you will likely have entered into a legally binding contract.

If you are not sure whether you have entered into a contract, get legal advice.

4. Who can enter into a contract?

Not everyone has the legal capacity to enter into a contract, this includes:

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- Young people under the age of 18.
- People who have a mental impairment (including a person who is incapable of understanding what they are doing by reason of intoxication by drugs or alcohol).
- People signing on behalf of a company without authority.

If one of these factors applies to you or the other party you wish to enter into a contract with, you should get legal advice before proceeding with the contract.

5. Is it okay to start work before signing the contract?

You may feel pressure to start working on something before a contract has been fully negotiated. This pressure could be to meet a deadline or to avoid "missing out" on the project. However, you may not be paid for the work if the contract falls through, doesn't get signed or the client changes their brief for what they want you to create. To protect yourself from these and other risks, it is best not to start work before signing the contract.

6. I found a template contract on the internet which seems relevant. Is it okay to use this?

We get it. Template contracts that you find on the internet can seem like a good idea, but are they right for you? Especially when it comes to contract terms about how your creative work will be owned or used, contract terms must be drafted with your specific circumstances in mind. This caution is to make sure that your creative work is treated the way you and the other party intend.

Template contracts may have been drafted under the laws of another country and without specific consideration of your situation. As an example, in the USA, agreements dealing with copyright work may use the phrase a "work made for hire", but that expression does not appear in Australian copyright laws.

7. I don't feel like I can negotiate the contract I'm being asked to agree to. What should I do?

There is no legal reason why a contract cannot be negotiated. Particularly for contracts where you are named as a party (as opposed to general terms and conditions applicable to all customers), you should feel empowered to negotiate a contract. Read the contract to ensure you understand your obligations and your expectations of the other party. Some things you might want to consider are:

- If it is a contract to commission a piece of artwork: Is the brief clear about what the client's requirements are?
- Is it clear what dates you will be delivering to?
- Are those dates reasonable and achievable?
- Is the amount of your compensation and timing for payment clear?

In negotiating the contract, ensure that all the important terms are accurately and completely captured in the contract. Do not to rely on discussions or emails outside of the contract.

8. What should I do with a contract once it is agreed?

Once all the hard work is done and you have a signed contract – congratulations! Keep a signed copy of the contract somewhere safe. Sometimes, you will need to refer to it. You may need to check everyone is doing what they said they would

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do, a disagreement might arise, or you might need to get advice from a lawyer.

9. I would like to change the contract, but it's already agreed. What can I do?

It is common for a contract to include a clause stating that changes must be agreed in writing. It is always possible for the parties to agree to change the contract by signing another contract setting out the changes to the original contract (often called a "variation" or "amendment" agreement). If you wish to change a contract term, raise this with the other party and try to reach agreement about the change. You should document any agreed changes in writing and have all parties sign it. It is not possible to change the terms of a contract without agreement with the other side, unless the contract clearly states that you can do so.

Because a "variation" is a new contract, it must have the four essential elements of a contract, including consideration. To make sure your changes are legally binding, it is a good idea to get legal advice about how to make those changes.

10. I'm in a disagreement with the other party to the contract. What should I do?

Sometimes, things might not go to plan and disagreements may arise. This might be about fees, the scope of the services or timing of the project (or something else altogether). If this comes up, we recommend these steps:

- Check if the contract has a dispute resolution clause. If so, follow this process. Many contracts, including Arts Law templates, contain a clause where the parties agree to try alternative dispute resolution like mediation before starting court proceedings (which can be expensive and time-consuming). For more information about alternative dispute resolution, see Arts Law's Information Sheet. The parties can agree to alternative dispute resolution (like mediation) even if there is no clause about it in the contract.
- Check if the contract has a legal notices clause. If so, review it carefully because it is important that any communications regarding the dispute meet the notice requirements.
- Get advice from a lawyer to understand your rights and obligations in relation to the dispute.

Further Resources

For more information about the law, take a look at these information sheets from Arts Law:

- Contracts: An Introduction
- Contracts: A glossary of jargon
- Contracts: Getting it right
- Signing Legal Documents
- Alternative Dispute Resolution – Mediation

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