



This article is an overview of the nature of contracts. It discusses the formation of legal binding contracts, factors that can undermine a contract and possible remedies when a breach of contract occurs.



Most people at some time in their lives will enter into a contract of some form. More commonly, you would be faced with entering into an employment contract, consumer contracts for the use of a credit card, a contract for the purchase or sale of land, and so on.

The law that regulates contracts has been developed over many centuries and is basically the same regardless of the type of contract that you would be called to enter into with another party.

Contract law governs agreements entered into between two or more parties. For example, a retail lease which is guaranteed by a guarantor would be a contract with three parties being the landlord, the tenant and the guarantor.

### **A. WHEN IS A CONTRACT ENFORCEABLE BY LAW?**

Certain steps need to be taken in order for a contract to be enforceable by law. These are set out below:

#### **A.1. OFFER AND ACCEPTANCE**

An offer is an invitation made by the offeror to another party, called the offeree. It shows the willingness of a party to enter into an agreement with the other party. The offer can be revoked or taken back at any time prior to the acceptance and will expire or lapse when:

- A counter offer has been made by the offeree;
- The death of either party before acceptance;
- On loss of contractual capacity by either party; or
- If it is not accepted within the time given. However, if there is no specification of time to accept the offer, the offer has to be accepted within a reasonable time dependent on the nature of what was offered.

#### **A.2. CONSIDERATION**

For a party to enforce a promise under a contract, it must be shown that consideration has been given. Consideration is a “payment” for value of the offer. It does not always have to include money, it only needs something of value even if it is of nominal value such as a “peppercorn”. This includes:

- a right;
- interest;
- profit or benefit;
- forbearance; or
- responsibility or loss given.

Past consideration is not consideration, and consideration must move from the promisee (“offeree”) to the promisor (“offeror”). If a promise is unsupported by consideration it is regarded as a gratuitous gift which will not be enforced in contract law unless contained in a deed under seal. A deed is a contract which has been signed and expressed to be a deed. A contract set out as a deed is enforceable without requiring the parties to have provided consideration.

#### **A.3. INTENTION TO CREATE LEGAL RELATIONS**

For an agreement to be legally binding, the parties need to have the intention that the agreement will be recognised by law.



### **B. WRITING REQUIREMENTS: DOES A CONTRACT HAVE TO BE IN WRITING?**

There are specific contracts that need to be in writing such as a Contract for the Sale of Land, and it is preferable to put a contract in writing to clearly evidence the intention of the parties. Some contracts can be made orally and will be enforceable by law as long as they satisfy the above criteria.

### **C. VITIATING FACTORS: UNDER WHAT CIRCUMSTANCES CAN A CONTRACT BE VITIATED?**

A vitiating factor is one that impairs a contract and makes it void or voidable. Most of these factors involve some form of unfair or unconscionable conduct on the part of one of the parties. This conduct includes:

- **Misrepresentation:** a false statement of fact that induces the other party to enter into the contract. These false statements are made before the contract is formed through correspondence between parties, for example.
- **Mistake:** an error in judgment. Where parties have failed to understand each other completely and there has been a misunderstanding. As a general rule, a mistake does not give the other party a right to discharge its contractual obligations.
- **Duress:** unlawful pressure applied to force a party to perform an act or enter into a contract unwillingly. This can be in the form of threats.
- **Undue influence:** where a party is able to persuade another party into performing an act by taking advantage of the personal relationship between the two parties.
- **Unconscionable conduct:** where a party has taken advantage of a weaker party with a 'special disability' (most commonly age, illiteracy, lack of education or a combination of factors) leading them to enter into a contract.

If you feel that you have been treated in an unfair or unconscionable manner, i.e. through the examples listed above, your contract may be considered void or voidable.

### **D. BREACH: WHAT HAPPENS WHEN A CONTRACT IS BREACHED?**

If one party to the contract breaches his/her obligations under the contract, then the other party is able to sue for breach of contract. The Court has a discretion as to the remedies available to the innocent party. Remedies for breaching a contract can include:

- Damages;
- Rescission of the Contract; and
- Equitable remedies for situations where there has been more than just a loss of money. For example, specific performance, where a court orders the parties to the contract to follow through with the initial terms agreed in the contract.

### **E. WHAT ARE THE LIMITS FOR LEGAL CLAIMS AGAINST A PARTY UNDER CONTRACT LAW?**

Under the *Limitations Act 1969* (NSW), any action against another party to a contract is not able to be brought after a limitation period of six years starting from the date on which the cause of action first occurred. An action under a deed has a limitation period of 12 years.

### **F. HOW CAN WE HELP YOU?**

Our firm has wide experience and is knowledgeable in the area of contract law. Services we provide include:

- Drafting terms and conditions for a contract and/or a deed, ensuring the validity of the contract and/or deed under common law and statute;
- Reviewing an existing contract and advising you if you are unsure of the terms and conditions of the contract;
- Negotiating the terms of a contract for you if needed; and
- Advising you on your legal remedies in the event that there is a breach of the terms of a contract.

Comasters can help clients with drafting, reviewing and negotiating terms of the contract. We also advise on possible legal remedies in situations where a breach has occurred.

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