



# Working with Contracts

Practical  
assistance for  
small business  
managers



Office of Small Business

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## how to quickly navigate your way through the text...

To help you find the information you are seeking quickly, these icons are used in the text.

### More detailed information:

read these sections for a more detailed analysis.



### Critical issue or major pitfall to avoid:

read carefully and take special note.



# 1 How the guide can help you

Dealing with contracts is very much a part of small business management. Once in place, contractual requirements largely dictate the way in which small businesses operate. In short, they underpin the viability and security of any business, large or small.

Confidence in working with contracts is therefore very important.

Confidence comes from understanding. This guide is specifically designed to familiarise small business managers with contracts – what they are, what they contain, how to avoid the pitfalls – and to help them get the most from these very valuable and fundamentally important business tools.

In particular, the guide provides a plain English approach to understanding:

- the essential ingredients of a contract, supported by useful and practical examples relevant to small businesses
- the more frequently encountered and important legal jargon used in contracts
- the different types of contracts
- the basic content and structure of contracts
- what standard form contracts are and some useful pointers on constructing your own
- some of the basic issues relating to specific types of small business relationships.

This guide also provides a summary checklist of all the issues raised and where to obtain more detailed information and assistance.

The guide is not intended to tell you everything there is to know about contract law. It will not replace the need for professional legal advice where a thorough understanding of the law will be required.

The guide is about giving small business managers the ability to be able to use contracts confidently: to be able to identify the major issues and avoid the major pitfalls.

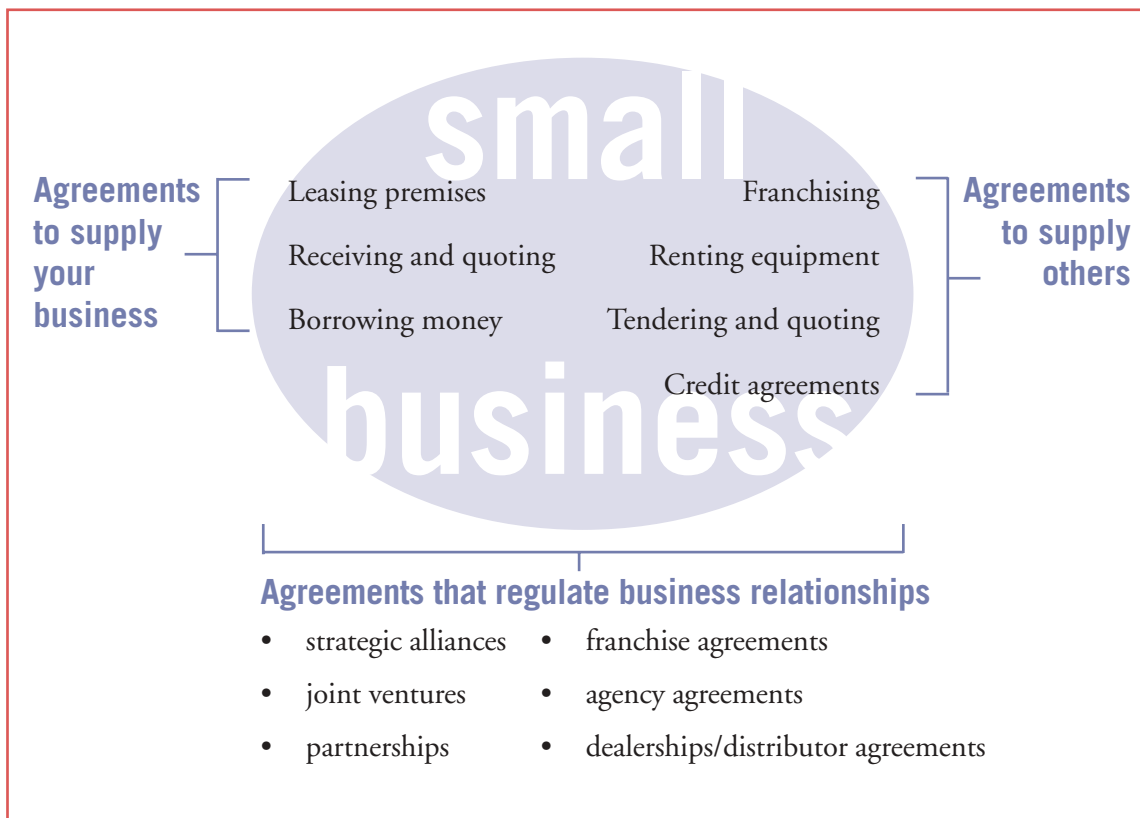
## 2 The 'big picture' of small business relationships

The small business sector is no different from any other sector in its need to manage a whole variety of business relationships. Most, if not all, of these relationships will involve contractual commitments and obligations. You may be:

- a consumer of goods and services – *as a borrower of finance, as a purchaser, in rental agreements and franchise agreements*
- a provider of goods and services – *retailer, professional consultant, trades person*
- in some form of partnering agreement with other businesses – *joint ventures, strategic alliances, partnerships, subcontractors.*

Contracts need to be managed. It is often a good idea to keep in touch with the other party to ensure that contractual obligations are being met as they should be. Sometimes a little give and take is necessary to cope with unforeseen circumstances. Managing the relationship may be as important as managing the contract.

### Managing small business contractual relationships



# 3 The essential ingredients of a contract

In the small business environment, discussions, negotiations and deal-making are an everyday occurrence. Typically they involve: providing quotes; discussions with suppliers, sales representatives, agents and clients; making offers and submitting tenders.

Out of these deals, agreements are made, where someone has agreed to do something for payment. Some of these agreements will be more important than others, but they are still agreements.

Contracts are 'legally binding' agreements, that is, agreements which in the eyes of the law are valid and which, with certain exceptions, must be fulfilled. The question is, when does all the discussion and negotiation become an agreement, and then, when does an agreement become, in the eyes of the law, legally binding?

For an agreement to be regarded as a contract, it must contain four essential ingredients: if any one of them is absent the agreement will not be legally binding.



The **four** essential ingredients are:

- **offer**
- **acceptance**
- **intention of legal consequences**
- **consideration**

## 'Offer'

There must be an offer to do something. The offer must be quite clearly stated, and definite in its intention.

- 'Offers' can be withdrawn at any time before they are 'accepted', unless it is a standing offer fixed for a period of time.
- There is a very important difference between an 'offer' and something simply intended to get negotiations under way. The latter are termed 'invitations to treat' and are not legally binding.

## Examples

- What is an offer?
  - advertisements which include price details
  - tender submissions
  - formal quotations
  - proposals to lease.
- What is **not** an offer?
  - 'ball park' estimates
  - requests for proposals
  - expressions of interest
  - letters of intent.
- When does an offer lapse?
  - when the time for acceptance expires
  - after a reasonable time in the circumstances; generally the greater the value of the contract, the longer the life of the offer.

#### 'Acceptance'

The offer, exactly as given, must be clearly understood and its acceptance must be definite.



- Only what is offered can be accepted. If any new terms are suggested this is regarded only as a counter offer which can be accepted or rejected.
- Counter offers are regarded under contract law as removing the original offer made.
- Requests for further detail about an offer are not counter offers.
- Where acceptance is given with conditions, the acceptance is not complete until the conditions are fulfilled – these are regarded as conditional contracts.

#### Examples

- Acceptance can be given:
  - verbally
  - in writing
  - by action which clearly indicates acceptance.
- Acceptance cannot be presumed through inaction or lack of response.
- You cannot say that 'I will assume you have accepted if I do not hear from you within three days'. Acceptance requires a positive action: one of the three forms noted above.
- Acceptance by mail is complete at the time of posting — if this is the expected way of replying. Sometimes a letter must be received, eg insurance acceptance.
- Acceptance by electronic means, such as email or fax, is completed at the time of receipt.

#### 'Intention of legal consequences'

The parties to the agreement must understand that the agreement can be enforced by law.



- For a contract to be binding, it does not have to expressly state that you understand and intend legal consequences to follow.
- For commercial contracts your intentions are presumed, for example, to be legally bound.
- The parties to a contract can decide not to be legally bound by the agreement – this must be clearly stated and is then an agreement that is not legally enforceable.

#### Examples

- Given that your intention will be presumed, it must be made absolutely clear if you do not intend your agreement to be a binding agreement.

#### 'Consideration'

Being a business arrangement, the promise must involve giving something in exchange for something of value (the 'consideration'). Usually the consideration involves the payment of money.



- Usually consideration is the payment, or promised payment, of money – but it can be anything of value; even items of the smallest value are good consideration.
- The payment need not be fair payment.
- Consideration can also be the promise not to do something, to refrain from exercising some right.

#### Examples

- Consideration will either be:
  - the agreed price, or
  - a price which is able to be calculated.
- Consideration cannot be something which is unable to be given a commercial value.



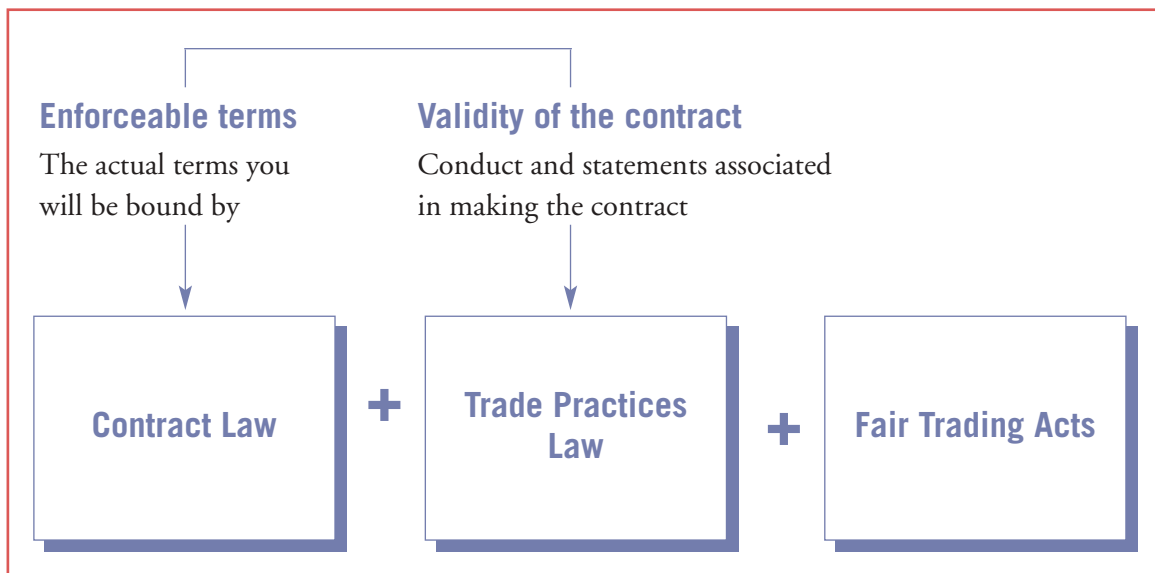
## 4 More on 'offer': the lead up to the contract

What is actually said or claimed in marketing material, sales presentations, brochures and product specifications materials, by whom and when, during the negotiating period leading up to formalising a contract – referred to in law as 'representations' – can be of critical importance in determining:

- whether an 'offer' was actually made, as opposed to an 'invitation to treat', and therefore, whether a contract actually exists
- what was actually offered and accepted – the actual enforceable terms of the contract
- whether what was said, which directly led to an agreement being reached, was false or misleading to the point where any contract is made invalid.

Conventional contract law (for example common law made by Judges) is not the only law governing contracts. Common statutes such as the *Trade Practices Act 1974* and the State and Territory statutes on Fair Trading, Credit Acts or Contracts Review may also regulate the contractual relationship.

### Representations



## Enforceable terms



Claims or representations are the verbal and written statements made in the lead-up period which are designed to inform or persuade another party to enter into a contract. Representations include advertisements, sales pitches, and any other statements made prior to a formal agreement being made.

Representations are extremely important because as opinions, information and promises they may become enforceable terms of a contract if a party has relied on them.

Therefore, written contracts should make very clear which prior representations, if any, will form part of the agreement.



If a verbal or written representation conflicts with a subsequent written contract, the terms of the written contract will be those which will be enforced. Generally speaking, a written contract, once signed, is very difficult to make inoperative.

Make sure that what was claimed, either verbally or in writing, and relied upon, is clearly incorporated in the written contract.



Even when the contract is wholly or partly verbal, proving that such representations have been made and relied upon can be a difficult task. Generally, in assessing the level of influence of representations, courts will consider:

- the significance of what was actually claimed
- how close to the finalising of the agreement the representations were made
- whether they convinced a person to enter the contract
- the expertise of the person giving opinions.

The representation is probably not part of the contract if it can be proven that:

- the person made up their own mind, despite what has been said, or
- it was only one of many statements made during the early negotiation stages.

## Validity of the contract



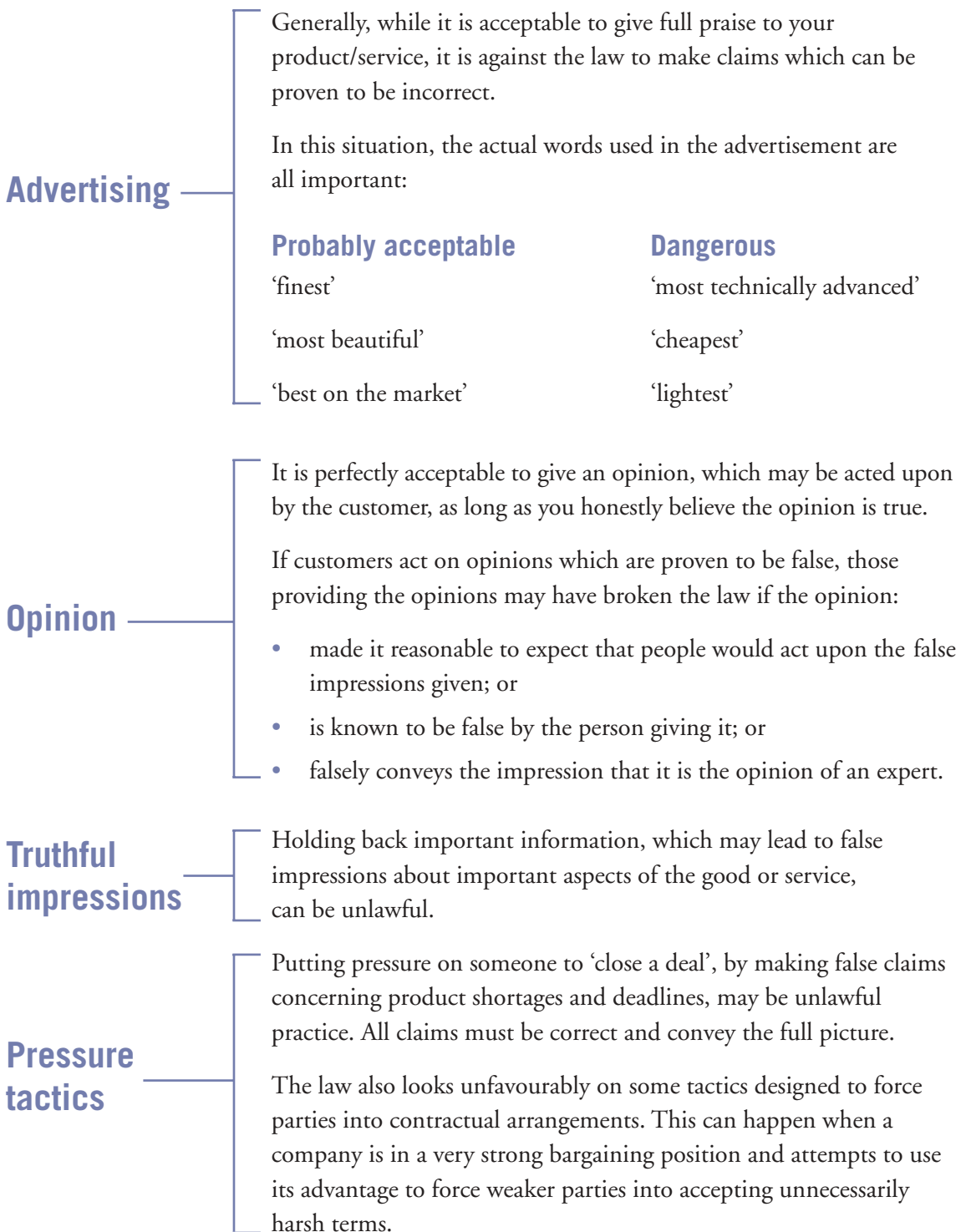
The validity of the contract is determined by the manner in which a sale takes place, by what is said or not said.

The whole agreement may be invalid under Commonwealth and State law if dishonest or careless statements were made during the lead-up to a contract, or a person was improperly induced into a contract because of language, age or personality characteristics.

Under the Australian Constitution, the Trade Practices Act (TPA) applies to companies and contracts between individuals in different States, but not usually to persons making contracts solely within a State.

All Australian States have, with some minor differences, copied the provisions of the TPA in each of their Fair Trading Acts – which means that all businesses, whether companies or not, must not use deceptive or misleading behaviour when making a contract.

### Acceptable practice



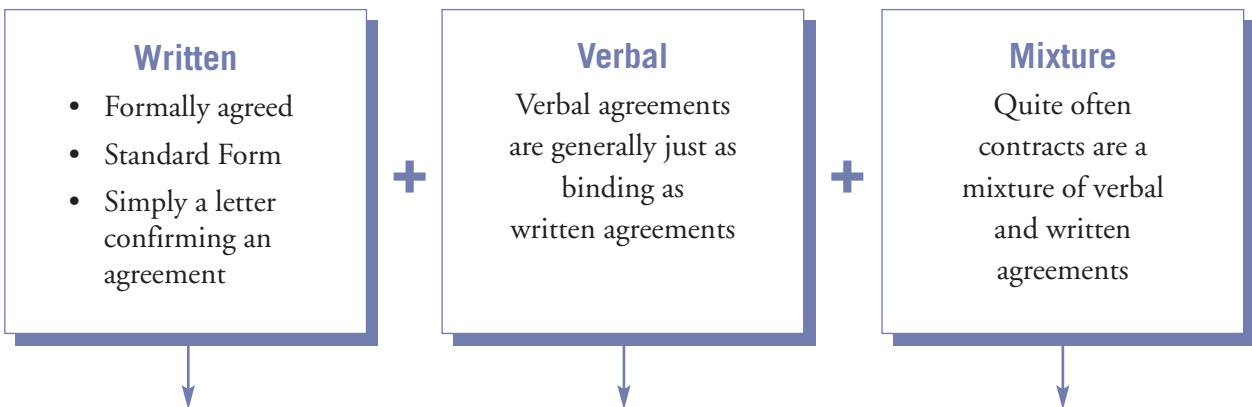
# 5 The different types of contracts

With certain specific exceptions, contracts do not have to be in writing to be legally binding.

However, signed written contracts are usually the most desirable form of contract, especially when it comes to business arrangements. After all:

- the contents ('terms') are in writing for all to see
- they can ensure that precise language is used in describing the terms of the agreement
- there is, therefore, less opportunity for misunderstandings and conflicting assumptions
- there is less need to rely on memories of what was originally agreed
- the individuals involved in the transaction may change over time.

In fact, the law recognises a number of different types of legally binding contracts:



- Verbal agreements may be difficult to prove, difficult to remember precisely, and open to misunderstanding. In resolving a dispute on this issue, the conduct and statements made by each party leading up to the contract under challenge will be the critical issue.
- Contracts can be a mixture of written and verbal agreements when the written agreement does not contain many terms.
- If a written contract does not appear to be complete, verbal undertakings and conduct will be considered.



It is a rule of law that when a contract has been put in writing, and it appears to be complete, it will be accepted against a contradictory verbal agreement.

In business arrangements, it is usually preferable to have a full written contract in order to avoid all the pitfalls of:

- proving a contract existed
- proving it to be a complete or incomplete document
- proving verbal undertakings
- interpreting people's conduct.

### Summary of important issues

#### Written contracts

- If the contract has been formally written and signed by the parties, there is an assumption that all the terms of the agreement are contained in the written document regardless of what may have been verbally agreed.
- Contracts can be a combination of written and verbal agreements when the written agreement itself covers very few terms.
- When a contract is signed, it is assumed that all the terms have been read and agreed to.
- If unsigned a written contract must:
  - be presented to and understood by all parties to be valid; and
  - be recognised by all parties as a contract, that is, it must look like a contract and not simply a receipt or docket.

#### Verbal agreements

- Verbal agreements rely on the good faith of all the parties and can be difficult to prove.
- Conversely, in some situations, insisting on a detailed written agreement may be counter-productive if:
  - the value of the transaction is not particularly high; and/or
  - the presentation of a substantial document, possibly with many provisions, may raise more questions and uncertainty in the minds of the parties than it resolves, ending in the transaction not proceeding. If you are confident of the good faith of the party, a less intimidating form of written arrangement may be the best course of action.
- Do not automatically think that because it is not in writing, it can never be proved. Verbal agreements can be supported by:
  - the conduct of the other party both before and after the agreement
  - specific actions of the other party
  - past dealings with the other party.

# 6 Contracts: what's in them

Although contracts vary in complexity, they all have a basic content and structure.

The whole point of a contract is to spell out as clearly as possible what is agreed, what payment or other 'consideration' is involved, and under what agreed 'terms' the agreement will be fulfilled.

Good contracts are those where the parties have carefully considered all the circumstances that are likely to arise during the lifetime of the agreement and have adequately provided for them. Such contracts will have clearly and fully covered such matters as:

- exactly what is required by each party
- limits to what is required
- payment terms, including credit terms and under what circumstances
- risk: what could go wrong in the relationship and how to provide safeguards against this.

## Terms of a contract – express and implied



The terms of a contract are all the points of agreement between the parties concerning just how and under what circumstances the agreement is to be fulfilled. With some clear exceptions noted below, contract law does not specify what those terms must be: they are up to the parties to determine.

Contract law recognises two types of terms: *express* terms and *implied* terms.

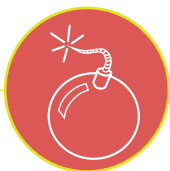
### Express terms

These are the terms of the contract which are specifically agreed to between the parties and are put in writing in the contract document or agreed to verbally between the parties.

### Implied terms

Some terms may not actually be put in writing, talked about or even considered – but they are binding nevertheless.

These terms will actually be regarded as part of the legally binding agreement because the law requires them to be part of the contract, or because common sense, standard industry practice or past dealings help to support each party's reasonable expectation about how the agreement will be carried out and to what standard.



Considerable care needs to be taken on this issue of implied terms. If the terms of the contract are going to be carried out differently from what would normally be expected by common sense, standard industry practice or past dealings, they must be clearly stated in the contract.

### Implied terms



- **Common sense:** In every agreement there are matters which are so obvious that they go without saying. For example, common sense dictates that goods are appropriately packaged, and that deliveries take place at appropriate business hours.
- **Standard commercial practice:** Each industry, unless the agreement involves an entirely new product or concept, will have well established customary practices, including recognised quality standards and terminology. Unless you require something quite different from these standards and practices, they will apply to your contract.
- **Past performance:** Past dealings and arrangements create an expectation that future agreements will be carried out in the same way, unless the parties decide to change the arrangement. Again, past performance will be the benchmark for future contracts. If you want otherwise, the contract must say so as part of its express terms.
- **The law:** Federal and State law, regardless of what the contract may say, 'implies' or imposes specific terms into particular types of contracts as part of consumer protection laws. The types of contracts involved cover commercial, credit and consumer purchases. Implied legal terms are imposed whether the parties are aware of them or not, and they are extremely difficult to exclude.

On the issue of terms implied by law, State law for example has implied that there must be a 'cooling off period' in some contracts such as the purchase of a house or new car.

Under the Commonwealth Trade Practices Act and the State Goods Acts some important implied terms are that:

- goods and services sold must be of a good (merchantable) condition
- a sample shown to the buyer must be the same as the bulk of goods
- the goods have been correctly described, by the seller or their packaging
- the holder of the goods has the right (title) to sell the goods
- the goods will be fit for their usually intended purpose
- services will be of good quality and achieve the desired purpose of the buyer.

### Major and minor terms: *conditions and warranties*



In contract law, the terms of a contract, whether express or implied, have different levels of importance.

In viewing all the agreed terms as a package, contract law is very careful to distinguish between those terms, whether they be express or implied, which will be regarded as contract conditions (major terms) and those which will be regarded as contract warranties (minor terms). Note, contract warranties are different from warranties attached to consumer purchases.

## Contract conditions

Contract conditions go to the very heart of the agreement. They spell out what is absolutely fundamental to it, and if not fulfilled, will make the agreement pointless. For example, a printer orders a printing press but receives a refrigerator; products arrive too late to be exhibited; a franchisor fails to provide marketing support for a franchisee.



It is therefore essential that in negotiating contract terms you:

- decide what will be the conditions of the contract
- ensure that you have agreement from the other party on these conditions
- check that the contract makes clear what these conditions are.

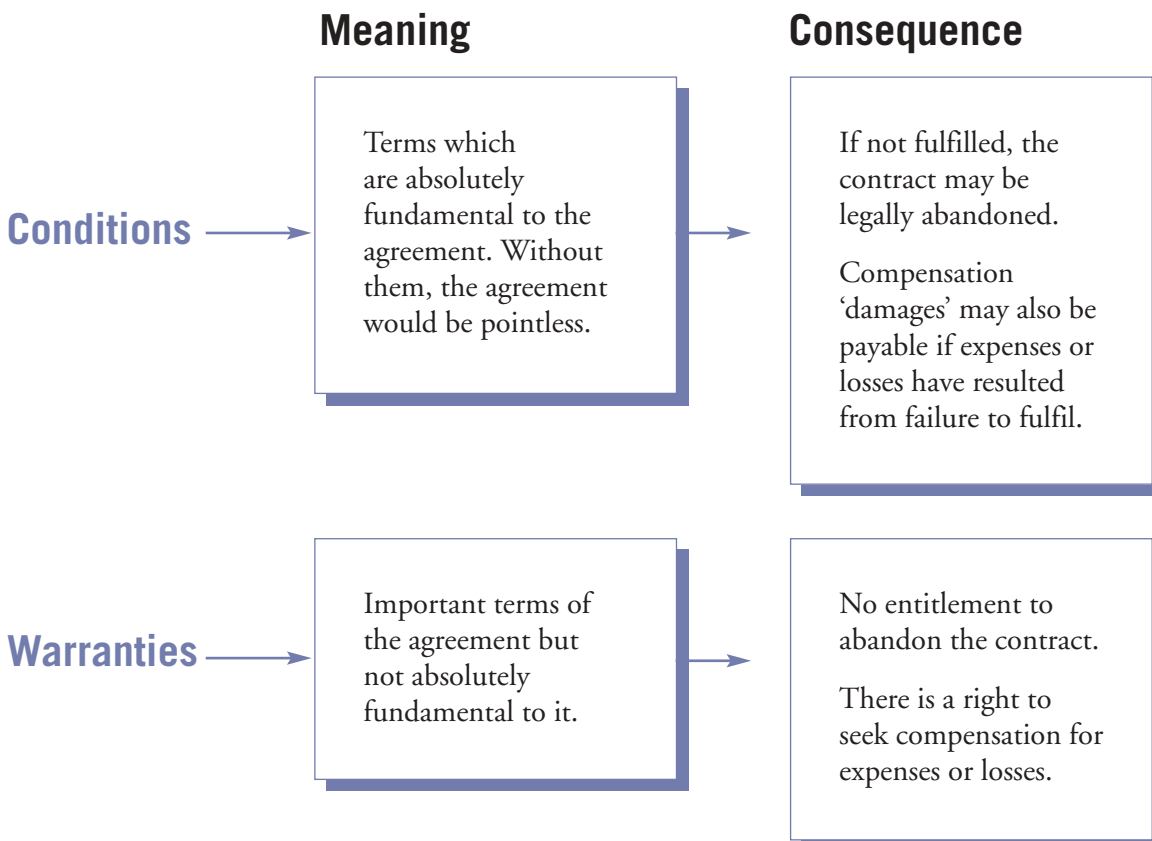
## Contract warranties

Contract warranties are terms of lesser importance and are not fundamental to the contract. A contract can be carried out even if a warranty hasn't been fulfilled.

The distinction between these two types of terms is critical. Failing to comply with contract conditions may result in the contract being terminated and compensation being payable to the other party for loss or damage that resulted from non-compliance.

However, breach of warranty will not lead to termination but may involve compensation.

## Contract terms





- It is important to make sure that if a term has not been carried out, it is correctly identified as a condition or warranty. A person risks being sued for non-performance if they improperly abandon a contract because a warranty was not satisfied.
- Circumstances will determine whether a particular requirement is a condition or warranty. A term may be a warranty in one instance and a condition in another. For example, if timeliness in delivery is critical, it may be a condition; if merely desirable, it may be a warranty.
- Under the Trade Practices Act some implied terms are specifically stated to be conditions and therefore fundamental to the contract. They cannot be excluded.

### Typical content and structure



Before peering into the fine print, you should be clear about what you and the other party expect from the contract. Your expectations may be simple, immediate and strictly commercial, or they may be longer-term, less immediately focused on achieving financial returns and more strategic in their objectives. Whichever is the case, it is essential that you all agree on what the contract is expected to deliver.

When overall objectives are clear, navigating your way through the contract can be a much easier task. Remember, all contracts have a basic content and structure.

The following pages outline some of the more fundamental issues to consider in entering into contracts and how they are typically covered.

### Overall objective . . .

what do you and the other party expect from the relationship?

- critical starting point for assessing contract content.

### Typical content and structure . . .

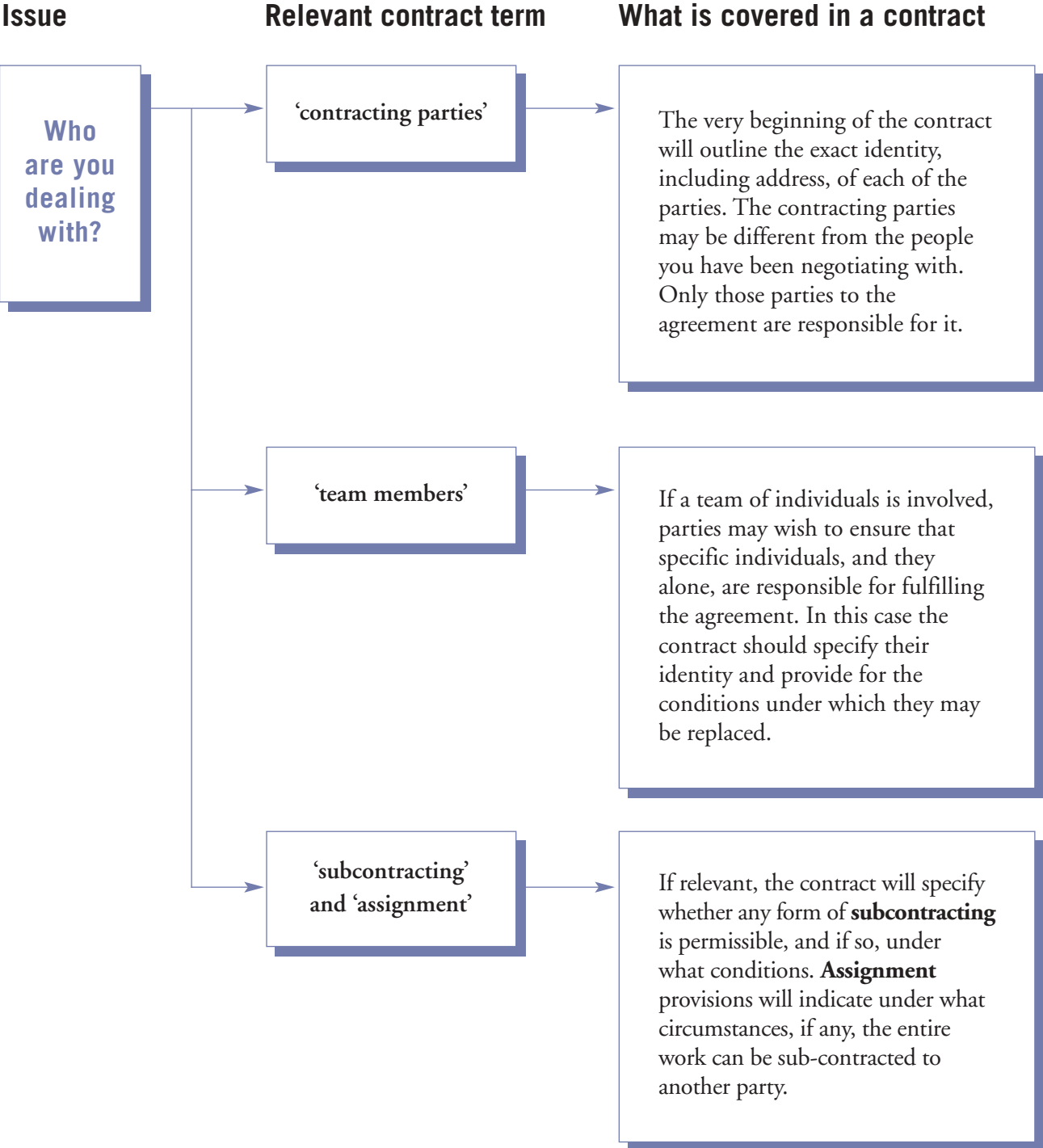
what is agreed, for how much, and under what terms such as:

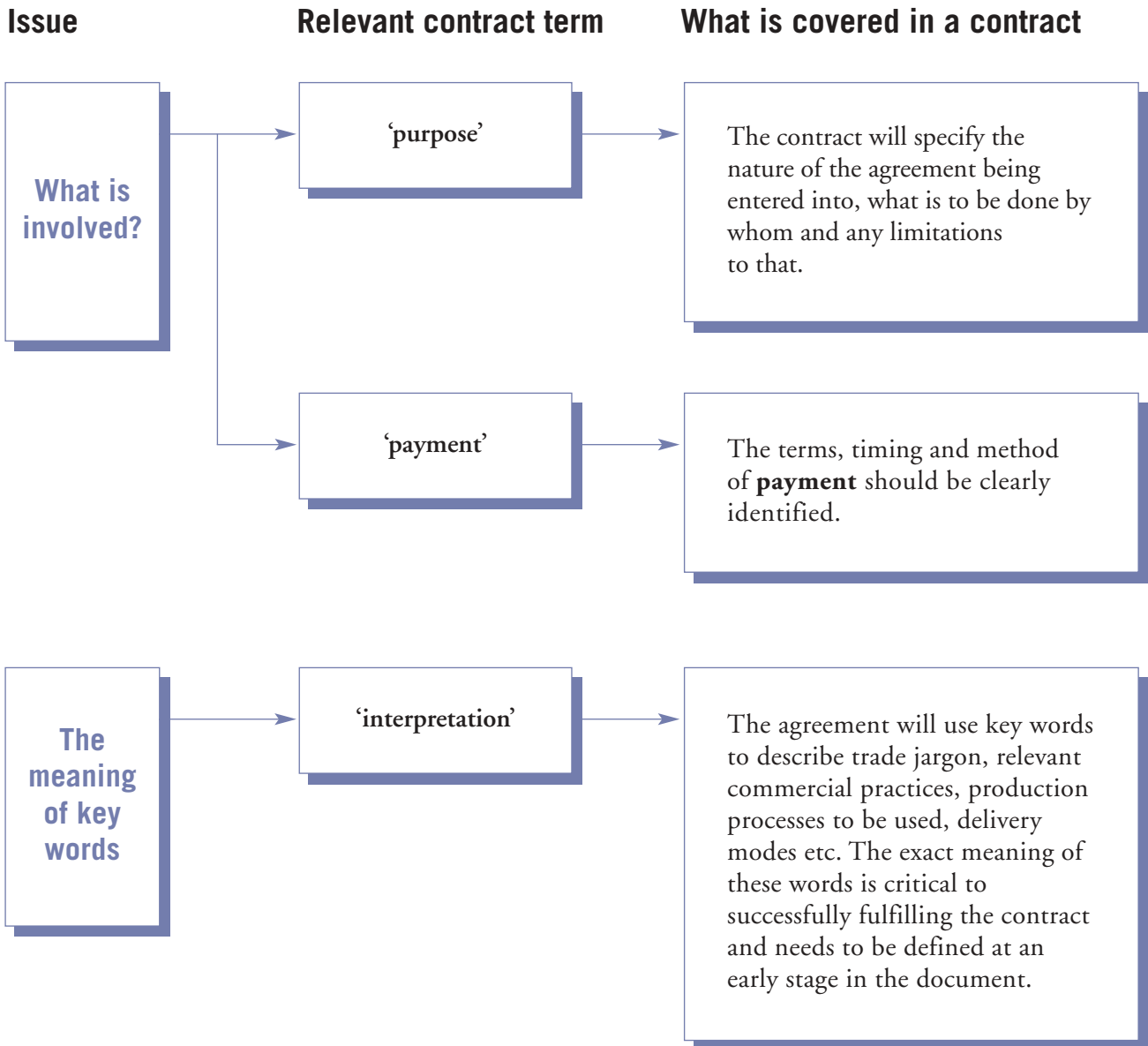
- **who are you dealing with?**
- **what is involved?**
- **the meaning of key words**
- **risk management issues**
- **contract performance**
- **dealing with difficulties and changed circumstances.**



### Goods and Services Tax

You should be aware that contracts or agreements which you have entered into before 1 July 2000, and which involve the supply of anything after that date, may have Goods and Services Tax (GST) implications. The *Trade Practices Act* makes it illegal to exploit prices by use of the GST and penalties can be imposed if a contract price has been inflated.





Issue

Relevant contract term

What is covered in a contract

Risk management issues

'default'

A contract may state that it must be performed in a certain way or meet progressive deadlines: examples might be a payment of interest, or works completed. If a payment deadline or some other stipulation is missed, this may be a **default**, and may lead to the cancellation of the contract. Note that courts do not always enforce these where they believe them to be unreasonable in the circumstances.

'indemnity'

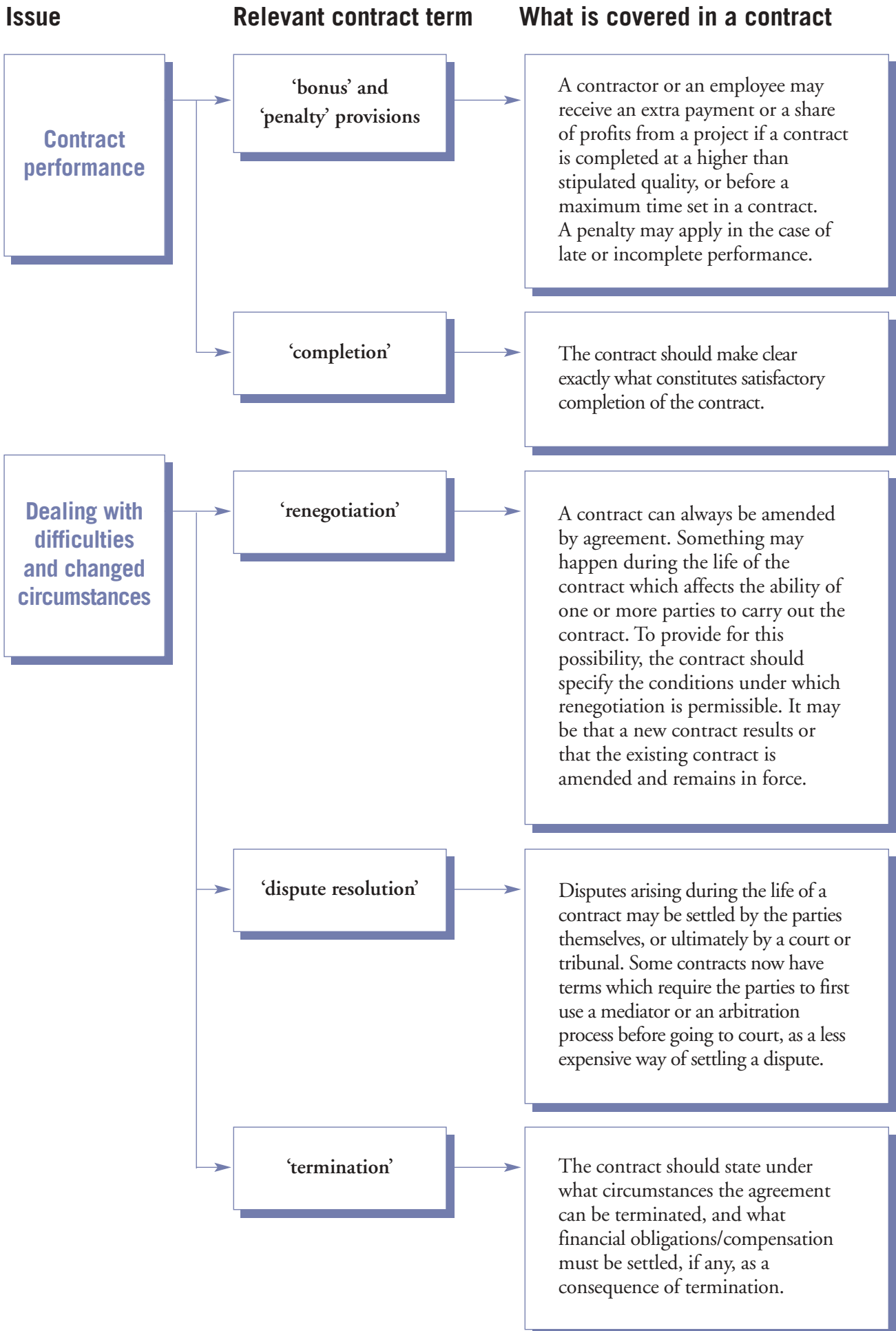
The contract may provide an **indemnity** clause which effectively seeks to protect the other party from outside claims which may arise against you.

'exclusions'

**Exclusions** and exemption clauses seek to exclude, limit or cap liability for breach of contract. Commonwealth and State legislation overrules some excluding terms.

'director's guarantee'

A supplier or lender to the business may require that a director personally guarantee any debt incurred by their business. If the business is unable to meet its obligation, the director will be personally liable.



# 7 Standard form contracts

Standard form contracts are pre-prepared contracts where all the terms have already been set. You may experience such contracts:

- as a recipient of a standard form contract, where there is little or no prior negotiation. The contracts are normally printed so that there are only a few blank spaces left to fill in, such as names and signatures; or
- as a provider of a standard form contract in which you have your own standard terms and conditions.

Standard contracts may contain a multitude of terms and be pages long, or can be straightforward documents which are simply designed to name the parties to an agreement along with dates, subject matter and any special requirements.

## Important features



Important features of standard form contracts are that they are:

- usually written in favour of the party presenting them
- often used by large corporations, including financial institutions, which have many clients, and are typically presented for contracts involving insurance, leases and mortgages — but they are also used by the full range of business organisations
- often used as an attempt to limit liability for damages, losses or delays by the party presenting the standard form agreement, who is usually the bigger and stronger party in the contract.



Once a standard form contract is signed or accepted it is presumed to have been read and agreed to. Standard form contracts are often printed on the back of a standard business document — order forms, invoices, quotations, delivery documents — usually in fine print.

## Important issues



- There is nothing stopping you from attempting to renegotiate the terms of the contract.
- Any changes to the terms must be presented to the other party and agreed to before the contract comes into existence.

- The other party to the agreement must be aware that it is of a contractual nature and contains terms. Otherwise, it could just be a receipt, docket or a sheet of information and not be expected to contain a legally binding agreement.
- Unfair behaviour (or ‘unconscionable conduct’) may also involve unreasonable pressure on small businesses by big businesses in a stronger bargaining position.
- The terms of a standard form contract cannot override terms implied by legislation, including laws relating to consumer protection.

### ‘Battle of the forms’



Where the parties negotiating an agreement each have their own standard form – and these are exchanged – there is a presumption in law that the last form presented contains the contractual agreement between the parties. You should therefore be careful in accepting another contractor’s documentation – and their terms. It may be more prudent to construct a mutual contract, or, if accepting an agreement, to make a statement in writing that your terms are also included.

### Constructing your own standard form contract



For small businesses which engage in a number of essentially identical contracts it may be worthwhile having your own standard form contract which sets out the terms and conditions either for the acquisition or provision of goods and services.

- When buying goods or services the standard contract can be printed on or sent with the order form.
- When selling goods and services the standard contract can be printed on or accompany the quotation or proposal.

The exact content and structure of your standard form contract will depend entirely on the nature and complexity of the business you are in.

Seeking professional advice may be a sensible precaution to ensure the terms cover your particular requirements and address important issues which might not have occurred to you. However, you can certainly limit your exposure to legal costs and ensure the terms and conditions meet your requirements by considering some fundamental issues.

### Useful pointers in constructing your own standard form contract

When constructing your own standard form contract is a sensible option, consider whether the contract:

- clearly and completely identifies what goods or services are being provided or obtained so that there is no room for ambiguity
- clearly identifies what will be required to successfully fulfil or complete the contract, including a clear indication of contract conditions, such as:

- required quality and any tests that are to be satisfied
- timeliness of delivery or other relevant milestones
- time and method of payment
- warranties and other support services
- clearly identifies any special arrangements which you require that may be contrary to standard industry practice or which differ from past practice
- minimises your exposure to possible risks. This might be by limiting or capping your liability to the minimum legal requirements and maximising the potential liability for default of the other party
- ensures that there are suitable mechanisms for resolving disputes in a timely and cost-effective manner
- ensures that there are suitable mechanisms for varying the contract so that both parties understand any changes to the price, delivery times or other relevant terms
- provides a clear statement of how the contract can be terminated in the event of default or other specified events and what is then to be done by the parties
- protects confidential information and intellectual property rights.

## Things to look out for in standard form contracts

### Examples in finance contracts

- Contracts that provide credit for a purchase are specifically regulated by the Credit Acts of each State. Therefore, the information required to be provided is quite specific. Each contract must contain prescribed information about:
  - interest rates
  - payments
  - liabilities
  - the format of finance contracts
  - pre-contractual information that must be supplied.
- Any standard form finance contract which does not comply with these legal requirements may be invalid.
- For further advice and assistance, contact the Australian Banking Industry Ombudsman, telephone 1800 337 444, facsimile (03) 9613 7345 or <http://www.werple.net.au/~abio>.



### Examples in insurance contracts

- Insurance contracts are usually quite elaborate in specifying terms and typically contain many exemption and limiting clauses.
- The liability of insurers usually hinges on the meaning of key words and how the insurance company will choose to interpret them: they require careful examination of terms such as:
  - expiry date
  - items/services insured
  - limits to insurance cover
  - what is not insured.



- These contracts may also refer to documents and rules outside the contract, such as the General Insurance Code of Practice.
- A feature of standard form insurance agreements is the need for those seeking insurance to provide 'utmost good faith'. Failure to honestly and fully disclose required information, depending on its significance, could invalidate the contract.
- For further advice and assistance, contact Insurance Enquiries and Complaints Ltd on telephone 1300 363 683, <http://www.iecltd.com.au>.

Insurance Enquiries and Complaints Ltd will assist consumers and small businesses with fewer than five employees and a turnover of less than \$400 000. The businesses must be independently owned and operated and the service only relates to certain insurance policies.

### Examples in retail tenancy contracts

- A non-residential lease is often used as an example of the potential inequality of parties, especially where the owner of the premises is a large corporation which owns and manages a large office block or a large retail precinct in a popular location. A small business in taking a lease may be presented with a document specifying a number of obligations and fees, but often with minimal requirements on behalf of the owner of the premises.
- State/Territory retail tenancies legislation, which considers small businesses, provides protection.
- The decision to sign or not sign the lease should be an 'on balance' decision, based on the important legal and commercial considerations involved in the deal.
- Consider carefully the issues of:
  - location
  - rent increases
  - fit-out costs
  - the bond
  - lease renewal
  - termination.
- For further advice and assistance, contact the following information agencies:

ACT	ACT Retail Tenancy Tribunal (02) 6217 4283
NSW	Retail Tenancy Unit (02) 9223 0466
Vic	Victorian Civil and Administrative Tribunal (03) 9628 9960
Tas	Consumer Affairs and Trading (03) 6423 1205
SA	Office of Consumer Affairs (08) 8204 9544
WA	Small Business Development Corporation (08) 9220 0222
Qld	Retail Shop Leases Registry 1800 807 051



## 8 Specific small business relationships

Contracts which are specially designed to establish the agreed 'rules' for substantial long-term business relationships need to be quite specific and thorough in their treatment of a number of key issues:

- the rights of the parties involved – who will receive what?
- the duties of the parties involved – who must do what in return?
- any limits to these rights or duties
- how to anticipate any difficulties.



Agency agreements, franchise and partnership agreements are some of the most common small business relationships. The following is a guide to some of the more important issues which each should address.

### What if there is no written partnership agreement?

#### Partnership agreements

#### Definition

A partnership is a combination of two or more persons who conduct a business together and share the profits, noting that under the law the word 'person' can also mean an organisation.

Apart from specific partnership agreements, there are a variety of other relationships involving some form of partnering with other businesses, including:

- joint ventures
- strategic alliances
- consortia
- teaming.

In the absence of an agreement between partners, partnership law will impose all aspects of the relationship, including for example:

- a statutory interest rate on lending by a partner to the business
- an equal share in the partnership for every partner
- equal management powers for each partner
- a duty to be honest and accountable to the partnership which itself imposes a number of requirements on the behaviour of each partner.

#### Issues a partnering agreement should cover

- Will some partners have greater responsibilities than others, for example a senior partner or managing partner?
- If so, what will their individual rights/responsibilities be?
- Will some partners contribute more to the business than others?
- If so, what will their individual rights/responsibilities be?
- How does an existing partner leave the relationship?
- How are decisions made in the relationship?
- How will profits be distributed?
- How can the relationship be wound up?
- Is provision to be made for the spouse/children of a deceased partner?
- Is it clearly stated between the parties as to their agreed liability, for example, is it a formal limited liability partnership or are partners jointly and severally liable?

## The Franchising Code of Conduct

### Franchise agreements

#### Definition

A franchise is a contract between the owner of a business system, marketing plan, trademark or commercial symbol, and another business that wants to use the franchise idea in its enterprise on a 'continuing' and 'commercial' basis. A franchise contract allows a business (franchisee) to purchase the right to use a trade mark, business system or a combination of both. Note that this definition now covers dealerships and agreements which might not originally have been intended as franchises. The franchisee may be required to pay a percentage of their sales to the owner of the trademark or system. A franchise can involve several levels of interaction: the most common is known as the master franchise.

Franchises are now regulated by the Franchising Code of Conduct which has a legal effect on all franchises through the Trade Practices Act. The code requires the owner of the franchise idea to provide an extensive disclosure document which (among other things) sets out:

- important information about the franchise system and the franchisor; and
- the rights and obligations applying to the resolution of disputes.

The changes in law mean there is more scope for intervention by authorities on behalf of the franchise holder if the contract is unreasonable.

#### Issues to consider

- Research the concept, its marketability and the know-how required to make it a success.
- Some franchises require a business to sign an elaborate contract containing many terms, which often favour the owner of the franchise idea. Because the franchise idea is so valuable the owner of the franchise idea may dictate certain controls on the operation of the business which may be quite restrictive.
- Will the owner of the franchise provide the expected on-going support and other inputs which may help the business survive, for example, advertising and other promotional activity?
- Can you sell the franchise?
- What kinds of changes can you make in the franchise business?
- What happens if the business or franchise provider suffers any decline?
- What are the things that the franchise holder must do for the franchisee?
- What happens at the end of the agreement?

### Agency agreements

#### Definition

Basically, an agent is someone acting on behalf of a business, rather than acting on their own behalf.

Businesses rely on a range of people to act on their behalf, and these include employees, directors, partners as well as a range of professional agents who broker deals, find buyers and make purchases on behalf of the business. Estate agents, insurance agents and stock and station agents are examples of professional agents, but so are company secretaries and stockbrokers, even though they do not use the word agent to describe their activities.

#### The legal relationship

- The legal relationship of agency is when a principal (the business needing something done) authorises an agent to act on behalf of the business and to make contracts with an outside party.
- Generally, the principal is legally responsible for the actions of their agent. It is therefore very important to limit the scope of the agency agreement.
- When an agent completes their task they leave the principal in a contractual relationship with the outside world.
- Agents have a contractual relationship with the principal, which means they must do what the principal instructs and the principal in turn is obliged to pay for the services of the agent.
- Agents also have a fiduciary duty to their principal, which is a relationship of trust requiring honesty, diligence and an undertaking to act in the best interests of the principal.

#### Types of agency agreements

**Implied:** Agency relationships may be implied by law, for example, partners under the Partnership Act of each State are specifically agents of the partnership and each other partner.

**Informal:** An agency agreement can be quite informal and ad hoc, for example, a fruit retailer, who is running short of supplies, may ring up a buying agent and ask them to look for particular products from a wholesaler (who is probably an agent for the grower).

**Formal:** Agency agreements can also be quite formal and may appear in a written form containing extensive terms. One formal type of agency is the appointment of a person with the **power of attorney**. These agents normally have a lot of discretionary power, perhaps even to run a business. Where large amounts of money are involved it is a good idea to formalise an agency relationship.

#### Differences between State governments

- The appointment of such agents is regulated differently in each State, with some States having specific legislation, for example, the Powers of Attorney and Agency Act in South Australia.
- Under various criminal provisions for the States there are penalties for agents taking secret commissions while working for their principal – in Victoria and New South Wales this is covered in their respective Crimes Act.

# 9 Understanding the paper work: contract documents

Where a contract involves substantial amounts of money, or will establish a long-term relationship, the negotiation period can be quite lengthy with various exchanges of correspondence until a final agreement is established. This section explains some of the most common exchanges.

**Letter of Intention:** A letter or note which indicates that the writer is intending to enter into an agreement, or that they agree with whatever has been offered. Such letters may be sent to a successful tenderer or to someone making an offer. Letters of intention are generally considered under contract law as not sufficient to form a legal contract; they are preliminary to any proper agreement and care should be taken before commencing work or supplies under such a letter.

**Comfort Letters** Formal statements of assurance about behaviour, integrity or the actions of a person, but these letters are not intended to be legally binding.

**Memorandum of Understanding (MOU):** Used as a preliminary step towards forming a binding agreement at a later stage. The purpose of an MOU is usually designed to demonstrate your interest in exploring a potential contractual relationship. As such the MOU usually makes it clear that it is not intended as a binding agreement.

**Heads of Agreement:** Normally used to spell out agreement on the major issues of a contractual relationship prior to a comprehensive contract being put in place. They are not usually intended to be immediately binding unless the parties indicate otherwise.

**The contract**

**Side letters:** An agreement may be varied with the use of side agreements, or side letters, which sit outside a written public agreement. Side letters are useful in changing an agreement, if necessary, but cannot be used secretly to mislead or conceal the true nature of an agreement or arrangement.

**Non-disclosure agreement:** A business may require a potential contractor, or even employees, to promise not to disclose information which has been gained in a confidential relationship. What is actually confidential information is determined in law as that information which is not obvious, trivial or which someone may have had through their own professional knowledge, such as:

- strategic plans
- tenders
- prototypes
- pricing arrangements
- marketing plans.

# 10 Contracts which hold information

## Privacy and Contracts

Information may be gathered and stored in the course of holding contracts of employment, in trade or for banking purposes. There are some general and specific laws which protect the privacy of individuals. A business which releases private details may face legal action.

Particular areas to be wary of:

- Tax File Numbers – by law these must be kept secure and confidential
- Credit information– by law these must be kept secure and confidential
- Personal details of customers – should be stored appropriately and inappropriate information should not be collected or released to any unauthorized person or body
- Employee records – these must be kept confidential except to an appropriate authority.

## Confidential Information

A business may hold valuable information which belongs to the business itself, or to another party. Information includes a range of commercial types such as data, plans, customer lists and trade secrets. A business may specify in contracts of employment or supply that no information is allowed to be disclosed, but this may also be implied by the nature of the relationship.

Confidential information is very specific and must be secret and known to be confidential. A business can use a number of legal actions against a person or organization who misuses confidential information – since it is a breach of contract.

From December 21, 2001 all businesses with a turnover of more than \$3m must comply with privacy principles and construct their own privacy rules, though some exemptions will apply regarding the release of information eg employee records. See the privacy web site: <http://www.privacy.gov.au>

### **What is intellectual property?**

Intellectual property is the ownership and use of ideas, designs, images, original writing and unique signs which have been especially created. The owner has exclusive rights and can charge fees if anyone uses the 'ideas property' they have created.

### **Contracts containing intellectual property**

A contract should not involve the use of someone's intellectual property unless there is permission to do so. Contravention of property rights could be direct or even indirect, e.g. linking to a website which carries images or words, or even sending writing, pictures or materials in a quote.

### **Being Careful**

If material is being used, referred to or copied, as part of a contract, then some checking should take place. Consider the following:

- Is the material of an exempt category, e.g. for education?
- Has permission been obtained?
- Has there been appropriate acknowledgment of the owner of the copyright?

# 11 Intellectual Property and Contracts

## **Categories of Intellectual Property**

**Copyright:** Protected under the Copyright Act

Includes: published (original) works such as writing, music, recordings, films, computer programs, photos and music.

No registration is necessary and the owner has exclusive rights to use this material and collect fees for its use. Note:

- Photos which have been commissioned belong to the person paying for the photo
- Employers own the works of employees who have been paid to produce the materials
- Copyright lasts 50 years after the death of the author
- Websites may contain copyrighted material, so be careful when copying this material

Breach of copyright: stop orders, payments ordered by a court, fines, payment of profits and orders for destruction of works which infringe copyright.

**Designs:** Protected under the Designs Act

Includes: original shapes, configurations, and patterns which might also be copyright

Designs can be registered with the Register of Designs. Note:

Registration of design lasts for 1 year and must be updated annually — up to 16 years.

Breach of design: stop orders, payments ordered by a court, fines, payment of profits and orders for destruction of works which infringe an owner's design.

**Patents:** Protected under the Patents Act

Includes: inventions which are new, novel and useful or something which significantly improves what existed before.

Can be registered under the Patents Office but must be accompanied with specifications drawn by a patent attorney. Note:

- Registration can last up to 20 years
- Patents can be challenged as not original and therefore available to everyone
- Patents can be registered internationally.

Breach of patent: a court can place a stop order on the use of a patent, an improper use of patent may result in an order to hand over profits.

**Trade marks:** Protected under the Trade Marks Act

Includes: signs which indicate the ownership of a good or service. Signs include letters, words, names, signatures, numerals, devices, brands, labels, shapes, sounds or scents. Note

- Registration can take place with the Registrar of Trade marks at the Trade Marks Office
- The trade mark must be distinguishable from all others and not similar with any existing mark
- The trademark symbol must be used © — a name can be trademarked
- Registration lasts for 10 years.

Breach of Trademark: court stop orders, orders for payments of damages and action for deceptive and misleading conduct.

# 12 Contracts completed using the internet

## Electronic Transactions

Contracts can be made electronically by email or through an internet site, this is called e-commerce or electronic transactions. There are now 2 systems for making and proving a contract – the old paper system and the new electronic system. The making of contracts over the internet has exempted these contracts from some of the old law. There is now specific law on electronic transactions passed by the Commonwealth, Victoria, New South Wales and Western Australia.

There are still many unresolved problems and the users of electronic means should be very careful in ensuring that the contract is clear and completed. It is not always clear who is making an offer or who is accepting. A business should have some procedure or system for checking on what is sent and received when making a contract.

## The main principles

If a contract is made electronically then special law will apply, the essentials are:

- Definition of an electronic transaction: where data is sent by electro magnetic energy, including sound
- Where a contract has to be in writing: this is satisfied where the information is accessible.
- Giving information required by law: this can be done electronically, e.g. issuing certificates, objections and lodging claims
- Signing a document: the parties to a contract can have an electronic signature or special means of identifying themselves
- Production of a document: this can be done electronically if it can be shown to be the original document
- Recording of information: if required by law, this can be done in an electronic form as long as it is secure
- Receiving a communication: this takes place when the communication enters into the information system of the receiver — though the receiver may specify it must come to their attention to be a valid communication.

Note that the parties to the contract **must** consent to the use of these methods for it be valid. Think before you press the **I Agree** Button — what are you agreeing to?

# 13 Electronic Funds Transfer

## The basic principles:

**What is EFT?** Electronic Funds Transfer is the paperless movement of money through the use of cards and the internet. Many businesses have arrangements (contracts) with financial institutions to pay for goods and services through a transfer system.

**The cardholder:** A customer who uses a card has a contract with the financial institution regarding that card. The financial institutions have agreed that:

- Terms and conditions in using cards must be clear
- The card user will be notified of all charges in using the card and EFT facilities
- Cardholders are only liable for a fixed amount if their card is lost or stolen (once they have notified the institution of its loss)
- Disputes go to Australian Banking Industry Ombudsman.

**The Law** There is no one specific law but a collection of laws including general law, contract law and the Trade Practices Act. Codes also exist to guide transfer processes –these include Banking Codes, Building Society Codes, Small Business Principles and the Electronic Funds Transfer Code of Practice. Privacy law also applies. ‘Merchants’ have a contract with financial institutions which is quite separate from any contracts with a customer.

### **The Business accepting a card transaction:**

Merchants who use the EFT system are normally required to sign a standard form contract which contains a number of provisions which include:

- The giving of a paper receipt
- To honour all valid cards
- To use reasonable care to detect forged signatures
- To allow a financial institution to debit the merchants account with relevant charges
- To permit the financial institution to inspect books of account and records according to card transactions.

**The advantages:** If a business complies with the financial institutions terms. The financial institution then undertakes to pay into the merchants account the face value of all sales vouchers. The merchant gets to pass on risk to the financial provider, though there may be some exceptions, e.g. transactions through mail and telephone - which may move the risk to the merchant.

# 14 Resolving Disputes with Contracts

## Thinking about a resolution

Clients of a business may occasionally create a dispute with that business. A business may also be in dispute with another business — businesses are consumers too! Disputes over a contract should be addressed immediately or they can get out of hand and become worrisome, time consuming and expensive. Ultimately a dispute can go to court, but there may be some alternatives.

Some tips:

- Always listen to a complaint
- Attempt a resolution, compromise or some solution
- Don't ignore correspondence on a complaint
- Weigh up the costs of reputation and legal advice against a compromise
- Seek advice on the legal situation.

## Special Intermediaries

There are a variety of avenues in resolving disputes over contracts. Some special intermediaries exist who may be able to solve disputes without legal action, these include:

- The State Ombudsman
- The Commonwealth Ombudsman
- The Australian Banking Industry Ombudsman
- The Standards Branch (Commonwealth)
- The Electricity Industry Ombudsman (depending on the State)
- The Legal Ombudsman (depending on the State)
- The Insurance Ombudsman
- The Telecommunications Industry Ombudsman
- Consumer Affairs bodies.

## Alternatives to the courts

The courts now offer a number of alternatives to a formal legal action such as:

- The Small Claims Tribunal — which exists in different forms in different States
- Office of Fair Trading (which can make recommendations and findings)
- Commercial arbitration — the parties accept an independent decision, rather than take a legal action
- Conciliation in pre trial hearings (depending on the State).

Some bodies offer private resolution and mediation services and might negotiate an amicable resolution.

# 15 Bringing a contract to an end

Most contracts are concluded satisfactorily, goods and services are provided to the quality required and payments made as agreed.

When a contract comes to an end the parties involved have no further commitments to each other, with the exception of matters such as confidentiality and warranty provisions.

Bringing a contract to a premature conclusion, especially when it is also intended to seek compensation for non-performance, is something to be contemplated only after all other avenues have been considered.

The commercial reality is that this form of ‘final solution’ will not only remove any potential for further business with the other party – which may or may not be in your longer-term interest – but may well prove to be costly and very damaging. In the extreme situation of suing for non-performance, your business may suffer adverse publicity and attract, perhaps quite unfairly, a reputation as a difficult business partner.



Contracts can come to an end, or be brought to an end, in a number of ways – either by the actions of the parties themselves, by some unexpected event or because the contract is found to be an unfair and unequal agreement.

## Definitions — how a contract can end

Performance	The contract has been completed by all parties according to the agreement.
Agreement to end	The parties have agreed to end the contract – which means that they contractually agree to end the contract and are bound by that decision.
Illegality	The carrying out of the contract has become illegal – so by law it cannot be continued.
Frustration	<p>The contract has become impossible to carry out – the intention to complete an agreement has been frustrated by events beyond all parties’ control. A contract can only be ended for frustration when it is impossible and unfair to demand completion of the contract, as distinct from it being inconvenient, difficult or expensive. Just because the contract is going to cost more to complete, does not make it frustration.</p> <p>Victoria, South Australia and New South Wales have legislation called Frustrated Contracts Acts, which basically provide a formula for sorting out payments and obligations after a ‘frustrating’ occurrence.</p>

Breach of contract	The refusal or inability to complete a fundamental term (condition) of the contract is a breach of contract and allows for the ending of a contract – and potentially a claim for damages if there have been any losses or expenses as a result of the breach.
Mistake	If the agreement is based on a fundamental mistake or mistaken belief about property agreed upon, the contract may be ended. Sometimes an agreement is reached and then the parties discover that the property no longer exists, or they were contracting for entirely different things.
Unfair and unequal agreements	A contract may also come to an end where the process of making the agreement can be shown to be unfair and improper, or it results in gross inequality. In such cases the party which is considered under law to be the weaker, or who has been unfairly treated, can opt to end the contract and possibly seek damages if they suffer losses.
Unconscionable agreements	<p>Unconscionable behaviour in making an agreement may include unjust, unfair or unscrupulous conduct which is considered contrary to community standards. In practice, however, it is narrowly defined.</p> <p>In business-to-business contracts of less than \$3 million, a small business (not a publicly listed company) may allege unconscionable conduct where a stronger party has exploited its bargaining power to impose contractual terms or engage in conduct that would be unreasonable in the context of a particular commercial relationship.</p> <p>Unconscionable contracts can be brought to an end under the Trade Practices Act if there has been unacceptable behaviour by a company. Similarly, unjust contracts, both by companies and persons, may be unenforceable through the Fair Trading Acts of each State. The New South Wales legislation is more broadly defined and contracts which are unfair, harsh or unconscionable may be brought to an end.</p> <p><b>Note:</b> Under Commonwealth and State legislation, misleading and deceptive conduct is considered sufficient to bring a contract to an end.</p>
Pressured agreements	If a person has only entered an agreement because of threats, fear or actual force (duress), this may result in the ending of the contract. Under the law there is legitimate commercial pressure such as raising prices during a shortage, which is quite distinct from actual threats.
Children's agreements	A person under the age of 18 is considered a child and cannot be compelled to pay for non-essential items they may have ordered. A contract for a non-essential good can be abandoned by a child and it comes to an end. Businesses are normally reluctant to hand over goods to a child on time payment, or to provide credit, without a guarantor.

# 16 Summary checklist

Regardless of the specific nature of the contractual issue, there are a few key questions which you need to ask yourself that can help identify and clarify:

- whether the contract meets the objectives
- which matters are of primary importance and which are of secondary or lesser importance
- the potential risks in the relationship
- what the contract must clearly protect.

Time spent thinking about them beforehand can save a great deal of grievance and expense later while at the same time maximising the quality of any time spent with your legal advisor.

## What do you want out of the relationship?

- How important is it to you?
- What commercial return do you require over what period of time?
- Does it have the potential to grow?
- Does it have strategic value? Can it be the stepping stone to bigger things?
- How long do you want it to last?

## What does the other party want?

- How important is it to them?
- Do they see it having the potential to grow?
- Does it have strategic value to them? Can it be the stepping stone to bigger things?
- How long do they want it to last?

## What issues are absolutely critical to you about which you could not compromise – the contract conditions?

- Reliability of supply?
- Price?
- Cost of credit?
- Volume of business?
- Market share?
- Market exposure?
- Other?

**Have your expectations and ‘bottom line requirements’ been made clear to the other party during the process of negotiation?**

- Do they clearly understand your position?
- Are they prepared to accommodate your critical requirements?
- Are they capable of accommodating your critical requirements?

**Understanding each party’s needs and expectations, how far are you willing to compromise on such issues as:**

- The availability of credit terms?
- Frequency of price review?
- The means of calculating price reviews?

**What level of risk is involved and who bears it?**

- What is the commercial reputation of the other party?
- What could go wrong in the relationship that could seriously affect your business?
  - Failure of the other party’s business
  - Inadequate marketing support
  - Change of ownership in the other party’s business
  - Magnitude and frequency of interest rate/rental/invoice price adjustments
  - Resignation/death of key personnel
  - Delays in delivery
  - Delays in payment
  - Inferior or inappropriate quality
- Have these issues been addressed in the contract?

**How possible is it for things to go wrong?**

- What is industry experience?
- How many ‘steps’ in the chain?
- Where are you most vulnerable?

### Remember some basic rules – look at the fine print

- Written contracts, where practical, are always the best form of contract to rely on.
- Keep records of any promises made to clients by parties acting for the business – this could be done on a standard form showing dates and times.
- You may find it useful to construct a model contract which can be filled in by the business at the time an agreement is made – this would ensure that you always have something in writing.
- Make sure that:
  - anything signed by the parties making the agreement is the same as the spoken agreement made
  - any changes made to an agreement are explained and documented with the other parties
  - all parties have a copy of the contract, along with any appropriate changes
  - any difficulties or defects regarding a product or service have been brought to the attention of all parties.
- Take special care:
  - when dealing with people who might be disadvantaged in terms of sight, hearing or language capabilities – so that they understand the contract, or at least have had legal advice
  - to be aware that in business-to-business contracts not exceeding \$1 million, conduct engaged in transacting the deal is regulated by unconscionable conduct provisions under the Commonwealth's Trade Practices Act
  - in expressing an opinion – particularly where it may be relied on as the basis of the agreement.
- Read everything **before** you sign it.
- Seek professional advice where you are unsure of the meaning or consequence of any contractual issue, especially if:
  - a substantial amount of money is involved
  - your possible liability under the contract is substantial
  - further similar situations are likely to arise
  - the other party is using professional advice.

# 17 Additional sources of information for small business

## Business Entry Point

<http://www.business.gov.au>

The Commonwealth, in cooperation with State, Territory and local governments, is bringing government resources together on one Internet site known as the Business Entry Point (BEP). At this stage through BEP you can:

- access current government information and understand your obligations in areas such as taxation and superannuation, record keeping, occupational health and safety, customs, protecting intellectual property and workplace relations;
- tailor your search for information to suit your business and area of operation; and
- privately and securely undertake a number of initial business registrations with the Australian Taxation Office and the Australian Securities and Investment Commission on-line. You can also undertake transactions with the federal Department of Finance and Administration, South Australia's Bizgate service and Victoria's Maxi facility. Soon you will be able to carry out financial transactions with some Commonwealth Government agencies via BEP.

The site contains information from about 50 Commonwealth agencies and 100 State and Territory agencies, covering over 800 government programs.

You can access BEP via the Internet at <http://www.business.gov.au> and a telephone hotline 13 28 46.

## Small business advisory offices (State and Territory)

Government-funded small business advisory services operate in all States and Territories. Each offers free information, advice and referral services. These services should be consulted during the planning and establishment phases of any small business venture. Specific products vary between organisations but the following services are generally provided:

- accurate, relevant information and referrals;
- free, impartial and confidential services provided by experienced personnel; and
- a large selection of inexpensive, easy to read publications covering all aspects of small business operation and management.

In Victoria, First Place Business Directions offers a free first contact point to a range of government and commercial services available to support business.

## NEW SOUTH WALES

### Sydney Business Enterprise Centre

Level 11, 418A Elizabeth Street  
SURRY HILLS NSW 2010  
Tel: (02) 9282 6977 Fax: (02) 9281 2546  
<http://www.smallbiz.nsw.gov.au>

## VICTORIA

### Small Business Victoria

Level 5, 55 Collins Street  
MELBOURNE VIC 3000  
Tel: (03) 9651 9888  
Vic country callers: 1800 136 034  
Fax: (03) 9651 9725  
<http://www.sbv.vic.gov.au>

### First Place Business Directions

(location as above) Hotline: 13 22 15

## SOUTH AUSTRALIA

### The Business Centre

Department of Industry and Trade  
145 South Terrace  
ADELAIDE SA 5000  
Tel: (08) 8233 4600 Fax: (08) 8231 1199  
<http://www.tbc.sa.gov.au>

### Small Business Advocate

74 South Terrace  
ADELAIDE SA 5000  
Tel: (08) 8221 6120 Fax: (08) 8221 6106

## TASMANIA

### Business Tasmania

Department of State Development  
Level 5, ANZ Centre  
22 Elizabeth Street  
HOBART TAS 7000  
Tel: (03) 6233 5712 Fax: (03) 6233 5800

## AUSTRALIAN CAPITAL TERRITORY

### Links to Business

Canberra Business Centre  
49 Wentworth Avenue  
KINGSTON ACT 2604  
Tel: (02) 6295 5999 Fax: (02) 6295 5988

## QUEENSLAND

### Department of State Development

Level 21, 111 George Street  
BRISBANE QLD 4000  
Tel: (07) 3224 8568  
Qld country callers: 13 26 50  
Fax: (07) 3224 8661  
<http://www.statedevelopment.qld.gov.au>

## WESTERN AUSTRALIA

### Small Business Development Corporation

553 Hay Street  
PERTH WA 6000  
Tel: (08) 9220 0222  
WA country callers: 1800 199 125  
Fax: (08) 9221 1132  
<http://www.sbdc.com.au>

## NORTHERN TERRITORY

### Business Services

Department of Industries and Business  
First floor, Development House  
76 The Esplanade  
DARWIN NT 0800  
Tel: (08) 8999 7916  
NT country callers: 1800 193 111  
Fax: (08) 8999 7924  
<http://www.nt.gov.au>

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