

CONTRACTS - BEST TO HAVE THEM IN WRITING

1. *Simply described, a contract is essentially a legally binding agreement requiring two elements “an agreement” and “consideration”.*
2. *Firstly, there needs to be an “offer” by one party and then “acceptance” of that offer by the other party to create an agreement. Secondly, for the agreement to be legally enforceable “consideration” needs to be present. Consideration in essence is the notion of the exchange of contractual promises between the parties to the agreement.*
3. *Once the pre-conditions have been fulfilled and there is a valid contract between the parties the Law recognises that the contract can be solely oral or solely written or partly oral and partly written. Therefore just because an oral agreement has not been reduced to writing does not mean that it is unenforceable. An oral agreement may be just as valid as a written agreement. Nonetheless if an agreement has been reduced to writing and signed by the parties to it then performance of the terms of the contract will likely occur without dispute.*
4. *For a contract to be legally enforceable it need not necessarily be one where the parties have agreed on all of the terms of the contract. An agreement can be enforceable by one party against the other even if only a partial agreement where they nonetheless agree in principal that they will in due course formalise the agreement in a formal document. This is in essence an agreement to agree.¹ Disputes can flow in these circumstance as to whether the parties intended to be bound immediately by the terms of their initial agreement or whether they only ever intended to be bound once a formal agreement was finalised and reduced in writing.*
5. *As to whether an agreement has been reached depends on ascertaining what was the intention of the parties and this may be understood from the language used or otherwise inferred from their conduct. Ultimately, this is a finding that can only be determined by a Judge arising out of a dispute between the parties. Whilst no one wants to end up in Court over a contract dispute, the best way to avoid this prospect is to only create an intention to be bound once the agreement has been reduced into writing between the parties.*
6. *In daily life we deal with contracts all the time whether it is simply buying a cup of coffee or ordering by way of a “click and wrap” contract a movie subscription download through your smart phone. In doing all these daily tasks, it is vital to read the terms and conditions that constitute the agreement you are entering into. Unfortunately this does not always happen. Just because you are provided a standard contract (being an “offer”), does not mean that you are necessarily compelled to sign or accept same and does not necessarily mean that you can not negotiate with the other party the terms and conditions of the offer that has been put to you. Some contracts are more significant than others such as buying your house or car or entering into a commercial lease. All of these contracts are by their nature expensive exercises*

¹ Masters -v- Cameron (1954) CLR 353

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and consequently have a degree of risk associated with the contract. A review of a standard REIQ contract for the sale of house and land or a vehicle purchase contract or a commercial lease are not documents that can be characterised as simple and straight forward at first glance.

- 7. Before you sign any contract or strike any agreement consider the implications of that arrangement. If you have agreed on a bargain with another party then that arrangement should be formalised in writing and the terms should be clear and concise and each of the parties obligations understood. Failure to clearly spell out all of the terms of the agreement could result in financial pain for the parties particularly if they have conflicting views as to what were their obligations under the purported agreement. The negotiation and formalisation of an agreement could be critical to you and/or your business.*

- 8. So as to avoid the risks and pitfalls of unintended contractual obligations, you should consult with your legal advisor. Before you have even reached a concluded agreement, you should consult with Hoffensetz Solicitors as to the implications of what might flow from your proposed agreement. Alternatively, if you have reached a formalised agreement and it has not been reduced to writing, then again contact Hoffensetz Solicitors as we can help you in the preparation and formalisation of the contract.*

If you want to discuss your arrangement or contract or want advice as to your obligations under a contract then please speak to Leith Hoffensetz who can be contacted on 3281 3088 or by e-mail at lhoffensetz@hoffensetz.com.au .