

Australian Contract and Consumer Law

Contract law encompasses any laws or regulations directed toward enforcing certain promises. In Australia contract law is primarily regulated by the 'common law', but increasingly statutes are supplementing the common law of contract - particularly in relation to consumer protection.

Contract law is broadly divided into five categories:

- contractual **formation**
- **scope and content** of contracts
- **avoidance** of contractual obligations
- **performance and termination** of contracts and
- **remedies** for breach of contract.

In relation to consumer law current topics include the law relating to consumer guarantees, unfair terms in consumer contracts, unconscionable conduct and manufacturers' liability.

The other key part of the site involves summaries and notes of leading contract and consumer law cases. This remains a work in progress and more cases will be added progressively.

A contract is a legally binding promise or agreement. (Halsbury's Laws of Australia [110-1] Definition)

The five major concerns of contract law analysis are:

- (1) the processes by which contracts are formed, the identification of the parties and the identification and interpretation of the terms of the contract so formed;
- (2) the circumstances in which contractual agreement is affected by the presence of a vitiating factor or illegality;
- (3) the requirements of contract performance and the circumstances in which breach of contract occur;
- (4) the circumstances in which a contract will be discharged and the consequences of such a discharge; and
- (5) the principles governing remedies for breach of contract.

(Halsbury's Laws of Australia [110-5] Concerns of contract law analysis)

Start finding out more about Contract Law using LexisNexis Practical Guidance - Business (browse under Contract law)

Australian cases

Use a case citator, CaseBase or FirstPoint, to find specific cases from Australian courts.

- Competition, Consumer and Contract Law library (CCH)

Contains Australian Contract Law Cases

Australian Legislation

For more legislation, see Lawlex

- Competition and Consumer Act 2010 (Cth)
- Australian Consumer Law and Fair Trading Act 2012 (Vic)
- Competition, Consumer and Contract Law Library (CCH)

Contains Australian Contract Law Legislation by jurisdiction

When entering into a contract it is important to recognise and understand the legal system which governs the contract - both in its formation and in case of any disputes. In today's international marketplace, entering contracts with Australian counterparties, or contracts said to be governed by the law of Australia (or a particular Australian State or Territory) is not uncommon. The purpose of this article is to provide a high level overview of key aspects of Australian contract law for those doing business in Australia or entering into contracts governed by Australian law.

Australian contract law is based on the English common law, rather than on any codified or statute law. The basic principle of Australian contract law is freedom of contract, under which parties are at liberty to strike whatever bargain they choose.

These broad statements of principle are affected by some important legislation, notably, the Competition and Consumer Act 2010 (Cth), which cannot be contracted out of and may result in legislative rights which override contractual rights in certain circumstances.

FORM

No special forms or procedures are required, although it is good practice to record the terms of a contract in writing as Australian courts will give considerable weight to the expression of the parties' intentions evidenced in documentary form. Nonetheless, Australian law recognises oral contracts (except in relation to the transfer of land).

Similarly, there is no fundamental principle of contract law that prevents contracts being formed electronically. Consequently, the laws applicable to contracts online are the same as those applicable to non-virtual transactions. Electronic commerce in Australia is principally regulated by Federal, State and Territory Electronic Transaction Acts. The Electronic Transaction Acts are based on the UNCITRAL Model Law on Electronic Commerce.

PARTIES

Under Australian contract law, with certain limited exceptions, those who are not parties to a contract cannot be bound by it. This is known as the privity rule. By the same token, contracts can generally only be enforced by parties to the contract. Although, where a contract creates a trust for a third party, that third party may be able to enforce the contract.

If a corporation which is registered under the Corporations Act 2001 (Cth) is a party, its registered number – an Australian Company Number (ACN), Australian Registered Business Number (ARBN) or Australian Business Number (ABN) – must also be cited for that party in all public documents.

SECURITY OVER, OR TITLE TO, ASSETS

If a security interest is created over any assets which are "personal property" then the Personal Property Securities Act 2009 (Cth) (PPSA) will apply. To preserve the interest of the security holder, the interest should be registered on the Personal Property Securities Register within the applicable time period.

Personal property includes all property that is not land, or certain rights granted by Commonwealth or State Governments (for example, a mining licence). The PPSA covers a broad range of security interests, including traditional forms of security as well as interests created under retention of title provisions, hire purchase agreements and certain leasing arrangements. The registration of security interests is governed

by the PPSA, relevant provisions of the Corporations Act 2001 (Cth) and associated subsidiary legislation.

RESTRICTIONS ON PENALTIES IN CONTRACTS

Under the general law of contract, it is permissible for parties to agree upon a sum of liquidated damages, or the method of calculation of such a sum, payable by one party to the other in the event of defined breaches of contract. This may be useful where monetary damages may be difficult to calculate, and the parties wish to avoid the cost of dispute resolution or litigation. Such an agreement on liquidated damages must represent a genuine attempt to estimate the likely damages which may be suffered. If it is imposed by one party merely as a threat to enforce compliance, is excessive, or is specified to arise in circumstances which are vague, or may be triggered arbitrarily, then the provision may be regarded as a mere penalty and not enforced by a court.

RESTRICTIONS ON RESTRAINTS OF TRADE

Any restriction upon the dealing by a party to a contract (or deed) with third parties, including employment by a third party, directly or indirectly, whether during or after the term of a contract:

- may constitute exclusive dealing, conduct regulated by the anti-trust provisions of the Competition and Consumer Act 2010 (Cth); or
- may be a restraint of trade at common law, which if unnecessarily broad in the conduct restrained, the time period of the restraint or the area over which the restraint operates, will be void, and unenforceable by a court. In the State of New South Wales (only), the Restraints of Trade Act 1976 (NSW) permits the Supreme Court of New South Wales to limit the operation of a restraint to the extent that the Court considers reasonable.

LIMITATIONS AND EXCLUSIONS OF LIABILITY

Subject to the operation of the Competition and Consumer Act 2010 (Cth) and the equivalent sale of goods and fair trading legislation of the States and Territories, parties to a contract are free to limit or exclude liability for breaches of contract, or in other circumstances.

The party seeking to rely on an exclusion or limitation of liability clause will, however, need to convince the court that the clause in question, properly construed, is as that party contends. Historically, such clauses have been read against the party in whose favour the clause operates. While the courts have moved away from this approach, now favouring the view that a clause limiting or excluding liability should be construed according to ordinary principles of interpretation, any limitation or exclusion of liability should be set out in the clearest language possible.

CONSUMER LAW

Since 1 January 2011, Australia has had a national Australian Consumer Law (ACL) which applies at the State, Territory and Federal levels. The ACL specifically includes a national unfair contract terms provision, a new national product safety legislative and regulatory framework and new penalties, enforcement powers and consumer redress options.

The consumer protection provisions can be grouped into four broad categories:

- Product safety provisions, which provide for mandatory consumer standards, product information and notification of voluntary recalls, and the power to order mandatory recalls.
- Prohibitions against unconscionable, misleading or deceptive conduct in trade or commerce, which are extremely wide-ranging.
- A prohibition on the manufacture of defective products, which are restricted to consumer goods.
- A strict liability prohibition on manufacturers and importers of defective goods.

A corporation must not engage in conduct which is misleading or deceptive, or which is likely to mislead or deceive, or make false representations. A person aggrieved as a result of such conduct has a cause of action in damages and may be entitled to other compensatory remedies. These provisions have been relied upon in a wide variety of cases, including pre-contractual negotiations and misleading advertising.

RESOLUTION OF DISPUTES

The Australian court system is considered to be fair and impartial. The States and Territories have their own judicial systems and courts. Federal Courts deal with Federal matters and the High Court of Australia hears appeals in relation to Federal, State and Territory matters.

If an international commercial dispute is to be resolved by arbitration, rather than litigation, it will be governed by the International Arbitration Act 1974 (Cth). This Act gives the UNCITRAL Model Law the force of law in Australia and the UNCITRAL Model Law will apply to international commercial arbitrations (prior to 2010, parties were able to agree that some other rules governed the dispute).

Australia is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Accordingly, the award of an arbitrator (which can usually grant any legal, equitable and statutory remedies) will be recognised and enforced in the Federal Court or any of Australia's State or Territory Courts as if it were a judgment of that Court.

If the dispute is not 'international' in character, domestic arbitrations are governed by the relevant Commercial Arbitration Act of the State or Territory in which the seat of the arbitration is located.

INTERNATIONAL CONTRACTS FOR THE SALE OF GOODS

Australia is a signatory to the Vienna Convention on Contracts for the International Sale of Goods. The Convention provides for uniform rules which govern the formation and performance of contracts for the international sale of goods and sets up a framework of rules specifying the obligations of parties to them.

The parties to a contract for the international sale of goods may agree that the Convention is not to apply, and may select the laws of one of the parties' home jurisdictions as the governing law of their contract. If they do not do so, however, then the Convention will apply, and incorporate into the contract the rules set out in the Convention.