

CONTRACTS - GENERAL PRINCIPLES AND COMMON TRAPS

What is a contract?

A contract is an agreement that is enforceable by the courts.

A contract has the following characteristics:

- The parties must have actually reached agreement. Sometimes this is referred to as “offer” and “acceptance”. If you are still negotiating, then you have not made a contract.
- Something of value must be exchanged, for example money, goods, services, rights or benefits. The legal term for this is “consideration”.
- The parties must have the intention of making an agreement that is legally binding. This is usually implied in commercial situations. An example of an agreement that would not fall into this category is a family agreement for a parent to pay their child pocket money.
- The contract cannot be about something illegal, for example an agreement to steal something or kill somebody.
- The people making the agreement must be able, in a legal sense, of making the contract. Examples of people who may not be able to make binding contracts are children, bankrupts and people with dementia.

In general a contract can be oral or in writing; or it can be implied by how the parties act. Laws are sometimes passed which require specific sorts of agreements to be in writing. These include buying and selling real estate, assignments of copyright, door-to-door sales agreements, consumer finance agreements and buying a car from a licensed motor car trader.

Verbal promises, understandings, arrangements, quotes, software licences, financial transactions and even negotiations can all be binding on the University. All these arrangements must be recorded in an written contract so that all parties have an accurate record of their rights and obligations. Once a contract is made, whether or not is in writing, it can be enforced by the courts and it may not be possible to get out of it or change its terms.

The law generally does not interfere with the terms of a contract. If you do not read a contract before you sign it, you will still be bound by it. An exception to this is the protection given to consumers by state and federal parliaments. Legislation “implies” extra terms into consumer contracts. One implied term is that goods must be of “merchantable quality”. This means that consumers have the right to return faulty goods despite any claims that a “No Returns or Refunds” policy applies.

Common traps

- Accepting a contract's "terms and conditions" by submitting a tender without raising any queries or completing a "statement of non-compliance". You must always have a proposed contract checked by Legal Services before you submit the tender.
- Creating a contract when you think you are still negotiating. Contracts do not need to be "formal" or in legal-sounding language. Sometimes a contract can be made up of several things – letters, faxes, emails, telephone calls or meetings. You must be careful to let the other party know that any agreement is subject to a formal contract being signed.
- Accepting a contract just because the other party says "this is standard – take it or leave it". There is no legal reason why a contract cannot be negotiated and there are often very good practical reasons for doing so. There is no such thing as a "standard" contract which is non negotiable.
- Accepting software licences without realising that they are binding contracts which need to be checked by Legal Services.
- Making representations such as "you will definitely get the contract" or "we are going ahead with this". Even if negotiations do not get to the contract stage, the University could still be bound by these statements if the other party has relied on them to their detriment. In particular, if the University makes a decision not to proceed with a particular project or purchase, this should be communicated to the other party as soon as possible.
- Not making allowances for events outside the University's or your control, such as a requirement to obtain a particular licence, permit or ethics approval.
- Relying on other promises and goodwill gestures that are not written into the contract – the law presumes that the written contract is the whole agreement.
- Giving away more than you need – for example, you should not agree to assign copyright in your work without considering whether a limited licence is more appropriate.
- Not adequately dealing with the issue of student involvement or ownership of a student's work.
- Accepting automatic renewals.
- Not allowing for an appropriate "exit strategy" so that the University can end a contract at a suitable time.

- Making a contract with the wrong legal entity, for example a person instead of the company which employs them or a business name instead of the person behind it.
- A Memorandum of Understanding (or MOU) is the name often given to a document which sets out the parties' wishes and intentions with the intent that formal binding contracts setting out the specific terms and conditions of the arrangement will follow. However, even an MOU can be binding unless it specifically states that it is not intended to legally bind either party.
- Failure to have two "counterparts" (identical originals) signed so each party has one to keep. At the very least the University should keep a one signed original document and if this is not possible a complete photocopy of the signed original agreement.

Disputes

Contracts are "breached" if either party fails to fulfil their obligations.

There are a number of remedies available if a contract is breached, including:

- Using dispute resolution, mediation or arbitration;
- Obtaining damages, which is compensation for the innocent party for any loss they have suffered;
- Cancelling or terminating the contract;
- Obtaining a court order requiring the party at fault to fulfil their obligations.

You should contact Legal Services for advice on disputes involving the University as soon as possible after they arise. There may also be insurance implications and Legal Services will liaise with the Insurance Office.

Contract Policies and Procedures

The University's policies and procedures on negotiating, writing and approving contracts are in section 10 of the Business Procedures Manual at www.latrobe.edu.au/finance/publish.html and on the Legal Services webpage at www.latrobe.edu.au/legalservices/contracts.html.

Signing contracts

Only authorised staff can sign contracts and MOUs on behalf of La Trobe University. Some documents, such as deeds, must have the University's common seal affixed to them. Details of authorised staff, financial limits and signing delegations are set out in the section 10 of the Business Procedures Manual at www.latrobe.edu.au/finance/publish.html.

Legal Services will forward approved contracts and MOUs to the appropriate signatory.

Engaging contractors

All financial arrangements with contractors can affect the University's liability to pay superannuation, payroll tax, PAYG and GST withholding tax and extra workcover insurance premiums. The University has a system of assessing and pre-approving arrangements with contractors so it is not in breach of its obligations. This must be done before contracts are finalised and before any payments can be made to the contractor. The policy, procedures and questionnaire are available at www.latrobe.edu.au/finance/publish.html#contractors

How Legal Services can help you

Legal Services can:

- tell you whether there is any legislation which affects your proposed agreement;
- help you negotiate favourable terms;
- draft written contracts;
- explain the terms of a proposed agreement so you understand the consequences of agreeing to it before you make a final commitment;
- advise you if the other party breaches the contract;
- advise you if the other party accuses you of breaching the contract.

Sending information to Legal Services

When you request Legal Services to review a document or draft a new one, it would help if you provide the following information:

- full name (including Pty Ltd if a company), registered business address and ABN of all parties
- issues discussed and agreed, such as:
 - length of the agreement
 - what date the agreement is to start
 - general description of the goods or services to be obtained or provided, including dates and milestones
 - details of the costs or fees, including when and how payment is to be made
 - the name of any specified personnel who will be providing services
 - whether students will be involved
 - any specific arrangements about copyright, patents or publications.

The University's legal status

La Trobe University is a statutory corporation established by the [La Trobe University Act 1964](#). It does not have an ACN or ARBN. It does have an ABN which is 64 804 735 113.

The University should be described as "La Trobe University" on all legal documents. Faculties, schools, departments and other University bodies such as centres and institutes are not separate legal entities, so their names should not appear as party to any contract or MOU.