

18. FACT SHEET ON CONTRACTS



This fact sheet explains about legally enforceable contracts and how they can be entered into. It covers when a person or organisation will be liable for another's contracts, and how an organisation can give authority for contracts to be made on its behalf. Finally, the fact sheet explains which types of organisation can enter into contracts in their own name.

INTRODUCTION

What is a "contract"?

A contract is a legally enforceable private agreement in which each side promises to provide a benefit to the other. An "agreement" is another word for a contract.

When is an agreement a legally enforceable contract?

Not every agreement between two people or organisations is a legally enforceable contract. For the agreement to be enforceable there must be:

- a clear offer by one side and clear acceptance of that offer by the other
- "consideration" from each side, which means that each side must provide, or promise to provide, something of benefit to the other (unless the agreement is made by deed) – a gift is not legally enforceable, because only one side gives something of benefit
- certainty about the terms of the contract.

In some cases the contract must also be in writing – for example, for the sale and purchase of land.

Most contracts are not enforceable against people who are under 18.

METHODS OF ENTERING INTO CONTRACTS

Contract by deed

There are two situations in which a contract must be made by deed:

- When the law requires the contract to be made by deed in order to be effective. These situations are rare – two examples are the assignment of land not held under the Land Transfer Act 1952 and agreements between creditors to compromise a debt.

- When one party to a contract is not receiving any benefit ("consideration") from the other party. For example, if an organisation agrees to guarantee a debt owed by one of its branches.

Where the law requires a contract to be made by deed, an incorporated organisation can enter into the contract using its common seal (official stamp).

Contract in writing

A contract that is in writing must be signed by a person who has the express or implied authority of the organisation (see p2).

Written contracts usually specify that they cannot be amended except by a subsequent written agreement between the parties.

Contracts should always be in writing if they involve substantial amounts of property.

Oral (spoken) contracts

A contract that does not have to be in writing (a contract to buy a car, for example) may be made orally by any person who has the express or implied authority of the organisation to make the contract.

LIABILITY FOR CONTRACTS ENTERED INTO BY OTHERS

General rules

For Party A to be liable under any contract entered into by Party B:

- Party A must have guaranteed Party B's obligations under the contract, or
- Party B must have entered into the contract with actual or apparent authority to bind Party A (see p2), or
- Party A must have later ratified a contract that was purportedly entered into on its behalf.

Ratification is where an organisation indicates, explicitly or implicitly, that it intends to be bound by a contract that has been entered into on its behalf. This approval makes the contract valid and binding. The contract then takes effect as if the organisation had been a party to the contract when it was first entered into.

GIVING AUTHORITY TO OTHERS TO ENTER INTO CONTRACTS

The rules for giving authority to another person to enter into contracts are governed by the ordinary law of agency. Under those laws, any person who is legally competent of doing an act, including an incorporated body, may authorise another as their agent to perform that act on their behalf. It's necessary, however, to distinguish between "actual" authority and "apparent" authority.

Actual authority

Person Y has express actual authority to enter into contracts with a third party on behalf of organisation X, if Y is given this authority by:

- X's rules or constitution, or
- a resolution passed by X, or
- a contract between X and person Y.

Person Y will then also have implied actual authority to do whatever is necessary for, or incidental to, effectively carrying out X's express authority.

It is wise to specify the precise boundaries of the authority in the authorising document, and in as much detail as possible, rather than relying on implied authority.

Apparent authority

Person Y has apparent authority to enter into contracts with a third party on behalf of organisation X, if X represents to the third party that Y is authorised to do so on X's behalf. Organisation X might do this by telling or implying to the third party that Y is authorised, or simply by acting as if Y is authorised.

An organisation should follow these guidelines to minimise the risk of individuals or other organisations appearing to have apparent authority to bind the organisation:

- Avoid making express statements to third parties that a particular person Y has general authority to bind the organisation. When telling a third party of Y's authority, the organisation should

precisely specify the limits of Y's authority and make it very clear that Y has no authority to enter into contracts outside those limits.

- Avoid creating an implication that Y has general authority to bind the organisation. The organisation should not knowingly permit Y to act in a way that suggests Y has the authority to bind the organisation. For example, an organisation should not allow Y to use the organisation's name, letterhead, logo or seal when negotiating or executing contracts, or when carrying out business generally.

CONTRACTS AND DIFFERENT TYPES OF ORGANISATIONS

Unincorporated groups

An unincorporated group does not have a separate legal identity and therefore cannot enter into contracts in its own name. Instead, contracts must be entered into by some or all of the group's members personally (or in the name of an umbrella or parent body – see p3). Those members will be personally liable for the obligations incurred through the contract.

Incorporated societies

An incorporated society can enter into a contract in its own name, subject to the society's rules or constitution. The way in which an incorporated society enters into contracts is explicitly set out in the Incorporated Societies Act 1908.

Trusts

A trust (if it's not a charitable trust board) is not an incorporated body and therefore cannot enter into contracts in its own name. Instead, trustees are empowered under the Trustee Act 1956, and usually by the particular trust deed, to enter into contracts.

The trustees are personally liable for obligations incurred through a contract. Usually the trust deed will grant the trustees a right to be indemnified out of the trust property for that liability.

Charitable trust boards

Charitable trust boards (both trusts and societies) are incorporated under the Charitable Trusts Act and can therefore enter into contracts in their own name. The trustees or society members who are the

members of the board are therefore not personally liable for the board's obligations.

Companies

A company, as an incorporated body, may enter into a contract in its own name.

The personal liability of the shareholders will usually be limited to the value of their shareholding. The company's directors are not liable for the company's obligations unless they have breached their duties or given personal guarantees.

National and other parent structures

National association structures and branch structures

Each national body and branch in a national association or branch structure is an incorporated body and can therefore enter into contracts in its own name.

See Fact sheet 5: Relationships between national, branch and local offices.

Whether parent bodies and branches can bind each other to contracts is governed by the general rules for liability for contracts entered into by others (see p1).

Local committees and contracts

A local committee is an unincorporated body and therefore cannot enter into contracts in its own name. Instead, contracts must be entered into by some or all of its members personally, and they will be personally liable for the obligations in the contract.

See Fact sheet 2: Unincorporated groups.

A local committee will be taken to have implied actual authority to enter into any contract on the parent body's behalf provided:

- the parent body could itself have entered into that contract
- the parent body's rules do not place explicit limitations on the authority of the local committee to do this.

A local committee may also enter into contracts that bind the parent body if it has apparent authority.

As a matter of good practice, the rules of all parent bodies that operate local committee structures should contain:

- detailed provisions covering the type of contracts that a local committee is authorised to enter into on behalf of the parent body, or
- a provision requiring the consent of the parent body before it can be bound by a contract entered into by the local committee, or
- a combination of the two.

A national or other parent body on whose behalf a local committee has entered into an unauthorised contract may later ratify the contract and become bound under it.

A local committee may be liable under a contract that it has entered into on a parent body's behalf if:

- there is express agreement to that effect in the contract
- the local committee has made representations in the course of negotiating or executing the contract that it will be solely or jointly liable, or
- the local committee has acted outside its express or implied actual authority, or acted without apparent authority to bind the parent body.

RESOURCES

Fact sheets

Fact sheet 2: Unincorporated groups

Fact sheet 3: Incorporated societies

Fact sheet 4: Trusts and charitable trust boards

Fact sheet 5: Relationships between national, branch and local offices

Fact sheet 6: Companies and other legal forms

Websites

www.consumeraffairs.govt.nz

The Ministry of Consumer Affairs provides information about contracts under "Consumer information/Contracts".

www.lawaccess.lsa.govt.nz

This website offers a catalogue of law-related information resources, with over 140 New Zealand organisations listing their resources on the site.

RESOURCES (CONTINUED)

Publications

Ministry of Consumer Affairs' fact sheets *What is a contract and When can I cancel a contract?* (order from www.consumeraffairs.govt.nz)

Von Dadelszen, M – *Law of Societies in New Zealand* (2000, Wellington, Butterworths)

Von Dadelszen, M – *Members Meetings in New Zealand*, 2nd ed (2004, Wellington, LexisNexis)

