

NEWSLETTER

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A Contract entered into on the telephone can be just as binding as any other Contract >>

A reader of this Newsletter has asked us to comment on a personal experience purchasing a computer program over the telephone that may be of interest and value to other readers.

Payment for the program was made using a credit card. After receiving the program our reader considered it to be unsuitable and had some discussions with the company about returning it and obtaining a refund.

The company told him that they did not make refunds and that they took the view that there was a legally binding contract and that was the end of it.

Our reader had believed that there was a cooling off period during which this kind of transaction could be cancelled. He was surprised to find that this was not the case. He has asked us to prepare this Newsletter that sets out the principles relating to when a contract is formed and when a cooling off period might apply.

>> *Ten day cooling off period applies in door to door trading* <<

For a contract to be made an offer must be made and there has to be an acceptance of that offer. This involves an exchange between at least two parties.

It can involve a promise for a promise or an exchange of a promise for an act.

The next requirement for a contract to exist is that there is consideration. This means that there must be value. The one exception to this requirement is if the parties execute a Deed.

The next requirement is that there be an intention of the parties to assume a legal obligation. Normally no special act is required to show this. The intention is normally inferred from what the parties do.

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The last requirement to create a contract is that the terms must be certain. For example if parties agree to agree in the future, the first agreement is so uncertain that this contract is void.

One matter that concerned our reader was the cooling off period.

For the protection of consumers Parliaments around Australia have introduced cooling off periods so that a party to some types of contract can cancel the contract within a certain time after first entering into it if there is a change of mind.

In New South Wales there are such provisions in the Conveyancing Act, the Retirement Villages Act, the Motor Dealers Act, the Farm Debt Mediation Act and the Corporations Act.

In the circumstances described by our reader the protection given in the Fair Trading Act is the best example of what might be available. However, since he made the phone call to purchase the computer program, the Fair Trading Act would not assist.

Under the Fair Trading Act door to door trading occurs when a trader approaches a consumer to buy goods or provide services. The approach can be made either by telephone or in person.

Unless there is a pre-arranged appointment, the Act says that door to door traders cannot call on consumers on Sundays or Public Holidays. Door to door trading can occur between 9.00 am and 8.00 pm on weekdays and between 9.00 am and 5.00 pm on Saturdays unless there is a prior arrangement or appointment.

If a purchase is made in the course of door to door trading and it is valued at more than \$50.00 and a contract is signed, there is a ten day cooling off period during which the consumer can change his or her mind about the deal.

In a door to door trading situation like this, the trader must provide copies of forms which explain the cooling off period. The trader must not take any payment or trade-in or deposit until after the ten day period has expired. The trader also must not install any product that is purchased pursuant to a door to door trading contract until after the cooling off period has expired.

It should be noted that there are different cooling off provisions in the different states and territories of Australia. The Department of Fair Trading in New South Wales makes a number of recommendations:

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- Don't be pressured
- Compare prices with other traders
- Consider all costs including credit charges, insurance and delivery costs
- Never allow a trader to take away an incomplete contract
- If in doubt say no – or at least seek a second opinion before signing anything.

We hope that this reminder of the principles of the law of contract and the cooling off periods that apply in New South Wales assists our readers.

>> Professional advice should be sought before applying the information in this newsletter to particular circumstances.

>> We hope that our newsletters are of interest to you. If you wish a particular topic examined, please let us know.

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