

Remedies: contract and specific performance essay sample



Currently, courts are largely limited to awarding loss-based damages for breach of contract, although performance can be ordered in some circumstances. There are economic arguments in favour of this approach, but in some circumstances it may be inadequate. If the idea of reforming Australian contract law is welcomed, one reform measure might be to expand the range of remedies that a court could order when a contract has been breached.

What is a breach?

A breach of contract occurs when a party fails to do what they have promised to do. This happens for many different reasons. For example, a party may misunderstand their obligations, they may no longer have capacity to perform, or they may no longer be willing to perform.

What is a remedy?

A legal remedy is a court order that seeks to uphold a person's rights or to redress a breach of the law. When one party breaches a contract, the other party may ask a court to provide a remedy for the breach. The court may order the breaching party to pay money to the non-breaching party. This remedy is called damages. Alternatively, the court may order the party to do what they promised to do under the contract. This remedy is called specific performance.

Loss-based damages

Damages are the normal remedy for breach of contract. In Australian law, the amount of damages is the loss caused by the other party's breach. In

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most circumstances, the court will order the party in breach to pay the sum of money needed to place the non-breaching party in the same situation as if the contract had been performed.

For example, if Abe promised to sell Beryl a car for \$X, and then failed to deliver because he accepted a higher price from Celeste, a court may order Abe to pay Beryl the difference between \$X and the market price of an identical car. This would allow Beryl to buy an identical car without paying more than \$X.

Market value is not always decisive when determining the amount of damages which a court may award for breach of contract. For example, if a builder constructs a house which does not conform with the contract, the landowner is usually entitled to damages sufficient to pay for repairs or rebuilding to comply with the contract standards even if there is no difference in the value of the two houses. Damages calculated on the basis of market value would not put the innocent party in the same position (which means more than just the same financial position) as if the contract had been performed.

There is an economic argument in favour of limiting remedies for breach of contract to loss-based damages. This is because it allows a party to breach the contract where they can make a greater profit by doing so, as long as they pay compensation to the other party. One party is better off and arguably the other party is no worse off, leading to a net increase in wealth. This idea is known as an 'efficient breach'. However, others argue that loss-

based damages are often an inadequate remedy so that the non-breaching party is not fully compensated.

Remoteness

Parties are entitled to loss-based damages only if the loss they have suffered has been caused by the other party's breach. Additionally, if the loss could not have been expected, the loss may be too remote from the breach for damages to be awarded.

For example, if Arturo breaches his contract with Bea, Bea may have problems fulfilling a second contract with Caroline. If Bea makes a settlement with Caroline to avoid litigation, she may be able to recover the money she paid under the settlement from Arturo—but that depends on whether the decision to settle with Caroline, and the amount agreed on, was reasonable. Otherwise the loss may be too remote.

Gain-based damages / Account of profits

A party may make a profit as a result of breaching a contract. Gain-based damages involve the court ordering the party in breach to pay the profits over to the non-breaching party. Australian courts do not award gain-based damages for breach of contract because the fact that the party in breach has made a profit does not constitute a loss to the non-breaching party. However, in England and the United States, cases have decided that gain-based damages can be awarded for breach of contract in some circumstances.

Exemplary damages and penalty clauses

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Exemplary damages are damages which have deterrence value and are higher than the loss suffered by the non-breaching party. Australian courts do not award exemplary damages for breach of contract. Nor will courts enforce terms in the contract which set the amount of damages for breach if the sum goes beyond a genuine pre-estimate of loss. One justification for these rules is that they allow efficient breaches to take place. However, some argue that exemplary damages are sometimes appropriate. Certain breaches of contract, such as refusing to pay the other party after it has performed its obligations, are in bad faith and do not lead to a more efficient use of resources.

A greater role for specific performance?

At common law, damages are the only remedy for breach of contract. However, in some cases courts may order specific performance of the contract to require the breaching party to keep its promise. Specific performance is an exceptional remedy in Australian law. It will only be ordered when monetary compensation would be inadequate. It is most commonly used for the sale of land or of unique goods.

There are a number of justifications for limiting the availability of specific performance as a remedy for breach of contract. Specific performance may be costly to enforce, as it requires prolonged supervision by the courts. Compelling parties to perform contractual obligations may be too great an imposition on individual liberty as well as being economically inefficient.

The limited role of specific performance has been criticised. Specific performance arguably accords better with parties' ordinary expectations
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when they make a contract. It allows them to get exactly what they contracted for, not just monetary compensation. In some civil law jurisdictions and international contract law instruments, specific performance is the main remedy for breach of contract.

Question for consideration

Should the remedies available for breach of contract in Australian law be expanded? If so, how?

Have your say

As we consider the future direction of Australian contract law, we want to take account of everyone's experience and perspective. If you want to respond to the infolets, please email us at contractlaw@ag.gov.au. You can also access our discussion paper on reforming Australian contract law on the Attorney-General's Department's website at www.ag.gov.au/contractlaw.

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