



Contracts

A Starting Point

Useful for: Business, Local Government, Government, Non Govt Organisations
Article looks at: Contractual Terms

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CONTRACTS – A STARTING POINT

In brief

- Every legally binding contract should answer 6 questions: Who, What, Where, When, How and How Much?
- A number of provisions will apply to all contracts regardless of type and value. General provisions are designed to rescue the parties in the event of disputes, or when something unexpected arises.
- When entering into a contract always bear in mind that it may contain terms by operation of law that can not be contracted out of. In particular, the Australian Consumer Law imposes certain consumer guarantees on all consumer contracts, and if it is a standard form contract, the unfair contract terms regime will also apply.

Common Considerations when Contracting

Every Contract should answer these 6 questions – Who, What, Where, When, How and How Much?

Who? Who am I actually dealing with here? Is the name on the contract a legal entity? Is this the right entity to contract with? Can this entity deliver what I want? If I am taking on risk by dealing with this entity (for example because it is a \$2 company with no or few assets), should I require security for performance? Do your upfront due diligence (see related articles on "**Due Diligence and Credit Control**").

What? What am I getting? What do I have to do? What does the other side have to do? Do the obligations set out in the contract match my perception of what the "deal" is? Are service levels/key performance indicators relevant? If they are, ensure that the ramifications for failure of same are precisely set out in the contract to ensure there are no hidden unintended consequences of the breach.

Where? Where will the contract be performed? In my office? At the other party's place of business? In Africa? For supply contracts – where are the raw materials/goods

being sourced from? What happens if there is a failure in the supply chain? What could be the impacts of dealing with a company located/incorporated in a foreign jurisdiction?

When? When do the parties' obligations need to be performed by? Milestones? Final completion date? Is the timeline clear and correct? What are the ramifications for late/failure of performance of a milestone or late completion of the contract?

How? How are the obligations to be performed by the parties? Are key personnel (certain people) required to do the work? Do I have the right resources and enough of them to perform and avoid penalties/damages being claimed by the other party? Does the other side actually have the capacity to perform their side of the deal? What are your rights if the owners of the counterparty change? If key personnel change?

How Much? What is it going to cost me/them? Don't forget to factor in GST and ensure there is an appropriate grossing up clause where the agreed price is exclusive of GST. When is the price payable? Will there be an upfront deposit payable? How will it be secured (ie kept safe from a party going into liquidation) until completion of the contract? Will there be milestone payments? For Government bodies – follow the procurement rules - do I have the budget/appropriate approvals to proceed? For bodies that are using government funding to carry out the contract, am I in compliance with the funding agreement?

General Clauses about Risk Management (sometimes called "Boiler Plate" clauses)

Standard clauses are often glossed over and assumed to be meaningless "legalese". This isn't so – a well drafted boiler plate clause can provide a quick solution to all kinds of legal issues and avoid costly litigation.

Ensure you have at least, the following:

- A survival clause (this stops certain obligations from ceasing when the contract terminates or expires) – you will ordinarily want this to operate in respect of IP rights, confidentiality, privacy, warranties and indemnities, and depending on the nature of the contract other obligations may warrant continuation after the contract ends;
- A governing law clause – while nothing is foolproof, for the most part this ensures that there won't be significant argument over the court system that has jurisdiction to hear disputes in relation to the contract and is especially important in supply contracts where one or more parties are incorporated in, or located in, foreign jurisdictions;
- An "entire agreement" clause – states that the written contract contains the entire agreement of the parties and avoids arguments about whether verbal representations or ancillary documents form part of the contract or not. Again, not foolproof as this clause won't save you from the Australian Consumer laws (where applicable), but otherwise set the boundaries of the terms of the contract effectively;
- A "severance" clause – which provides that if a court decides that one or more clauses is void (not valid or legally binding), they may be removed from the contract and the balance will remain enforceable. This can save a contract from failure, but it depends

on what the void provisions are. If the whole substance of the contract is void, then the contract will fail.

Warning – some terms can sneak in!

The Australian Consumer Law (ACL) imposes heavy restrictions on providers of goods and services from contracting out of their liability for the delivery of those goods and services. The Consumer Guarantees are a set of assumptions that the law makes about the delivery of goods and services to a consumer, and if they are not met then the consumer will have certain rights - to a refund, exchange and in some cases to wider damages. These laws cannot be contracted out of and will always override anything in the contract to the contrary.

The ACL also regulates the use of standard form contracts via the Unfair Contract Terms regime. These are contracts that are not negotiated between the parties, but instead given to the consumer to accept on a “take or leave” basis. Any unfair terms contained in the contract will be void (invalid/not legally binding), and the business will not be able to rely on them. Significant penalties for breach may be imposed as well as damages to injured consumers. See Related Articles on “**Consumers**”) for detailed information about the Australian Consumer Law and its effect on business transactions.

Important Note: This article is general in nature and is not intended to be a substitute for specific legal advice in relation to particular contracts or types of contracts. The requirements of contracts will differ according to what the commercial deal is. This is an outline of matters that virtually every contract will deal with.