

Contract law: an overview

What is a contract?

Pre-contractual negotiations, term sheets, heads of agreement or other forms of preliminary agreements are common features of modern negotiating and contracting practice. A preliminary agreement may be intended to operate as a binding contract or as the basis for the negotiations for the main contract.

To ensure pre-contractual negotiations are as successful as possible, three elements must be present. They are the following:

- Understand what exactly you want the contractual arrangement to achieve;
- Have an insight into what the other party will be looking to get out of the contract; and
- Be prepared.

Possible Liability

The law does not recognise an agreement to enter into a contract as a binding contract. This means generally there will be no contractual liability during negotiations or because of a failure to complete negotiations. However, this does not mean that you will not have any liability for what you do or say in pre-contractual negotiations. This is particularly the case if you subsequently enter into a contract, based on those negotiations.

Accordingly, it is important that you are wary of your pre-contractual behaviour.

You must be careful about all conduct, including verbal statements and non-verbal conduct, and not just written statements. Be wary of making statements that are generalised or unqualified promises. Also, be aware of making statements that are misleading.

If you make representations about the future you must have reasonable grounds for making that representation. Mere hope is not enough. Even silence can be misleading, if there is a reasonable expectation that the relevant fact will be disclosed.

Even if your conduct is not misleading or deceptive, your conduct can put you in a position where you are not able to resile (or move away)

from something that you said in pre-contractual negotiations. If you make a representation during negotiations, the other party relies on that statement and alters their position to their detriment as a result, you will then not be able to move away from the truthfulness or correctness of that statement (even if it is in fact not the case).

Your liability for the representations that you make in pre-contractual negotiations can be based on any of the following:

1. The contract that is subsequently entered into – where representations are made that induced the party to enter into the contract, and those representations are not true or were misleading and deceptive, the contract may be breached.
2. Negligence – if a party requests information or advice in the course of contractual negotiations and that advice or information is given, with the intention of inducing the party to enter into the contract, a duty of care under the law of negligence may arise. If that information or advice was given negligently (in that a reasonable person in the same position would not have given the advice) or recklessly without any care as to whether or not it in fact was true or correct, then the other party may have a cause of action for that negligent misrepresentation.
3. Misleading or deceptive conduct – Under the Australian Consumer Law (ACL), contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth), misleading or deceptive conduct is unlawful. Most broadly, s 18 of the ACL prohibits any statements in trade or commerce that are misleading or deceptive, or would be likely to mislead or deceive. Further, s 29 contains a list of prohibited false or misleading representations which includes false representations relating to the standard, quality, value or grade of goods or services; or the place of origin of a product. And s 33 makes it an offence to mislead consumers about the nature of products or services including the manufacturing process, the characteristics, and the suitability for their purpose or the quantity of any goods.

It is important to recognise that conduct (which is not limited to written or spoken statements) can be misleading or deceptive even if it is true. The prohibition is not on conduct that is false, but that which is misleading or deceptive. Something that is true (or true in certain circumstances) may still be misleading or deceptive.

Ways of avoiding or limiting liability

Some examples of where parties have attempted to avoid liability but have not been successful (based on the facts in those cases) include each of the following:

- Information given was provided by a third party (for example, an independent expert valuer or surveyor) and was merely 'passed on'. It was argued that the party passing on the information should not be liable for what that party did not compile.
- Information was given with a disclaimer attached and the person receiving the information was bound by the terms of the disclaimer.
- No damage was caused to the recipient of the information because the recipient did not rely upon it.

You can still be liable when passing on information provided by another party. And may have no responsibility for passing on information

in the following circumstances:

- Where it is made apparent that you are not the source of the information and you expressly or impliedly disclaim personal liability for what is conveyed by, for example, disclaiming personal knowledge.
- While believing the information, you expressly or impliedly, disclaim personal responsibility for what it conveys by, for example, disclaiming personal knowledge.
- While believing the information, ensure that your name is not associated with the information.

Disclaimers

To be effective, disclaimers must have the effect of erasing whatever is misleading or deceptive in the conduct. A disclaimer must modify the conduct or representation, and must be express, clear and brought to the attention of the party. Disclaimers can be difficult to enforce, and may not exclude liability for negligence.

The best way to ensure that you do not create a liability for things said or done during pre-contractual negotiations is to make sure that you do not over promise on what you can deliver and do not create any gap between the promises made in order to get a contract and what you are able to deliver.

This fact sheet is only for information purposes, and to assist you in understanding your legal rights and obligations in a general sense. It is not tailored to any particular fact, situation or specific requirements, and must not be relied on as legal advice.

This Fact Sheet was prepared independently by the Australian Centre for Intellectual Property in Agriculture (ACIPA).

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