

Contracts 101

Three fundamentals for you and your clients

CONTRACTS ARE SUCH A COMMON PART OF LEGAL PROCESS THAT EVERY EARLY CAREER LAWYER MUST KNOW THE BASICS. CRAIG TANZER PROVIDES GUIDANCE ON THREE KEY PITFALLS THAT YOU, AND YOUR CLIENTS, SHOULD BE AWARE OF. THIS ARTICLE IS BROUGHT TO YOU BY THE QLS EARLY CAREER LAWYERS COMMITTEE AND WAS FIRST PUBLISHED IN THE AUGUST 2014 EDITION OF PROCTOR.

As a building and construction lawyer, my advice to clients is often governed by the terms of a contract.

This is not unique to building and construction law. Lawyers practising in any civil law discipline will deal with contracts all the time. Unfortunately, clients are not always diligent about getting the fundamentals right, causing themselves an uphill battle when disputes arise.

Whether they realise it or not, contracts are a major part of what your client's business does day to day. Ensuring your client gets the basics right will go a long way towards improving your client's business and the prospects of success in any disputes which may arise.

Contracts are a fact of life in business. One of the most important skills your clients can learn is how to get a contract right. An important part of getting a contract right, is learning from the failures of others.

'We do business on a wink and a handshake'

Not anymore. The only way you can make sure your client is covered if things go awry is if everything is in writing. If deals are being done without at least a purchase order and an invoice, your client is heading for trouble. Your clients should look at each and every transaction in which a person supplies your client goods or services, or where your client supplies goods or services, and

make sure there are contracts for the business that is being done. Murphy's Law dictates that it will be your client's biggest transaction that comes back to bite them if there's no paper trail.

If your client has any ongoing transactions, ensure that you get contracts in place to govern the relationship. A properly drafted contract will protect your client's rights and give your client a leg to stand on if the other party decides to go off book.

It is just as important to make sure that, if the scope of the agreement changes, you vary the contract in writing. A common story I hear from clients is that "we had a fixed price contract, and then he asked me to do extras and said he would pay me by the metre/hour". Well unfortunately, that's not what the contract says, and while they may have done significantly more work than what was stipulated in the contract, those clients will have an uphill battle to get paid anything over the contract price.

'It's a standard form contract'

Standard form contracts are often produced by industry or government bodies for use within a particular industry. Standards Australia, for example, produces a number of contracts for various different transactions.

The tip here is that just because it is a 'standard form' contract, it does not mean it reflects the terms on which you intended to contract with the other party. It also does

not mean that the contract is not weighted in favour of one party or another. Industry bodies offer their contracts for sale to their members; so needless to say, those contracts are often weighted in favour of the members in order to sell more contracts.

Standard form contracts can still contain provisions which are not in your client's best interests. Read every clause and think about whether you are comfortable advising your client to enter into a contract containing it. If not, speak to the other party about removing or changing it.

'This contract is non-negotiable'

Every contract is negotiable. Your client is about to hand over their hard-earned cash. They have every right to negotiate the terms under which they do that.

I often recommend to clients that they amend certain clauses in their contracts, to which they respond, "I don't think we can". Of course you can. Read every page and make sure you are comfortable with the contract and advising your client about how it operates. If you are not happy with a particular clause, you should advise your client to negotiate to have it changed or removed.

These tips may seem obvious to lawyers, but teaching your clients to pay more attention to the fundamentals may save everyone some heartache eventually, when you are dealing with a dispute on their behalf. ●