

WPS

LAW

HEALTHY CONTRACT CHECKLIST

Note: this document should be read in conjunction with our article, 'The Golden Rules for Good Contracts' and is intended as a guide only. This does not constitute legal advice. The issues and questions set out are of a general nature and may not reflect your specific circumstances. There may be additional and important issues that should be covered by an agreement in your specific circumstances, depending on the nature of the arrangement you wish to enter into and the circumstances of the contracting parties. If you or your organisation has a legal problem you should obtain professional advice from a legal practitioner.

For a complimentary discussion about this checklist and your responses, please email this completed checklist to info@mpslaw.com.au.

Your name: _____

Your role: _____

Corporation: _____

Date: _____

Forming and signing the agreement	
Are all relevant parties listed as a party to the agreement?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Have you reviewed Divisions 201, 246 and 508 Corporations Aboriginal and Torres Strait Islander Act 2006 (Cth)? <i>If yes, consider rights of third party to enforce. Risks are involved if the third party's rights are not expressly limited; consider limiting contractual rights which third parties can enforce.</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No
Terms generally	
Are all terms with technical or special meaning defined?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Are there any terms or phrases that carry both a plain ordinary meaning and a special technical / scientific meaning that require clarification as to which applies?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Does the agreement have 'rules' for interpretation that identify what it means for interpretation when words such as "including" are used to clarify meaning?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Is there potential for any ambiguity in the meaning of particular words or phrases within a clause? <i>If so, consider which contracting party is most likely to benefit from uncertainty in how the clause is constructed. If there is ambiguity, consider whether meaning or context may be given by recitals to the contract.</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No
If there are words, phrases or requirements that will or may take meaning from external documents (government policy, regulations, guidelines, legislation), does the agreement confirm if references to those documents are fixed (to the version as at the date of the agreement)? <i>Generally, the agreement is interpreted as at the date it was made and words are given the meaning at that date.</i>	<input type="checkbox"/> Yes <input type="checkbox"/> No

Relationship between the parties (services)	
<p>Does the agreement specify that it is the intention of the parties that no employment relationship exists?</p> <p><i>Note: although a contract may expressly exclude an employment relationship, the substance of the relationship between the parties must be considered. Seek professional advice if you are unsure.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
Exclusivity, restraint of trade, non-compete	
<p>Does the agreement contain restrictions to prevent a party from working for rivals, poaching clients or engaging in a competing business?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>If yes, is the clause reasonable and proportionate to what is necessary to protect legitimate business interests?</p> <p><i>For example, a restraint of trade clause may be unenforceable if the restrained area covers all of Australia or the period of restraint is excessively long.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
Assignment and sub-contracting	
<p>Does the agreement specify that it is the intention of the parties that no employment relationship exists?</p> <p><i>Note: although a contract may expressly exclude an employment relationship, the substance of the relationship between the parties must be considered. Seek professional advice if you are unsure.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
Payment	
<p>If payments will be made under the agreement, does the agreement specify if interest is payable for late payments or disputes about payments?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No

<p>If the agreement relates to goods, does the agreement specify if payment occurs on delivery or by a specified time?</p> <p><i>Where payments are not made under the agreement, confirm that there is 'consideration' (something of value) that is exchanged in return for receiving the benefit of goods, services or other advantage to be bestowed. Where there is no 'consideration', consider forming the arrangement as a deed.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Termination</p>	
<p>Does the contract contain a clause that will allow unilateral termination of the contract, or will a breach be required to end the contract?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Are there ethical, cultural or other values or standards which are important in the contracting relationship such that if they are breached, the agreement should come to an end?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Renewal</p>	
<p>Does the contract contain arrangements for automatic renewal?</p> <p><i>If yes, confirm if notice is provided prior to renewal. Consider how termination will be handled for the renewal.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Cancellation (services)</p>	
<p>Are there conditions in the contract which allows the providing party to suspend or cancel a service?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>If yes, is the ability to suspend / cancel conditional on something happening (breach by other party, supervening event etc.)?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
<p>If yes, are those triggering conditions reasonable?</p> <p><i>Does the triggering condition impact on the substance of what was agreed?</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A

Time	
Is time of the essence? Does performance and/or payment need to be completed as a matter of priority?	<input type="checkbox"/> Yes <input type="checkbox"/> No
If time is essential, does the agreement clarify the consequences of a failure to comply with an agreed timeframe?	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> N/A
Delivery (goods)	
<p>If the timeframe for receiving the goods is essential, does the agreement specify that time is of the essence for delivery and the purchaser can recover loss suffered as a result?</p> <p><i>Remember: non-delivery within a specified timeframe is a real risk; if damages are available for non-delivery, ensure that the quantum is capped.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
Force majeure	
<p>Does the agreement indicate who is liable / who will bear the loss if a contract cannot be performed due to an unforeseeable event beyond the reasonable control of a party?</p> <p><i>Things to consider: Australian Consumer Law protects consumers and small business from unfair contract terms.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
Indemnity and liability	
Does the agreement include a clause to prevent the amount of liability a party has?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Are there any monetary limits in the agreement that restrict the amount of damages or liability a party has?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Is there a requirement for the party engaged (the contractor) to effect and maintain insurance?	<input type="checkbox"/> Yes <input type="checkbox"/> No

<p>Are there any terms which purport to create obligations jointly and severally? Or which refer to 'parties' or a group of persons collectively and in doing so, extend rights and obligations to those parties?</p> <p><i>If yes, to be enforceable the rights and obligations imposed must be consistent with liability of those parties under operative clauses of the agreement.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Warranties</p>	
<p>Does the agreement include clauses that confirm or disclaim warranties?</p> <p><i>If warranties are excluded, consider the risks / benefits of broad exclusion of all warranties. If the agreement is a consumer contract, remember that warranties under the Australian Consumer Law cannot be removed by contract.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Does the contract provide that there are no third party intellectual property rights in breach?</p> <p><i>This is necessary to prevent third-party claimants from claiming infringement.</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No
<p>Insurance</p>	
<p>If insurance is required by either or both parties</p> <ul style="list-style-type: none"> • Does the agreement specify which insurances are required and require that the other party must notify of any cancellations or non-renewal of any relevant insurance policies? • Does the agreement confirm whether each party bears their own costs or that costs are to be shared? • If the agreement permits the use of subcontractors, will the requirements for insurance extend to subcontractors? 	<input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Yes <input type="checkbox"/> No

How can we help?

Let's talk about your needs

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