

Article Information

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Webinar Q&As: 2025 Clause & Effect - Contract Law Series | Drafting Techniques

Piper Alderman provides answers in response to the questions received during our 2025 Clause and Effect - Contract Law Series | Drafting Techniques

Question: In terms of the size of a small business, and the definition of it under the Unfair Contract Terms regime, does it matter if the small business is a subsidiary of a larger corporate group?

Under Australian law, the definition of a small business for the purposes of the Unfair Contract Terms (UCT) regime does not change if the small business is a subsidiary of a larger corporate group. The UCT regime applies to a contract where one of the businesses employs fewer than 100 people or has an annual turnover of less than \$10million for the last income year. This definition focuses on the individual business's employment and turnover metrics, regardless of its affiliation with a larger corporate entity. Therefore, even if a small business is part of a larger corporate group, it can still be considered a small business under the UCT regime if it meets one of these criteria.

Question: Is there a risk that long clauses have just been replaced by long definitions / cross referencing other clauses?

Yes, there is a risk that what were once long clauses in agreements have been replaced by long definitions or extensive cross-referencing to other clauses. This can occur when drafters attempt to simplify the main body of the contract by moving detailed provisions to definitions or other sections. While this approach may make the contract appear more concise, it can lead to complexity and confusion, as parties must constantly refer to other parts of the document to understand the full meaning of the terms. This can undermine the clarity and readability of the contract, potentially leading to misunderstandings and disputes. Therefore, it is important to strike a balance between brevity and clarity when drafting legal contracts.

Question: How are parties bound to Purchase Order T&Cs in the absence of formal execution?

Parties can be bound to the terms and conditions (T&Cs) of a Purchase Order (PO) even in the absence of formal execution. This binding effect can occur through conduct that evidences acceptance of the PO, such as the supplier commencing work or delivering goods in accordance with the PO. Additionally, if the PO explicitly states that acceptance of the order constitutes agreement to the T&Cs, and the supplier proceeds without objection, the T&Cs can be considered binding. Therefore, formal execution is not always necessary for the T&Cs of a PO to be enforceable.

Question: How would you differentiate 'reasonable endeavours' and 'best endeavours'?

In Australian legal contract drafting, 'reasonable endeavours' and 'best endeavours' represent different levels of effort required by a party to discharge its contractual obligation. 'Reasonable endeavours' requires that a party take steps that are reasonable in the circumstances, balancing the obligation with their own commercial interests. This standard does not require the party to sacrifice their own interests or incur significant costs. On the other hand, 'best endeavours' imposes a higher standard, requiring the party to take all available steps to achieve the desired outcome, even if it involves significant effort and cost. Essentially, 'best endeavours' demands a more exhaustive and committed effort compared to 'reasonable endeavours'.

Question: For a contract between Australia and overseas, do you have any tips for the dispute/agreed jurisdiction clause?

When drafting a dispute/agreed jurisdiction clause for a contract between an Australian party and an overseas party, it is important to clearly specify the jurisdiction that will govern any disputes arising under the contract. For the Australian party, it would be optimal for the agreement to be governed under Australian law and for the parties to submit to the jurisdiction of the courts of Australia. However, this is not always agreed to by the counterparty. Consider the following tips:

1. **Mutual agreement:** Ensure that both parties mutually agree on the chosen jurisdiction. This can be a neutral jurisdiction or the home jurisdiction of one of the parties.
2. **Clarity:** Clearly state the chosen jurisdiction in the contract to avoid any misunderstandings.
3. **Legal advice:** Seek legal advice to understand the implications of the chosen jurisdiction, including enforcement of judgments and any potential legal advantages or disadvantages.
4. **Arbitration:** Consider including an arbitration clause as an alternative to litigation, specifying the arbitration rules and the location of the arbitration.

By addressing these points, you can create a more robust and clear dispute/agreed jurisdiction clause in your contract.

Question: Should definitions go in the front or the back of the document? Or does it depend on the type of agreement?

There is no right or wrong, but definitions are there to help parties understand the document. At times, a reader will need to cross reference a definition with the clause and so making the definitions easy to find will help. Most documents have definitions at the front of the document and following that convention will make your definitions easier to find.

Question: What about when terms and conditions are referred to in a quote or Purchase Order without a direct link to a website where those terms are contained?

In Australian contract law, if terms and conditions (T&Cs) are referred to in a quote or Purchase Order (PO) without a direct link to a website where those terms are contained, the enforceability of those T&Cs can be questionable. For the T&Cs to be binding, the party must have had a reasonable opportunity to review them before accepting the contract. If the T&Cs are not easily accessible, it may be argued that the party did not have adequate notice of the terms, potentially rendering them unenforceable. To avoid such issues, it is advisable to provide a direct link to the T&Cs or include the full text within the document itself. This ensures that all parties are fully aware of and can review the terms before proceeding.

Question: Can you provide tips to overcome UCT risks of the Australian Consumer Law (ACL) when drafting exclusion clauses?

When drafting exclusion clauses in consumer and small business contracts, it is crucial to ensure that the clauses are clear, unambiguous, and fair. Here are some tips:

1. **Clarity and precision:** Clearly define the scope and limitations of the exclusion clause to avoid any ambiguity. Ensure that the language used is straightforward and easily understandable. Make sure it clearly extends as far as intended.
2. **Fairness:** Ensure that the exclusion clause is fair and reasonable. Unfair terms may be deemed void under the ACL, so it is important to balance the interests of both parties. Also, if possible, structure the clause so that only unfair portions are deleted and the balance of the exclusion remains.
3. **Transparency:** Make sure that the exclusion clause is prominently displayed and not hidden in fine print. The clause should be brought to the attention of the other party before the contract is agreed upon.
4. **Compliance with statutory requirements:** Ensure that the exclusion clause complies with all relevant statutory requirements and does not attempt to exclude liability for conduct that is prohibited by law.
5. **Context:** Consider including some context to justify the exclusion.

By following these tips, you can draft exclusion clauses that are more likely to withstand scrutiny under the Unfair Contract Terms regime of the ACL.

Question: Could you please share tips on how to overcome confirmation bias?

It is more correct to talk about avoiding confirmation bias. It is the tendency to see evidence as confirming your existing beliefs. When drafting, it is the tendency to see the words you wrote as saying what you wanted to say:

1. **Be aware:** Ask yourself, does this say what I want and only what I want to say? Am I sure it is clear, can I see a different interpretation.
2. **Get a second opinion.**

Question: Do you use AI when drafting, what are some traps?

I do not use AI when drafting, but it has been interesting to watch progress of the technology and it is bound to be a great productivity tool.

First thing to remember is that it is an algorithm and not a brain doing the work.

AI famously makes some things up. That won't be such an issue for drafting agreements. I think the best tip would be something that applies for traditional precedents – do not follow this precedent slavishly. Review the work, check it against precedents and be careful.