

CONTRACT

INTRODUCTORY

COURSE

Attendees Notes

Prepared and Presented by: University Legal Office
Australian National University

Introduction

This is an introductory training session on contracts to assist staff in the review, negotiation and recommendation for signing of agreements, contracts and derivatives thereof on behalf of the Australian National University (“ANU”).

It is designed to provide an overview of the legal aspects of contracts; to assist you to understand the makeup and construction of legal arrangements; and provide an explanation of legal requirements, terminology, and some common clauses such as warranties, insurance, indemnification, termination, and force majeure.

It is an interactive session and your participation and comment are welcome. The session will involve some simple exercises to reinforce the issues explained.

Finally, it is hoped you will go away from the session armed with knowledge and understanding for dealing with contracts and agreements at the ANU.

The session is delivered over a three hour period, which includes time for questions.

Your feedback is welcomed in assisting the legal office to develop this course to better meet the needs of staff.

Comments can be sent via e-mail to **Legal.Office@anu.edu.au**

What is a Contract?

A contract is an agreement made between two or more parties whereby legal obligations are created which the law will generally enforce.

Contracts are about promises, and rights and obligations

<p style="text-align: center;">REQUIREMENTS FOR A LEGALLY ENFORCEABLE CONTRACT</p>

1. Intention to create legal relations – formation.

2. Agreement – Offer and Acceptance.

3. Consideration – a form of or valuable.

4. Legal capacity.

5. Genuine consent.

6. Legality of objects – ie. not fraudulent or an illegal activity.

Different Arrangements – Are They Contracts?

1. **Tenders – EoIs/RFPs/RFTs**
2. **Agreement or contract?**
3. **Correspondence – Letters of Offer, Letters of Intent, e-mails or letters generally.**
4. **Purchase Orders – additional terms or new terms.**
5. **Licence, license and lease.**
6. **Alliances, Collaborations, and Partnering**
7. **Deeds, Non-Disclosure, Hire, Consultancy etc.**
8. **Memorandum of Understanding (‘MoU’)**

What is it?

Why use it?

- No legal agreement possible
- Negotiating tool
- Advance relationships
- International associations

What to watch out for?

- Rules of interpretation: substance not form
- Binding agreement dressed up as an MOU, eg termination clauses

Staff indicating that there is no need to review “just an MOU”

9. Oral discussions/arrangements.

Basic Terms and Conditions

All legal arrangements should contain the basic information. These include:

- A.** The correct legal names of the parties. That is:
- At least 2 “persons”;
 - Institution, company or individual
 - ABN/ACN
 - Check for legal title – correct identification is important
 - Handy sites to check legal title: www.abr.business.gov.au and/or “www.asic.gov.au/”

THE AUSTRALIAN NATIONAL UNIVERSITY, ABN 52 234 063 906, an institution pursuant to the *Australian National University Act 1991 (Cth)* through and limited to the *{insert name of college/faculty/school/department/centre}*, of Acton, in the Australian Capital Territory, 0200, Australia (‘the ANU’).

- B.** The dates (start and finish) or term of the agreement.
- C.** The responsibilities and obligations of the parties respectively.
- D.** The terms of payment or other consideration.
- E.** The procedure for termination of the agreement.
- F.** A signature line for the authorised delegate of ANU to sign.

Delegations: Who has the delegation for this type of agreement? (Be familiar with delegations policy).

Why should a delegate sign?

Does the person with the appropriate delegation agree to execute the document? A briefing or explanation may be required why they should sign.

Execution Block (non-seal)

SIGNED for and on behalf of) THE AUSTRALIAN NATIONAL UNIVERSITY) By its duly appointed authorised officer)) Print name) Signature) Title/position) Date) in the presence of:)) Signature of witness Name of witness
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What to look for in a Contract

Basic Questions

These are questions for you to ask yourself as you review a contract before sending it on:

1. Does it contain all elements of the deal?

Does the arrangement reflect that of the ANU and/or your understanding of what is wanted in the contract?

2. Do the language and scope of the document reflect what was negotiated?

3. Does the contract represent a good deal for the University and area seeking to make the deal?

4. Does the contract meet ANU requirements?

- *University wide agreement:* Can the area within the University ensure compliance with the contract? Not only involvement in your area but other areas.

5. Can you negotiate better terms?

Have a go

6. Consider issues, such as:

Indemnification/ hold harmless

- ANU may indemnify but not 'hold harmless'
- Mutual indemnities
- Avoid giving an ANU warranty

We like the other side to indemnify!

For example:

Indemnity

- a. *Other party will at all times indemnify (and hold harmless) the ANU, its officers, employees and agents (in this clause referred to as “those indemnified”) from and against any loss (including legal costs and expenses on a solicitor / own client basis), or liability, reasonably incurred or suffered by any of those indemnified arising from any claim, suit, demand, action or proceeding by any person against any of those indemnified where such loss or liability was caused by any wilful, unlawful or negligent act or omission of the other party, its employees, agents or subcontractors in connection with the contract.*

(note: don't include this part if 'hold harmless' used above)

- b. *Other party's liability to indemnify the ANU under clause (a) will be reduced proportionally to the extent that any act or omission of the ANU or its employees or agents contributed to the loss or liability.*
- c. The indemnity referred to in clause (a) will survive the expiration or termination of the contract.

❑ Conflicts of Interest

Question any connections within University or between ANU employees involved and the other parties. See the *Conflict of Interest and Commitment Policy*.

Question if this contract will create personal financial benefit for an ANU employee or family member. Is it a consulting contract? Does it satisfy the University policy on consultancies? Is the transactions arm's length for tax purposes?

Potential Conflicts

- Contracts with firms in which employees has financial interest (direct or indirect)
- Contracts with firms in which employee's relative has financial interest (direct or indirect)
- Favouring people with whom an employee has a close personal relationship eg using as consultant on grant project

❑ Intellectual Property

- What is it?

Intellectual Property Rights” includes all copyright, all rights in relation to inventions (including patent rights), plant varieties, registered and unregistered trademarks (including service marks), registered designs, and circuit layouts, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

- Who owns it?
 - ANU?
 - Staff?
 - Students?
 - Visitors?

Be familiar with the ANU IP policy

- Why is it important?
 - It is all we have

- How can you deal with it?
 - Assignment (note ‘moral rights’)
 - Licence - exclusive or non-exclusive – which areas/country or territories.

□ Trade Practices Act/ Fair Trading Act

- Representations/misleading conduct
- What is it?
 - Anti-competitive conduct; or
 - Misrepresentation.

Example: in Course materials, qualifications of staff or representation of qualifications, accreditation of course, immigration in relation to students/staff from overseas and what University offers

□ Subcontractors

Why does it matter?

Some issues to consider:

- audit requirements
- Performance is measured against the objectives of the ANU contract
- Has responsibility to comply with applicable ANU contract requirements
- Assumes the risk if performance is more costly or time consuming than expected.
- May be responsible for wages/salary if contractor defaults!

OTHER ISSUES

A. Amendments and modifications to be in writing

Any changes or amendments to a contract **must** be in writing signed by all the parties.

Sample clause:

Entire Agreement

This Contract constitutes the entire agreement between the parties and supersedes all communications, negotiations, arrangements and agreements, whether oral or written, between the parties with respect to the subject matter of this Contract.

No agreement or understanding varying or extending this Contract shall be legally binding upon either party unless in writing and signed by both parties.

B. Governing Law:

Where will the contract be performed? Does it matter? Why? Overseas arrangements can be a problem.

Sample clause:

Jurisdiction

This Contract shall be governed by and take effect and be construed in accordance with the laws in force in the Australian Capital Territory. The parties agree to submit to and accept the jurisdiction of the courts in the Australian Capital Territory and each party irrevocably waives any objection it may now or in the future have to the venue in any action or proceedings and any claim it may now or in the future have to the venue in any action or proceedings and any claim it may now or in the future have that any such action or proceedings have been brought in an inconvenient forum.

C. Insurance

If they want insurance from us:

- we go through Insurance Clerk.
- little flexibility.

- No:
 - Certificate
 - Pre-cancellation notice
 - Additional name on insurance
 - Possibly able to “note interest of party” on policy

Remember: If there are issues, check with ANU Insurance Clerk.

D. Warranty provisions

- When we buy, we don’t want to waive warranties
- When we sell, we may not offer warranties

- Purchase/sale of goods—implied warranties (trade practices/fair trading)
- Know you have them; watch out for attempted waiver

E. Confidentiality clauses

- Do we want maximum confidentiality?
- Do we want to give maximum confidentiality?
- Cwth/ACT statutory disclosure provisions.

Exception: to the extent provided by law

- Freedom of Information
- Privacy
- Common law duties of confidentiality

Other Exceptions:

- we already know it
- we find it out elsewhere
- we need to tell to defend ourselves

NEGOTIATING Tips

- Keep focussed and don't be distracted. Try and stick to what you intended.
- Consider what is needed to be undertaken and ensure it is covered in the contract.
- Maintain your position but be prepared to give a little.
- Have a fall back or alternate position that is acceptable.
- Consider an 'out' – termination.
- Fair dealing and other legislative impacts such as Trade Practices Act.
- Ask questions if you do not understand.
- Avoid drifting into contract while negotiating.
- Seek help if necessary.
- Maintain composure.
- Don't be afraid to walk away if necessary.

SUMMARY

- Read the document – if you do not understand it, you cannot administer or manage it.
- Identify the risk and exposure for the University.
- Recognise and fully understand the obligations, activities & requirements of parties.
- Understand the warranties, liquidated damages clauses, exclusions and limitations of liability, termination and indemnities.
- Negotiate – a better position may be possible.
- Execute – properly and according to delegation authority of Council.
- Formalise changes/variations.
- Administer/Manage – don't forget it.
- Termination/expiry.
- Use legal remedies as a last resort.
- Maintain goodwill – look to future.
- Don't allow everything to turn to custard.

REMEMBER

**IF YOU ARE UNCERTAIN OR HAVING DOUBTS THEN PLEASE GET
LEGAL ADVICE – EARLY.**

Please call the Legal Office on 5-8489 or 5-4394 for assistance or e-mail
“Legal.Office@anu.edu.au”.

THANK YOU FOR YOUR ATTENDANCE.

Your feedback would be welcome.

Contract Checklist - Things to Think About in a Contract

- ❑ Termination/Expiry
- ❑ Indemnity / Insurance
- ❑ Intellectual Property / Moral Rights / Ownership
- ❑ Confidentiality
- ❑ Publishing Rights
- ❑ GST / tax issues
- ❑ Commercialisation
- ❑ Dispute Resolution
- ❑ Amendments/Variations
- ❑ Independent Legal Advice
- ❑ Exchange Rate/Transfer of Money
- ❑ Risk / Exposure / Key Performance Indicators (KPIs)
- ❑ Medical Cover – Overseas
- ❑ Delegation/Authorisation
- ❑ Law – International/Local/Interstate
- ❑ Performance / Indicators / Quality
- ❑ Jurisdiction – Local or Overseas
- ❑ Privacy
 - buying/selling business – NPPs / Due Dilligence
 - flow down to subcontractors / grants / consultancy – NPPs / IPPs
- ❑ Due diligence – review and report

Education clause - EOSS

- Effective date / term
- Contra Proferentem
- Conflict of interest
- Negation of employment / representation
- Anti-terrorism regulations – pass obligations to sub-contractors
- Indemnity insurance for ANU’s negligence
- Clearly define acceptance testing & criteria
- Performance & service measures & levels
- Functionality & business outcomes
- Duty of good faith
- Trade Practices Act (TPA Act) – ‘carrying on business’
- Liquidated damages
- Force Majeure
- Financial services – giving advice – licence requirements
- Superannuation
- CAC Act – notifications.