

## IT BYTES

### ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

# IS A VARIATION VALID IF NO NEW MONETARY CONSIDERATION IS PROVIDED?



## WHEN DOES THIS QUESTION TEND TO ARISE?

As with all things in life, contracts are subject to change. Typically where a contract is varied there will be new obligations for each party - for example, if a procurement contract for the supply of widgets is varied to increase the number of widgets to be supplied, then the supplier will be obliged to produce the extra widgets and the customer will be obliged to pay for them. However, occasionally a contract will be varied to only affect the obligations of one party - for example, if the parties to the procurement contract just mentioned were to agree for the widgets to be delivered by an earlier date but without any change to the number of widgets or to the payment required from the customer. In those cases, is the variation still binding on both parties?

## WHAT DOES THE LAW SAY?

For a variation to be contractually binding, the variation itself must satisfy all of the legal requirements to form a valid contract, including through the provision of valuable consideration by each party.

As a general rule, past consideration is not sufficient consideration and traditionally, a promise to perform an existing obligation will not be good consideration (see *Wigan v Edwards* (1973) 47 ALJR 586 at 594). This means that the performance of existing contractual obligations under the original contract will not be viewed as sufficient consideration for any subsequent variation - that is, fresh consideration in addition to that already owing will need to be provided for the variation to be binding.

However, Australian courts have found this rule not to apply if the promisor receives a 'practical benefit' (or avoids a disbenefit) as a consequence of the variation. A 'practical benefit' may arise if the performance of existing contractual obligations avoids problems associated with non-performance (e.g. inconvenience) and the benefit of this exceeds the detriment likely suffered by non-performance. For example, in the case of *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, an agreement to reduce the tenant's rent was considered binding as the consideration received by the landlord was the 'practical benefit' of having a continuing tenancy, as opposed to having a vacant property and having to find a new tenant. This approach in interpreting any 'practical benefit' as consideration was cited with approval by the Full Federal Court in the more recent case of *Hill v Forteng Pty Ltd* [2019] FCAFC 105, where it was found that a variation to a director's employment contract to reduce his pay was supported by sufficient consideration as the director received the 'practical benefit' of retaining his job in circumstances where the company that employed him was steering towards insolvency.

It is also worth noting that consideration does not need to be monetary and can take many forms. For example, the abandonment of an existing legal right, the granting of new benefits or the assumption of additional obligations in the event of a breach could all constitute sufficient consideration. Accordingly, a lack of additional payment is not of itself an indicator that there is a lack of valuable consideration.

Finally, though not a true substitute for consideration, the doctrine of promissory estoppel may operate to prevent a promisor from relying on the absence of consideration to avoid making good their promise where it would be inequitable for them to do so. If a party makes a promise in a purported variation that the other party then relies upon to their detriment, the promisor may be estopped from resiling from their promise, even if there was no valuable consideration provided by the promisee in return.



## WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

While there may be ways around a lack of valuable consideration, it is best to avoid being in this position to begin with. Greatest certainty can be achieved by ensuring that every variation is supported by valuable consideration from each party. For example, if there is any doubt as to the consideration being provided, one way to eliminate doubt is to agree on some token consideration, such as the payment of a nominal amount by the benefitting party.

Another option where there is doubt as to the provision of valuable consideration, is to execute the variation as a deed rather than as an agreement as deeds can be legally binding without consideration. This may require some additional execution formalities to be observed, and you should take care to check that a valid method of execution is being followed in order to ensure that the deed is valid. With any variation, whether taking effect as an agreement or a deed, it is also important to ensure that any change control processes specified in the original agreement are followed.

## KEY CONTACTS



### MICHAEL SWINSON

PARTNER  
MELBOURNE

TEL +61 3 9643 4266  
MOB +61 488 040 000  
EMAIL michael.swinson@au.kwm.com



### BRYONY EVANS

PARTNER  
SYDNEY

TEL +61 2 9296 2565  
MOB +61 428 610 023  
EMAIL bryony.evans@au.kwm.com



### KIRSTEN BOWE

PARTNER  
BRISBANE

TEL +61 7 3244 8206  
MOB +61 409 460 861  
EMAIL kirsten.bowe@au.kwm.com

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