

IT BYTES

ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

WHAT EFFECT DO THE WORDS ‘FOR THE AVOIDANCE OF DOUBT’ OR ‘WITHOUT LIMITATION’ HAVE WHEN USED IN AN IT CONTRACT?



WHEN DOES THIS QUESTION TEND TO ARISE?

The language used in drafting IT contracts should be simple, clear and unambiguous. Sometimes use of common phrases can assist in this endeavour. However, other times this can be anachronistic and less helpful. In this IT Byte we will discuss two such phrases that will be familiar to any commercial lawyer: ‘for the avoidance of doubt’ and ‘without limitation’.

These phrases are typically used when parties want to clarify the scope of a particular provision or obligation in a contract they are negotiating. Proponents of the plain English approach may argue that these phrases are redundant; however, both phrases are still commonly used in commercial contracts.

The phrase ‘for the avoidance of doubt’ (or alternatives such as ‘for the sake of clarity’ or ‘to avoid doubt’) often arises where there is otherwise some ambiguity in the associated clause of the contract. For example, this phrase may appear when parties want to further clarify a contractual objective by making it more explicit, or where a party considers the clause could contradict or cut across another provision of the contract and wishes to make clear that is not the intention. However, it does not operate as a silver bullet, and residual uncertainty may still remain unless the actual ambiguity or contradiction in the other provisions is directly resolved.

The phrase ‘without limitation’ is often used where a party wishes to make clear that examples provided in the contract are not exhaustive. For example, this may be the case where the parties have drafted a specific list of items that is intended to be inclusive rather than exclusive. The words ‘without limitation’ in this context are usually intended to signify that other unspecified items may still be relevant and covered by the relevant contractual obligation, even though not expressly included in the list.

WHAT DOES THE LAW SAY?

General principles of contractual interpretation

All contractual terms are subject to common law principles of contractual interpretation that are widely applicable across Australian courts. The overarching principles that remain relevant to Australian courts include the following:

- the court should determine what the parties agreed upon based on the ordinary meaning of the words in the relevant clause; and
- the court should ascertain the parties’ objective intentions rather than their subjective beliefs; and
- the court should interpret the meaning of the terms of the commercial contract according to how a reasonable businessperson would understand them.

Finally, the practice of interpretation requires consideration not only of the text itself, but also of the surrounding circumstances known to the contracting parties, and the purpose and object of the contract in question.

For the avoidance of doubt

The phrase ‘for the avoidance of doubt’ does not have a definitive judicial interpretation. It has not developed an established legal meaning in contract other than the plain meaning of the words. The general approach of courts has been to regard this phrase as adding little or nothing substantive.

If, despite the use of this phrase, some ambiguity remains in the contract, the ambiguity will be resolved through the general principles of contractual interpretation, as noted above. If the relevant clause is related to an exclusion or limitation, the court may also apply the *contra proferentem* rule, a rule of last resort, to interpret the ambiguity against the party who drafted the term for their own benefit. Therefore, it is best to avoid the use of this phrase unless it can definitively resolve ambiguity. Indeed, arguably, the fact that the parties have resorted to words such as ‘for the avoidance of doubt’ suggests that they recognise there would otherwise be scope for doubt. In this case, the better approach may well be to simply amend the other provisions of the contract to remove that doubt. After all, from one perspective the entire written contract is ‘for the avoidance of doubt’!

Without limitation

In comparison, this phrase has an established legal use and tradition in Australian courts. In *Inghams Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196, the court expressed that the use of the phrase ‘without limitation’ conveys that the listed matters are ‘not intended either to restrict the matters which would otherwise fall within the language of the proceeding description, or to narrow the construction of that language by reason of any genus of matters listed.’ The phrase can avoid uncertainty or ambiguity by expressly including particular borderline cases.

The wording ‘without limitation’ is often used by drafters to overcome difficulties with the operation of the *eiusdem generis* rule of construction when interpreting general terms in a list. In *Cody v J H Nelson Pty Ltd* [1947] HCA 17; (1947) 74 CLR 629, which discussed this principle, it was established that ‘where there are general words following particular or specific words [of a class or category (a genus)], the general words should be confined to things of the same kind as those specified’. Though the *eiusdem generis* principle is one of legal construction, not a rule of law, drafters must consider the way the contract would be interpreted in court. The use of the phrase ‘without limitation’ allows parties to clarify otherwise ambiguous language and expressly exclude the operation of this principle if the parties are seeking to draft a non-exhaustive list.

However, there are limits to what scenarios are captured by the scope of this phrase, and it is not a replacement for identifying the necessary elements in a list. In *Australian Securities and Investments Commission (ASIC) v Bendigo and Adelaide Bank Limited* [2020] FCA 716, Gleeson J expressed that setting out a multiplicity of examples ‘without limitation’ did not express the breadth of the borrowers’ obligation in ‘reasonably plain terms’. Therefore, drafters are still encouraged to consider whether the list articulates the key subject matter or scenarios that are relevant for the contracting parties.



WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

The primary aim of any contract is to ensure clarity and certainty for the parties involved in the transaction. Contract drafters should determine whether incorporating phrases such as ‘for the avoidance of doubt’ or ‘without limitation’ assists to clarify ambiguity in contract terms, or rather risks exacerbating the ambiguity. Broadly, the phrase ‘for the avoidance of doubt’ will not of itself fix an unclear preceding provision. Indeed, in a worst case it may simply add further confusion. In contrast, when ‘without limitation’ is used before a list of inclusions or exclusions, it can effectively indicate that this list is non-exhaustive. The table below further illustrates these implications for your contract.

	‘FOR THE AVOIDANCE OF DOUBT’	‘WITHOUT LIMITATION’
When should you use this phrase?	This phrase may be used in circumstances where the parties believe it necessary to clarify their position on a particular aspect of the contract and wish to indicate how that certainty should be resolved. However, always consider whether the issue could be better resolved by rewording the other provision to eliminate the ambiguity.	This phrase may be used where examples set out in a provision are not intended to be an exhaustive list.
When should you avoid use of this phrase?	This phrase should be avoided where a provision is simply repeating or rephrasing previously another provision in the contract. This may indicate that the intentions of the contracting parties are unclear, and the better approach will usually be to rephrase the relevant clauses into one clear provision.	This phrase should be avoided where there is an intention to cover something that would not otherwise broadly fall within the scope of the specified examples. In other words, it should not be used as a substitute for clearly articulating the scope of the relevant contractual provision. If a reader would not objectively expect for something to be covered, it is far better to mention it explicitly rather than rely on general phrases such as ‘without limitation’ to somehow import it into the contract.

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