

IT BYTES

ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

DO CONTRACT RECITALS HAVE ANY LEGAL EFFECT?



WHEN DOES THIS QUESTION TEND TO ARISE?

Recitals are commonly used to provide context for a written contract. For example, recitals may explain the background to the relationship that the parties are entering into or include a statement about what the contract is intended to achieve. But what effect do the recitals have if something goes wrong and the parties disagree about the meaning of the contract?

WHAT DOES THE LAW SAY?

The extent to which recitals can be referred to or relied upon if a dispute relating to the interpretation of a contract term was neatly summarised by *Campbell JA in Franklins Pty Ltd v Metcash Trading Ltd* [2009] NSWCA 407 [380]:

- recitals can aid in the interpretation of an operative provision;
- although recitals can assist in the construction of a contract, they are not themselves operative terms;
- recitals can be used to determine the meaning of an ambiguous operative provision. However, recitals cannot be used to cut down operative words that are clear and unambiguous, even if the recital is also clear and unambiguous and is contrary to the operative provision;
- recitals can provide a means of proving background facts that are themselves legitimate aids to interpreting contract provisions;¹ and
- recitals which state that a party will carry out a particular action can be used to support an implied term in the agreement, but not recitals which merely set out the objects of the parties.

¹ Where recitals include factual statements, they can also be used as grounds for an estoppel claim to prevent a party from denying those facts.



WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

Recitals should be drafted carefully, given they can influence how the contract will be construed if there is a dispute. However, be wary of over-relying on recitals, because they cannot override a clear contradictory provision in the operative terms of the contract. For that reason, it is always important to check that the terms of the contract accurately capture the intent expressed in the recitals. Ultimately, recitals are not an essential part of the contract and can be dispensed with altogether if they do not serve a useful purpose, such as where the background and context for the contract are clear and do not require exposition.

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