

Dispute Resolution Update

## Top 10 tips for settlement documents

When parties to a dispute reach a compromise and a resolution of the dispute before it is determined by a court, it is prudent to reduce the terms of the compromise and resolution to writing in order to obtain both certainty and finality. Although the concept of settling a dispute is relatively straightforward, the task of documenting the settlement can be complex.

This article discusses some of our tips for drafting settlement documents. Although the focus is on settlement of court proceedings, many of the issues discussed below are relevant where a dispute is resolved by other methods, such as arbitration or expert determination.

### **1. Form of the document and Recitals**

The terms of the settlement should be documented in a deed or an agreement. A deed binds a party undertaking an obligation irrespective of whether the person to whom the obligation is owed has provided consideration. An agreement, on the other hand, will not be binding unless there is consideration. Normally, any settlement will by definition involve consideration.

Parties should include Recitals in the settlement document, setting out the context and background of the dispute. If legal proceedings have commenced, it is common for the Recitals to include a statement to the effect that the defendant denies liability in the proceedings, and without making any admissions, the parties agree to settle the proceedings on the terms set out in the settlement document.

### **2. How wide are the releases and indemnities?**

Settlements usually involve at least a unilateral release by one party of claims against another. The parties should consider whether the releases are to be unilateral or mutual, and how the scope of the release is to be defined. For example, does the release affect only existing claims made in proceedings, or is it a broader release extending to present and future claims relating to the same subject matter?

It may be necessary for an indemnity to be given where there is a liability which has not been released. This could arise where for example, there is potential liability to a person who is not a party to the settlement document. The parties may also need to consider whether mutual indemnities are appropriate.

### **3. Payment of a settlement sum and consequences of non-payment**

Generally in most cases, the intention of parties under the settlement is to substitute the rights which previously existed, with the rights arising under the settlement. The settlement document should reflect this intention, so that in the event the settlement sum is not paid, then the remedy available to the other party is to sue for the amount payable.

### **4. How will the proceedings be disposed of?**

The settlement document should be clear as to whether proceedings are to be dismissed or discontinued. Proceedings that are dismissed cannot usually be reinstated or restored. On the other hand, proceedings that are discontinued are usually able to be reinstated or restored.

### **5. Is there more than one defendant?**

When settling with only one of multiple defendants or potential defendants, it will be important that a plaintiff expressly reserves in the settlement document, its rights to claim against the other defendants or potential

defendants. It may also be relevant for both plaintiffs and defendants to consider the effect of proportionate liability legislation on the ability to recover from other defendants.

## 6. Are there conditions to the settlement?

The parties should consider whether there are conditions precedent to the settlement, or particular terms of settlement, coming into effect. So for example, it will commonly be the case that the plaintiff is not obliged to take steps to dispose of the proceedings until the full settlement sum is paid.

## 7. Who pays the costs?

The settlement document should set out clearly how the parties' costs incurred in the proceedings and in the drafting and negotiation of the settlement are to be borne. Parties may also wish to consider, if there are existing costs orders, whether to agree to vacate those orders.

## 8. Are there GST consequences?

Where a settlement sum is being paid, the GST implications must be considered. It is common for settlement documents to express that the settlement sum is inclusive of any GST amount payable.

## 9. Confidentiality

It is common to include an obligation on the parties to keep the terms of the settlement document confidential, save that disclosure may be made in limited circumstances, such as in compliance with the law or requirement of any regulatory body, or for the purposes of enforcing the settlement document.

## 10. Right parties and authority to execute

The final tip is plainly obvious but easy to forget – to ensure that the right parties and all of the relevant parties are signatories to the settlement document, and that the settlement document is executed by persons with authority to do so.

## Contacts



**Mark Elvy**  
Partner  
Sydney  
T: +61 2 9258 6945  
E: mark.elvy@ashurst.com



**Lorraine Hui**  
Senior Associate  
Sydney  
T: +61 2 9258 6011  
E: lorraine.hui@ashurst.com



**Andrew Cong**  
Lawyer  
Sydney  
T: +61 2 9258 5634  
E: andrew.cong@ashurst.com

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