

Heads of Agreement

By John Fitzpatrick

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1. Nature of Heads of Agreement

- Useful tool to assist parties towards final agreement
- BUT need to be used with care
- Disputes tend to arise:
 - i. Because terms are unclear
 - ii. Relationship deteriorates before final contract
 - iii. Relationship changes
 - iv. Change of mind

2. Categories

- First category: bound immediately, all terms agreed, but later there will be a fuller, more precise restatement of terms
- Second category: bound immediately, all terms agreed, but one or more terms will become effective only after formal document is executed
- Third category: not bound immediately, no contract unless formal document is executed
- Fourth category: parties indicate that:
 - i. They intend to be bound immediately; but
 - ii. Future contract in substitution of 1st contract containing additional terms

3. Is the Heads of Agreement binding?

- Did the parties arrive at a consensus?
- Was the consensus capable of forming a binding contract?
 - i. Agreement on all material terms
 - ii. Subject matter, price, duration, termination
- Did the parties intend the consensus to constitute a binding contract?
- Subject to contract?

John Fitzpatrick
Solicitor Director + Public Notary
Sydney Legal Advisers
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