

## IT BYTES

## ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

WHAT IS THE DIFFERENCE BETWEEN  
‘REASONABLE ENDEAVOURS’ AND  
‘BEST ENDEAVOURS’?

## WHEN DOES THIS QUESTION TEND TO ARISE?

**If the achievement of a particular outcome is not entirely within a party’s control (e.g. because it may depend on the actions of an independent third party), then that party may naturally be reluctant to accept an absolute contractual obligation to achieve that outcome. In these cases, the party in question may be more comfortable undertaking to use ‘reasonable endeavours’ or ‘best endeavours’ (or some similar permutation, such as ‘reasonable efforts’ or ‘best efforts’) to achieve that outcome. However, it is not always clear what the difference between these standards is.**

## WHAT DOES THE LAW SAY?

The words ‘best endeavours’ and ‘reasonable endeavours’ are not terms of art and, like all other words used in a contract, must be interpreted in accordance with usual principles of interpretation. That is, the answer depends on what a reasonable person would have understood the words of the contract to mean at the relevant time and in the relevant context in which the contract was entered into.

In practice, the terms ‘reasonable endeavours’ and ‘best endeavours’ tend to be given similar meanings, and are both qualified by concepts of reasonableness. For example, in *Electricity Generation Corporation (t/as Verve Energy) v Woodside Energy Ltd* (2014) 251 CLR 540, the High Court said that the nature and extent of an obligation to use ‘best endeavours’ was necessarily measured by what was reasonable in the circumstances. However, there are certainly shades of meaning and formulations such as ‘best endeavours’ or ‘all reasonable endeavours’ do tend to be interpreted as imposing a somewhat higher standard than ‘reasonable endeavours’. For example, in New South Wales it has been suggested that ‘best endeavours’ imposes an obligation to do everything reasonably possible to bring about the contractual objective, while ‘reasonable endeavours’ only requires a party to take steps a reasonable person in the circumstances would take.

In any case, the Courts have consistently found that an obligation to use ‘best endeavours’ or ‘reasonable endeavours’ will not require a party to ignore its own commercial interests. That is, unless there is a clear contractual statement to the contrary, a party will not be required to elevate the other party’s interests above its own in order to show that it has reached the ‘best endeavours’ or ‘reasonable endeavours’ threshold.

To limit scope for uncertainty, a contract may itself further define the standard of conduct required to discharge a ‘best endeavours’ or ‘reasonable endeavours’ obligation. For example, in the *Verve Energy v Woodside* case mentioned above, the Court emphasised the words of the contract as being paramount, holding that careful consideration will be given to any internal standard of reasonableness set out in the agreement as the clearest indicator of party intentions. For example, in that case, the contractual standard included an express entitlement to consider ‘relevant commercial, economic and operational matters’

WHAT ARE THE PRACTICAL  
IMPLICATIONS FOR YOUR CONTRACT?

The main objective of a written contract is to provide the parties with certainty as to the bargain they are entering into. To provide absolute certainty, every aspect of the contract, and the respective obligations of each party, would be tightly and prescriptively defined. However, that is not always practical or even possible. Concepts such as ‘reasonable endeavours’ and ‘best endeavours’ are commonly used to bridge the gap and provide an appropriate degree of flexibility. To ensure that the use of such concepts does not create too much uncertainty, you should consider:

**1** Including a specific interpretive provision in your contract to explain in more detail what will be required, or what will **not** be required, to satisfy the ‘best endeavours’ or ‘reasonable endeavours’ standard – for example, you could expressly state that in order to satisfy the relevant standard it will not be necessary for a party to pay money or provide any financial benefit to a third party, to enter into any contract or provide any undertaking that it considers to be detrimental to its interests, or to commence any legal action or proceeding.

**2** Ensuring that the concepts are used consistently throughout your contract – if in some instances a contract uses ‘best endeavours’ while in others it uses ‘reasonable endeavours’ it will be hard to argue that the concepts were intended to have the same meaning, and the Courts will be more likely to interpret ‘best endeavours’ as imposing a different and higher standard.

## KEY CONTACTS



## KIRSTEN BOWE

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

## BRYONY EVANS

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

## MICHAEL SWINSON

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

## Disclaimer

This publication provides information on and material containing matters of interest produced by King & Wood Mallesons. The material in this publication is provided only for your information and does not constitute legal or other advice on any specific matter. Readers should seek specific legal advice from KWM legal professionals before acting on the information contained in this publication.

## Asia Pacific | Europe | North America | Middle East

King & Wood Mallesons refers to the network of firms which are members of the King & Wood Mallesons network. See [kwm.com](http://kwm.com) for more information.

[www.kwm.com](http://www.kwm.com)

© 2023 King &amp; Wood Mallesons



## JOIN THE CONVERSATION

SUBSCRIBE TO OUR WECHAT COMMUNITY.  
SEARCH: KWM\_CHINA