

Risk Management & Contracts “PAN”



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May 2007

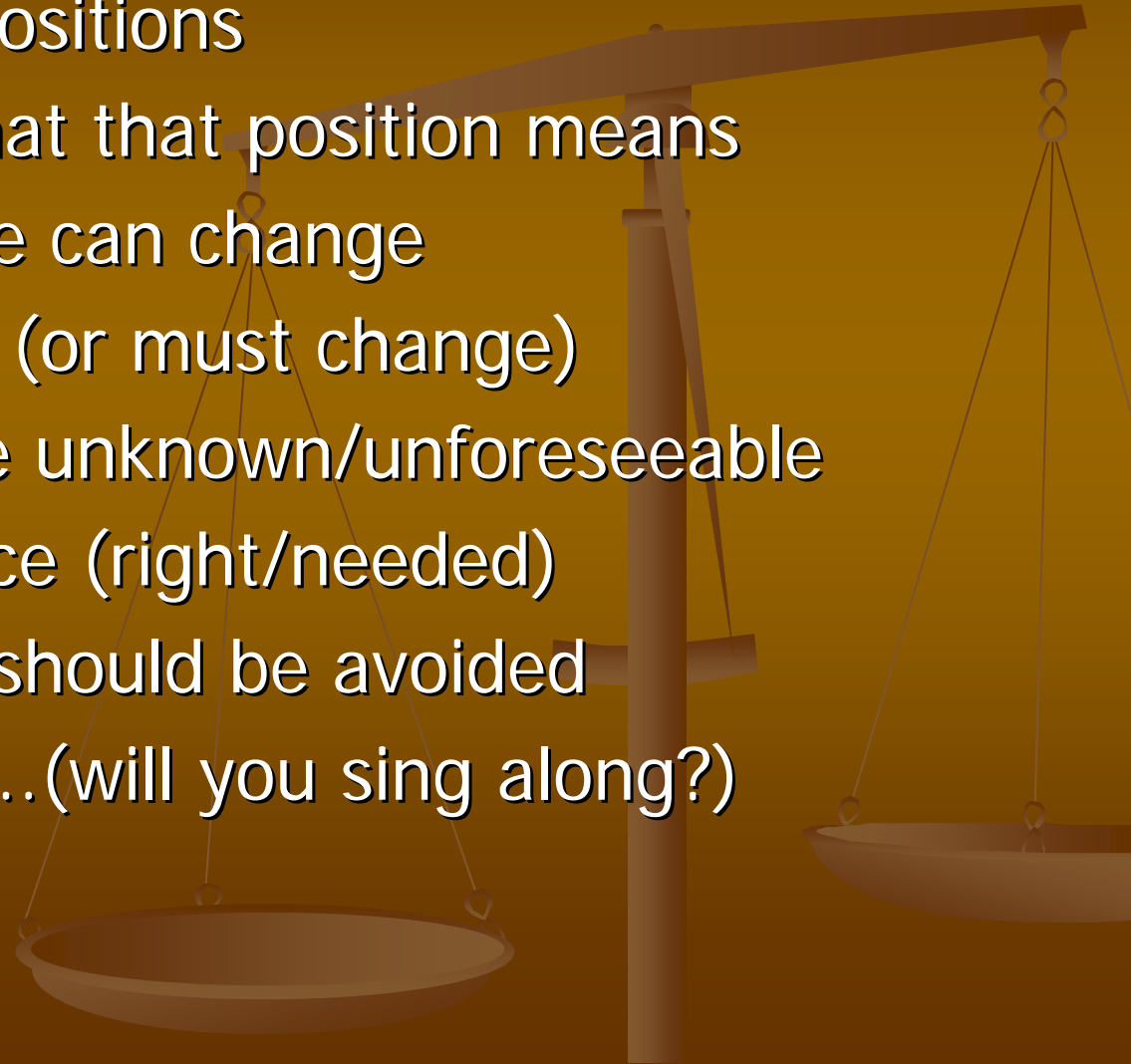
Our Reality

- Where are we?
- Increasing....everything
 - competition
 - demands from students, staff & regulators
 - complexity in relationships and contracts
 - accountability
 - risk
- And by the way.....
 - **Decrease your overheads/expenses**



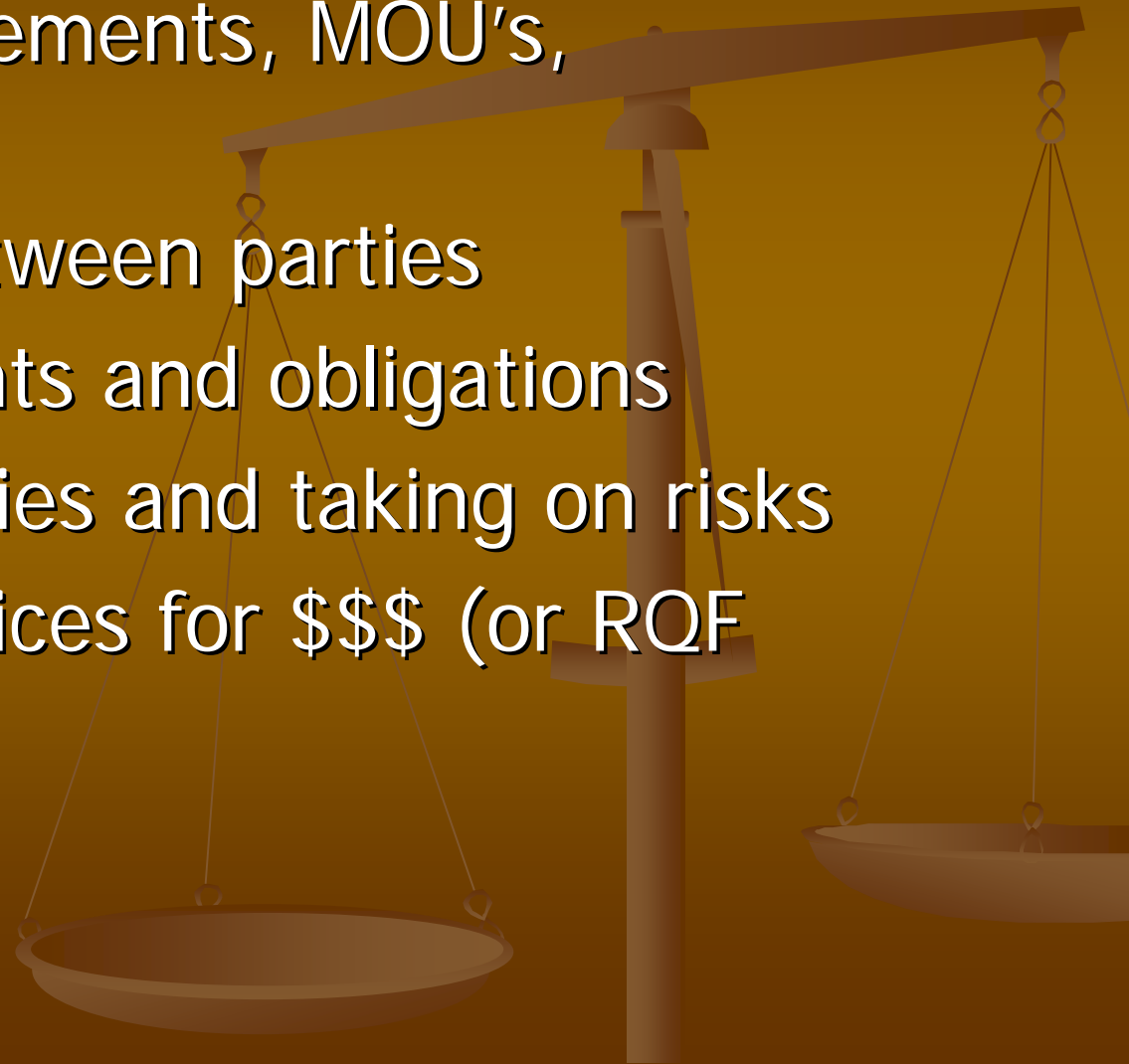
Today's Focus

- Recognising our positions
- Understanding what that position means
- Accepting what we can change
- What we must do (or must change)
- Risk Managing the unknown/unforeseeable
- Striking the balance (right/needed)
- What can be and should be avoided
- "My Way"(will you sing along?)

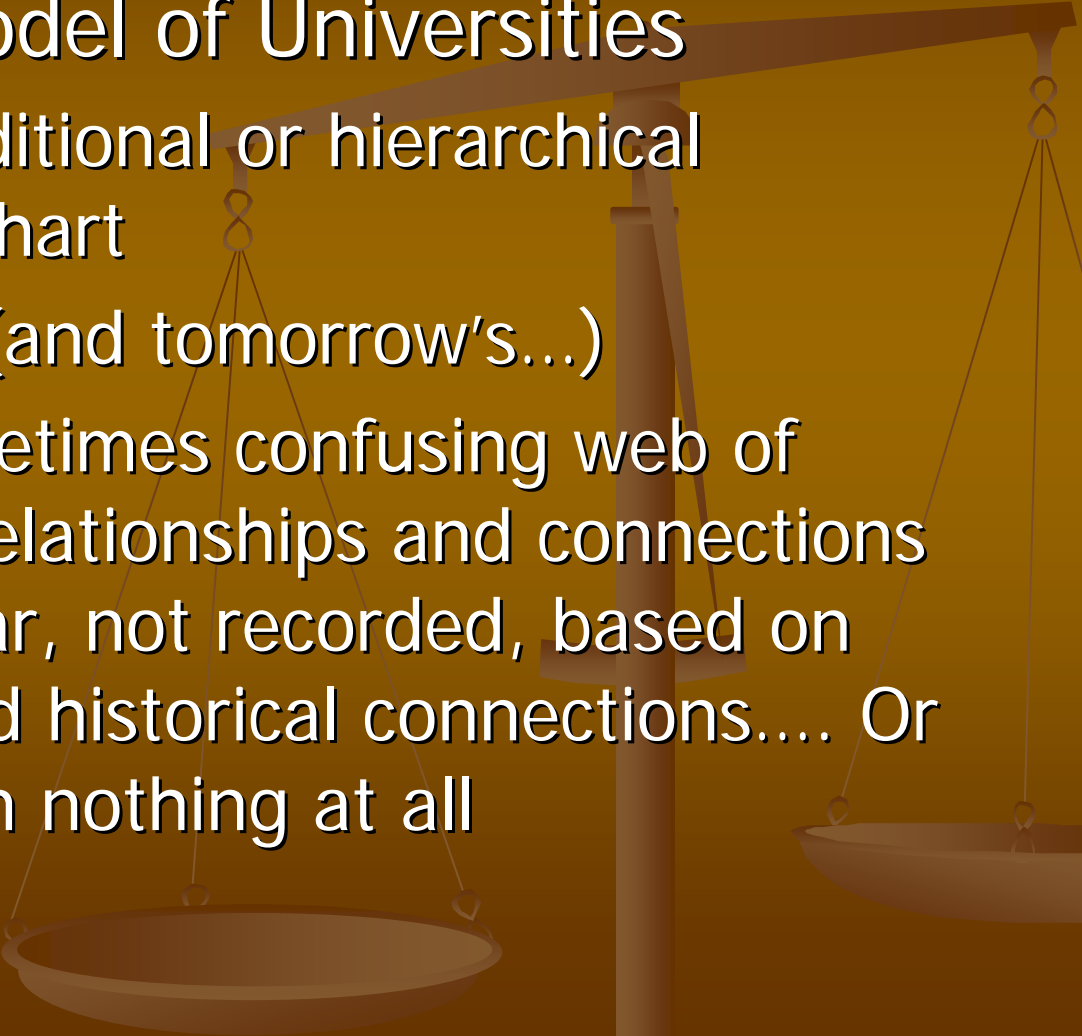


Everyday Activities

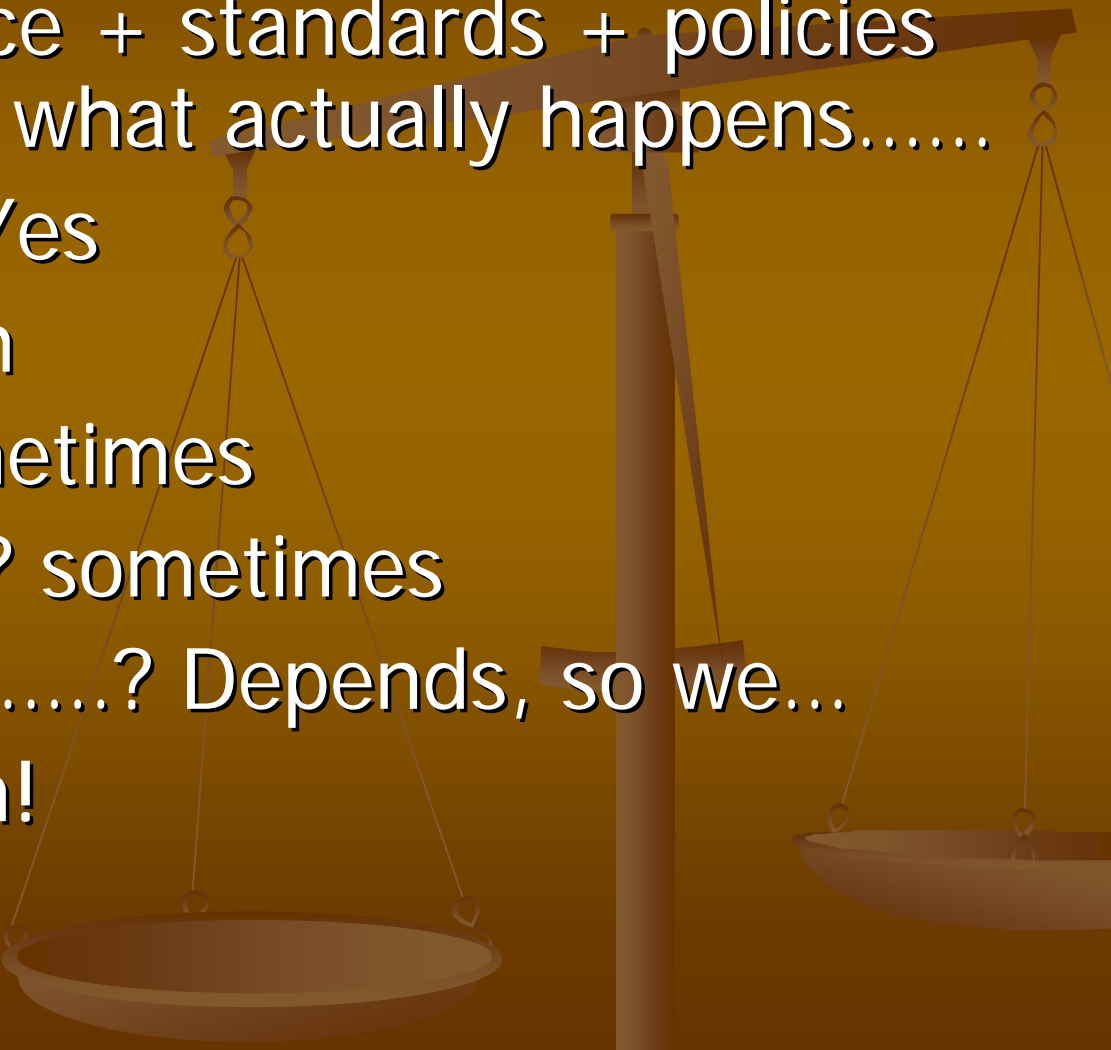
- Contracts, agreements, MOU's, "arrangements"
- Agreements between parties
- Exchanging rights and obligations
- Incurring liabilities and taking on risks
- Goods and services for \$\$\$ (or RQF ratings...?)



Working out who “we” are

- The evolving model of Universities
 - No longer a traditional or hierarchical organizational chart
 - Today's reality (and tomorrow's...)
 - a dynamic, sometimes confusing web of parties whose relationships and connections are often unclear, not recorded, based on mutual trust and historical connections.... Or worse, based on nothing at all
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The Usual approach

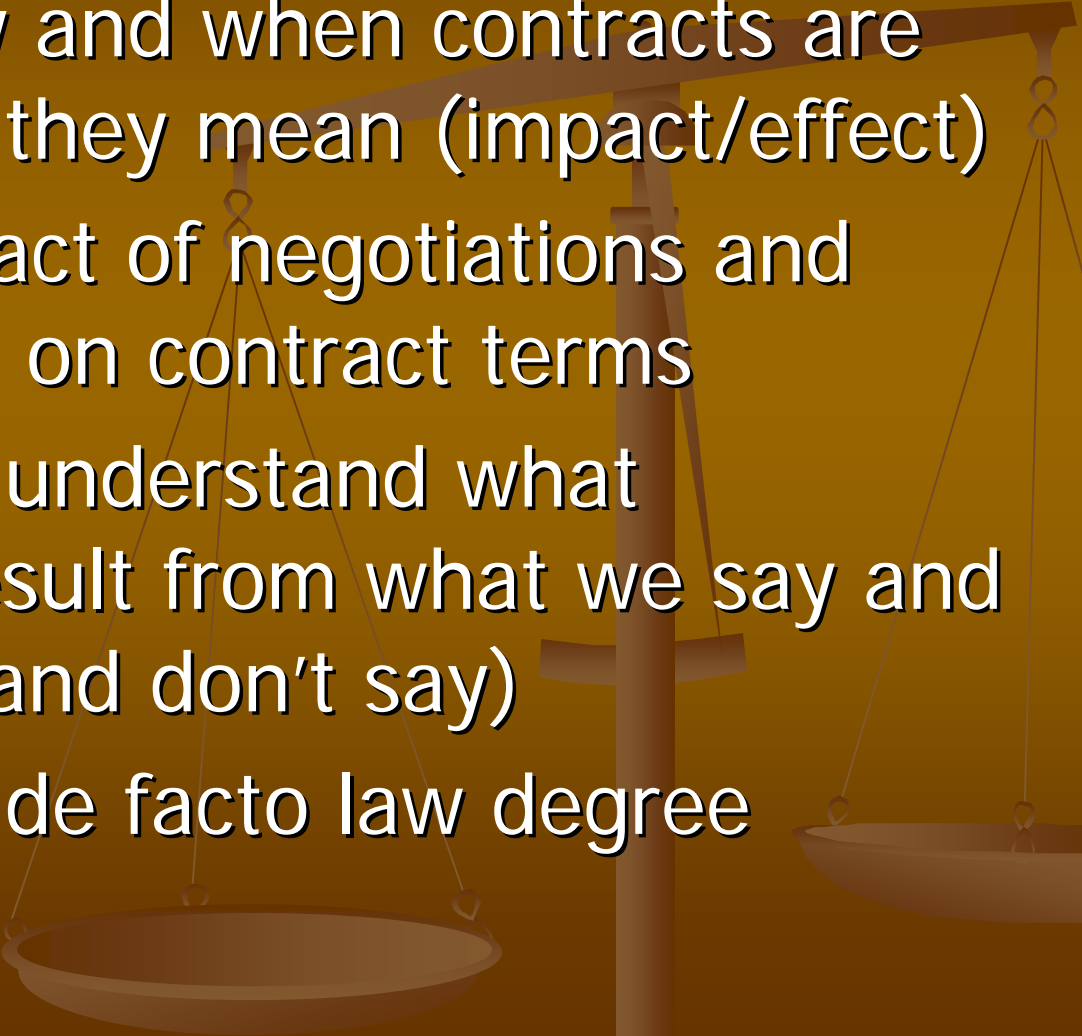
- Theory + practice + standards + policies + procedures + what actually happens.....
 - Commitment? Yes
 - Analysis? Yes'ish
 - Control.....? sometimes
 - Information.....? sometimes
 - Communication.....? Depends, so we...
 - Fire, Ready, Aim!
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Introducing the Concept

- My Way
- Not perfect but it works
- PAN - What is PAN?
- **P**referred
- **A**cceptable
- **N**ot-Negotiable
- What is preferred or not acceptable?
 - Terms, conditions, requirements, outcomes, objectives, deliverables, KPI's
- In short, our everyday contracts and commitments

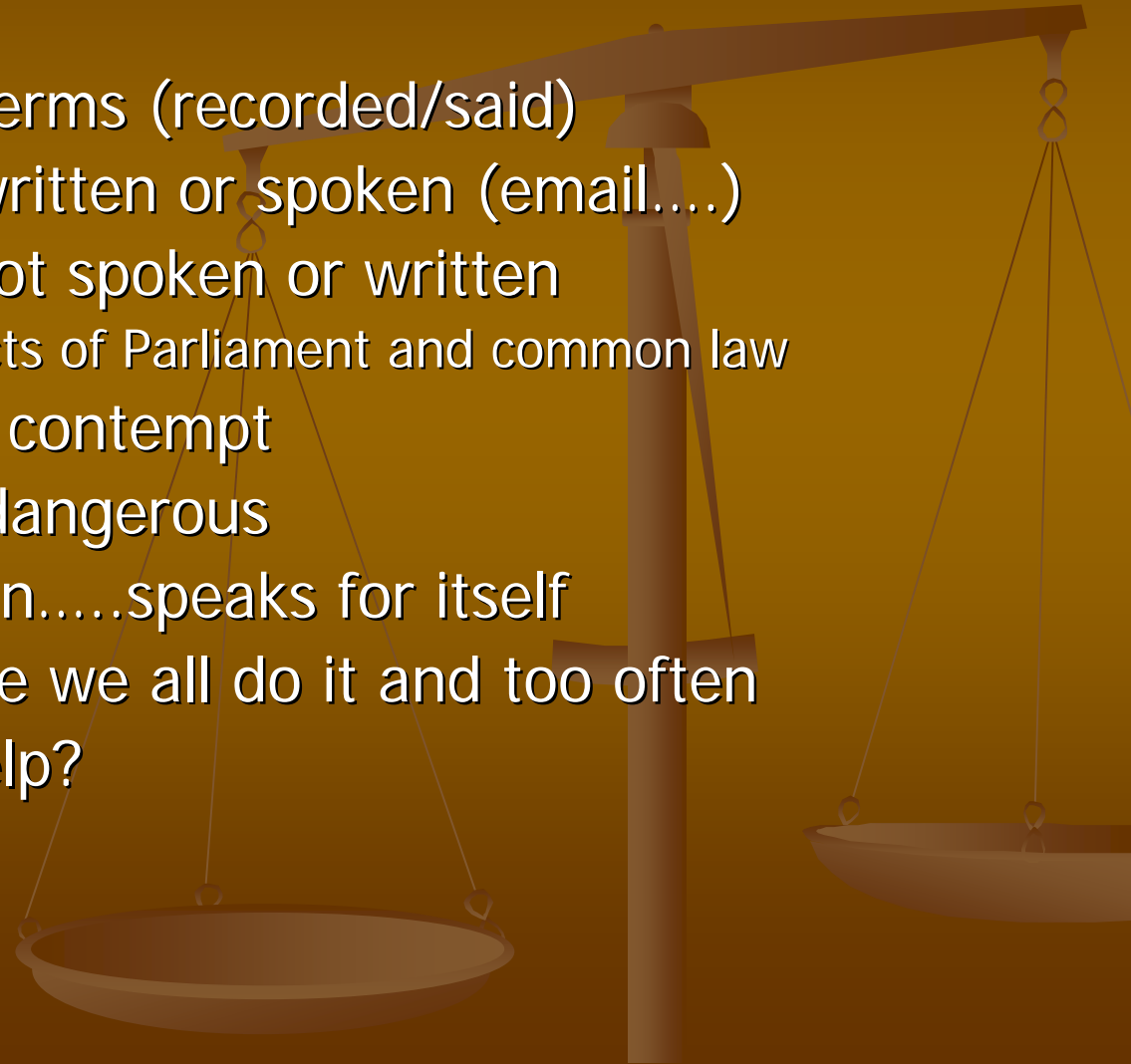


Preparation

- Understand how and when contracts are made and what they mean (impact/effect)
 - Origins and impact of negotiations and communications on contract terms
 - To enable us to understand what commitments result from what we say and do (or don't do and don't say)
 - Relax: it's not a de facto law degree
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Contracts & Obligations

- Combination of
 - Written and oral terms (recorded/said)
 - Express terms – written or spoken (email....)
 - Implied terms – not spoken or written
 - except in law – Acts of Parliament and common law
 - Familiarity breeds contempt
 - Assumptions are dangerous
 - Lack of preparation.....speaks for itself
 - But under pressure we all do it and too often
 - Shortcuts? Self-help?
 - PAN



The Smorgasbord of Procurement

- Costed Proposals
- Tenders
- EOI's – expression of interest
- Request for Proposal – RFP
- Request for Tender – RFT
- Invitation to treat
- Standing Orders
- Preferred supplier agreements

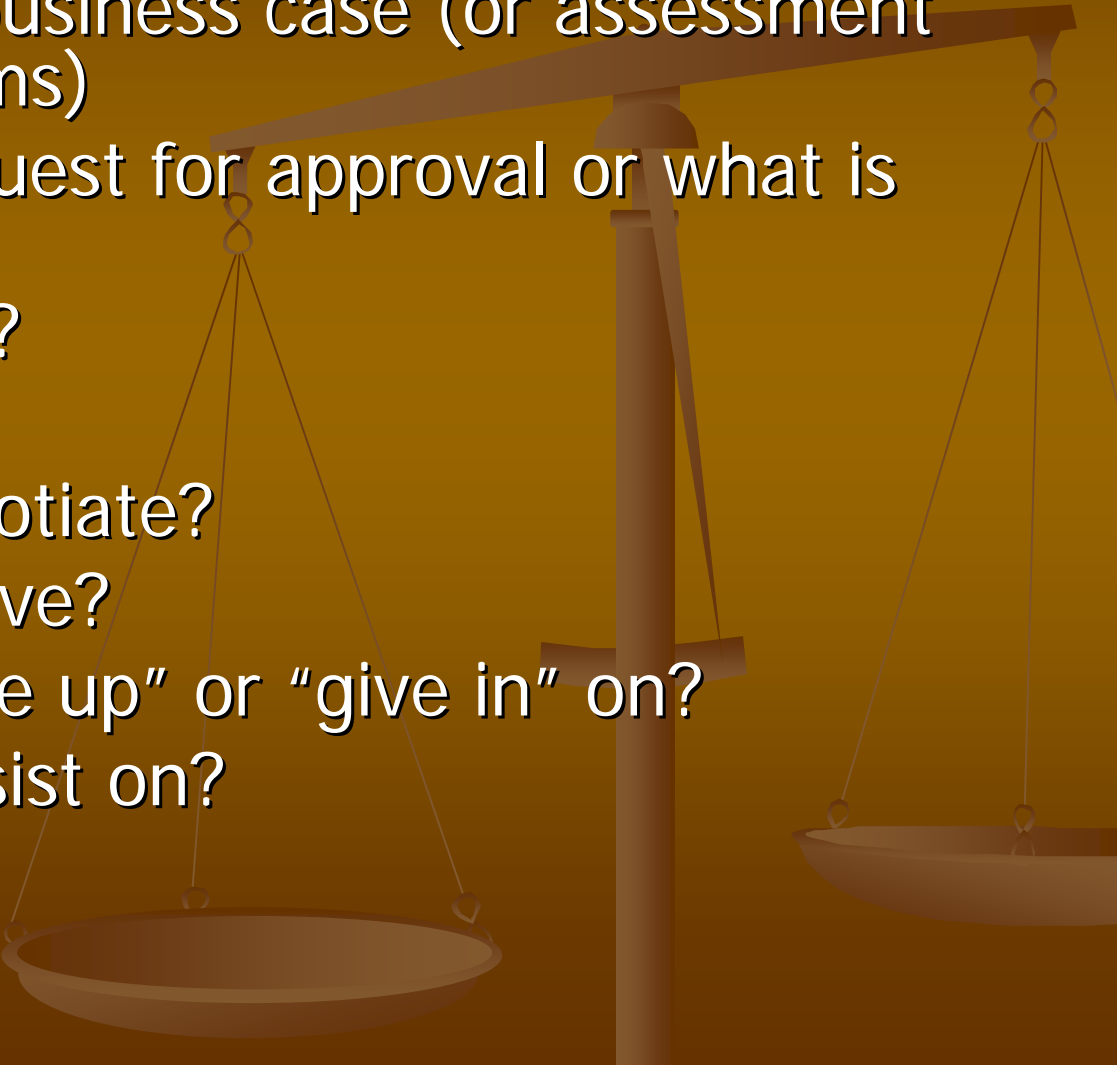


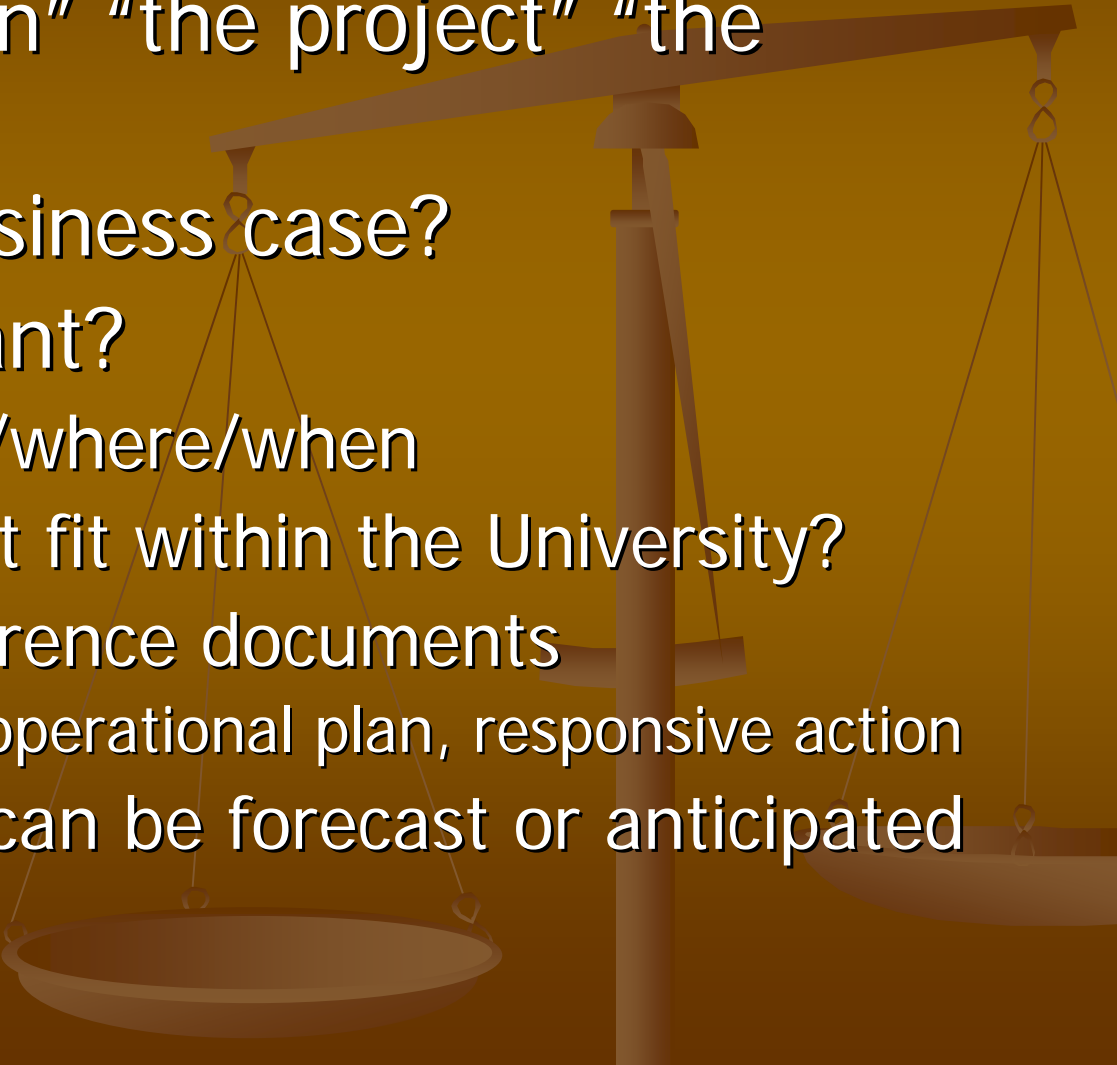
Before you start

- What is your business case?
- What do you want?
 - Who/how/what/where/when
- Authorisations and delegations
- Setting the Rules & recording what you do/say/don't do..
- Emails and "private files"
 - Notes – legible, recorded, (emails.....)



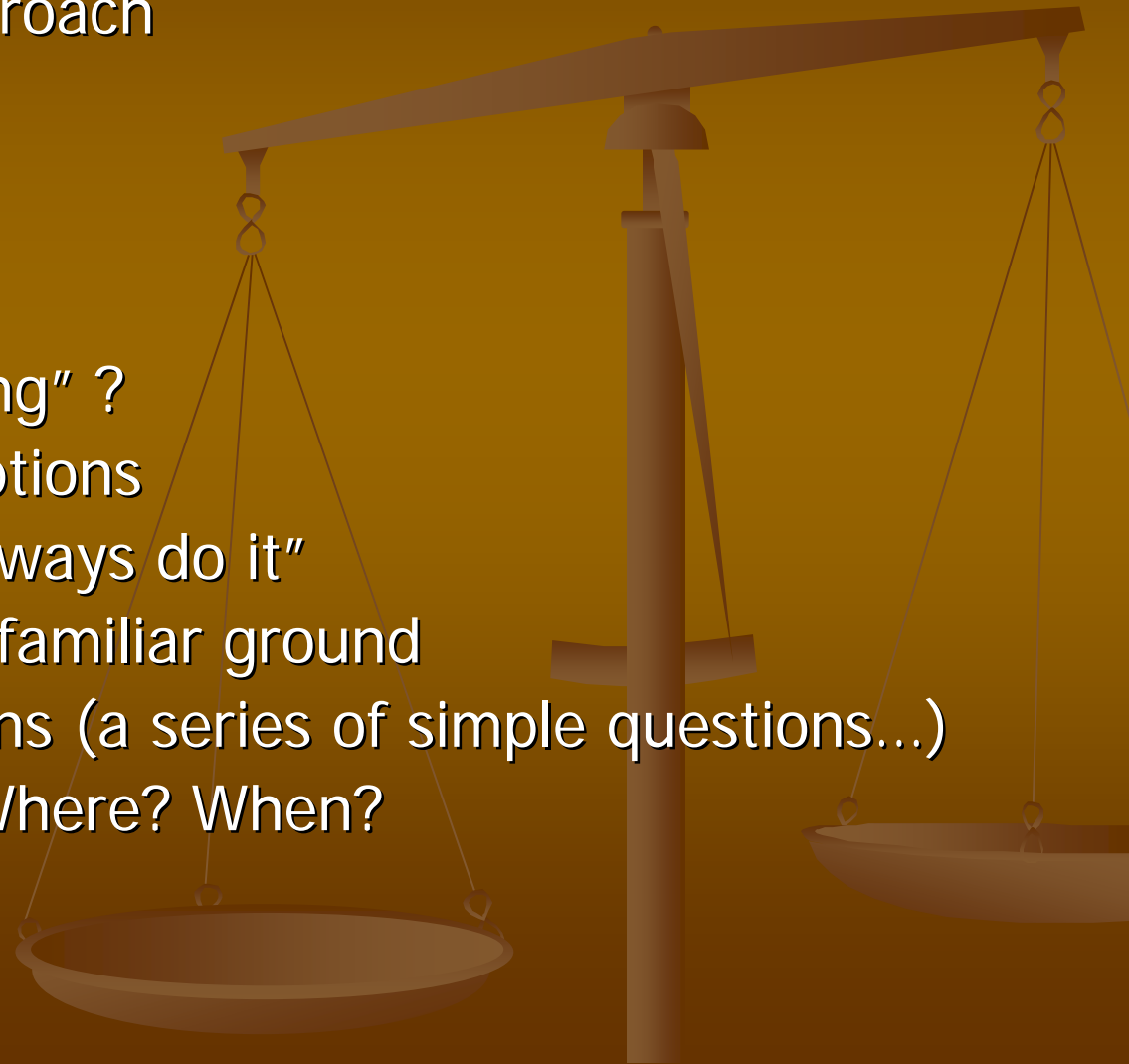
Minimum Mandatory Position

- Originates in the business case (or assessment in the case of claims)
 - Document the request for approval or what is being asked for
 - Any contingencies?
 - What's your PAN?
 - What *can* you negotiate?
 - What *must* you have?
 - What can you "give up" or "give in" on?
 - What must you insist on?
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- What is “the plan” “the project” “the desire”
 - What is your business case?
 - What do you want?
 - Who/how/what/where/when
 - Where does that fit within the University?
 - Foundation reference documents
 - strategic plan, operational plan, responsive action
 - Not everything can be forecast or anticipated

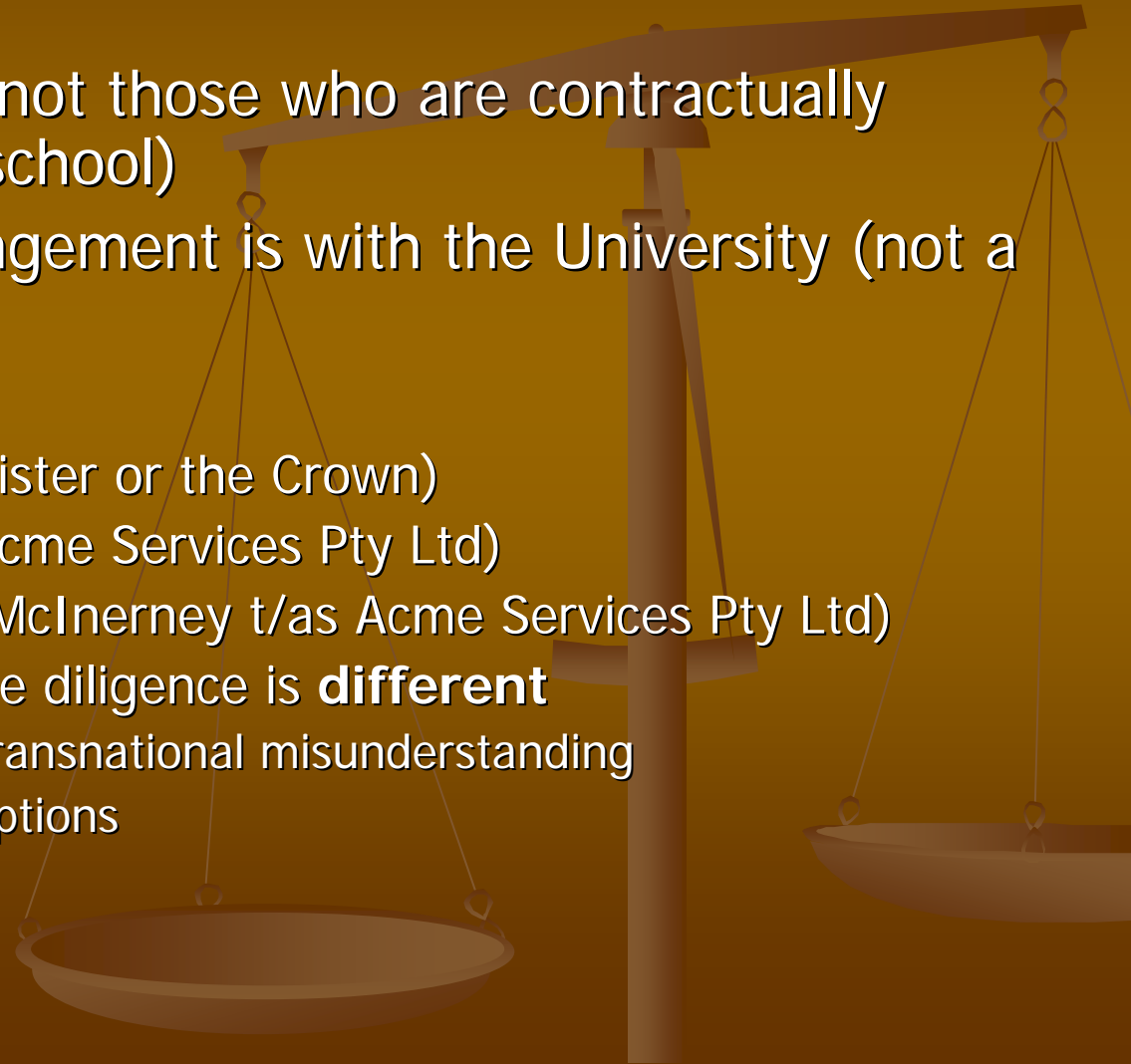
Where do I start?

- The David Niven Approach
 - A beginning
 - A middle
 - An end
- What is “the beginning” ?
- Set aside the assumptions
- Set aside “how we always do it”
- Set aside habits and familiar ground
- Ask the right questions (a series of simple questions...)
- Who? How? What? Where? When?



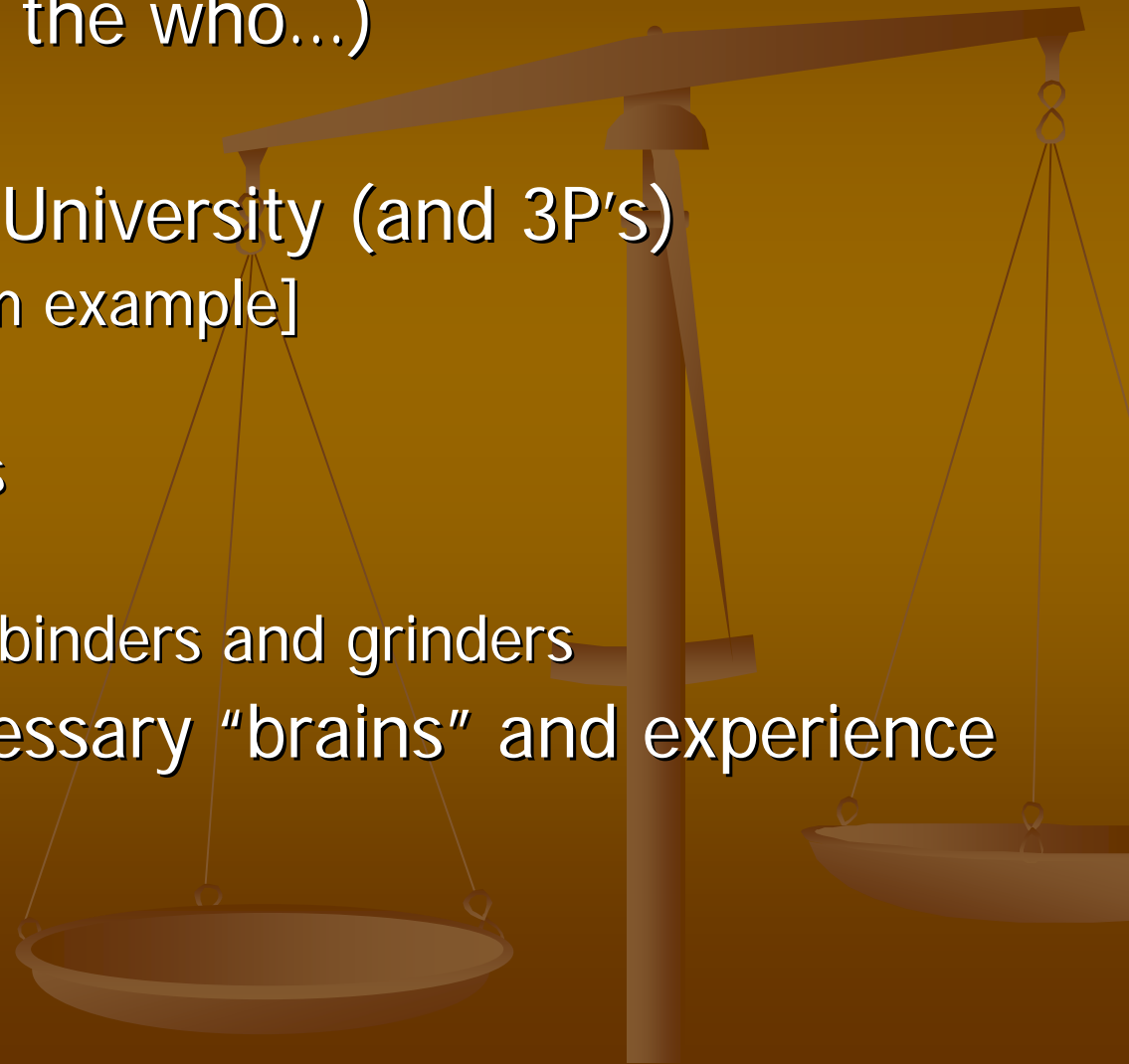
In the Beginning...

- Who? (the entities)
- Those arranging are not those who are contractually bound (department/school)
- The contract or arrangement is with the University (not a department/school)
- Another party
 - The government (Minister or the Crown)
 - A private company (Acme Services Pty Ltd)
 - An individual (Celine McInerney t/as Acme Services Pty Ltd)
 - Off shore? **Entity** due diligence is **different**
 - Many examples of transnational misunderstanding
 - Cross border assumptions



Still at the beginning

- Who (yes more of the who...)
- Entities
- Individuals at the University (and 3P's)
 - [off shore program example]
 - Project initiator
 - Project champions
 - Legs and arms
 - Finders, minders, binders and grinders
- Assemble the necessary "brains" and experience from BOTH sides



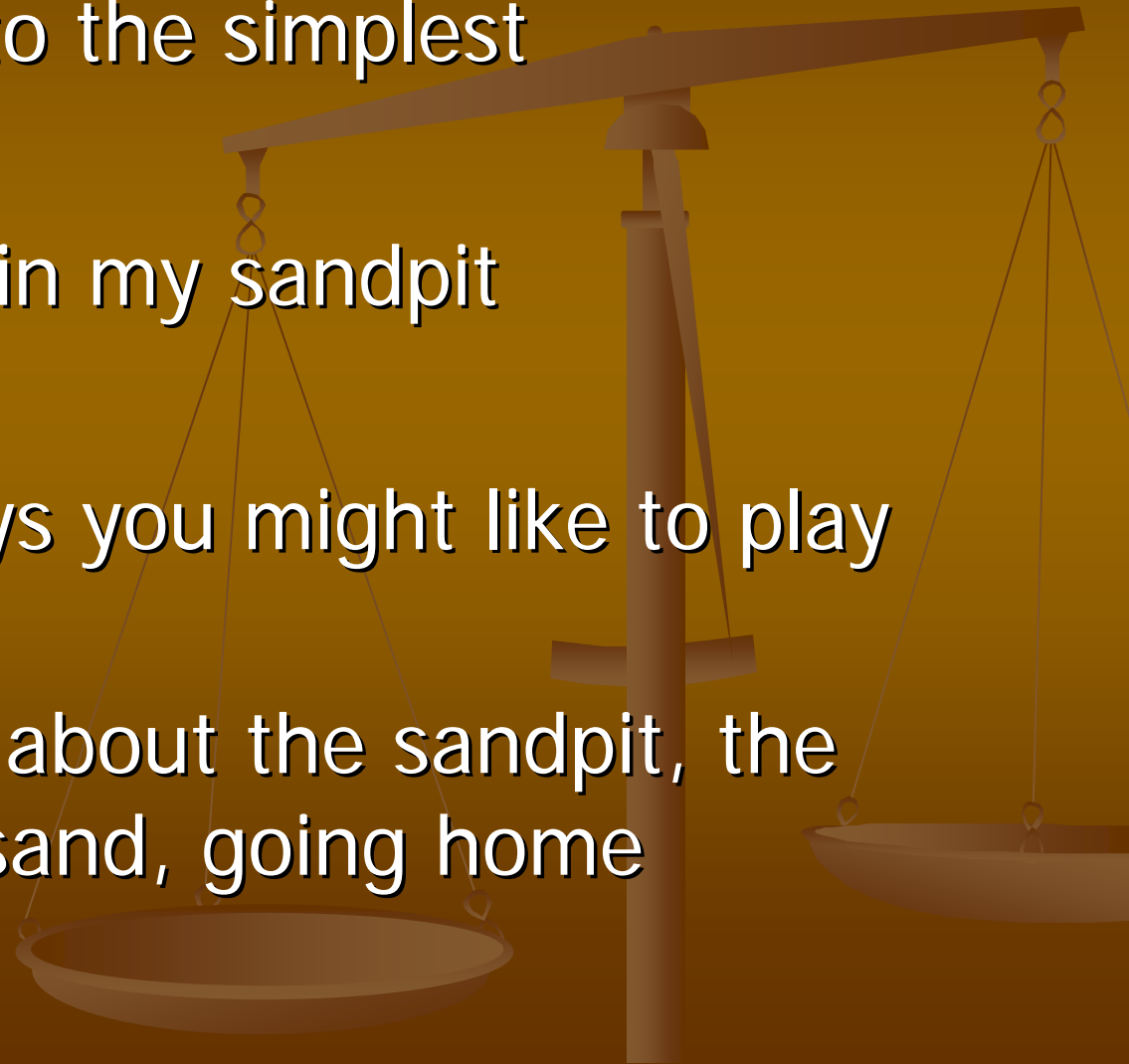
What is “it”?

- What? Asking the questions.....
- What am I trying to achieve?
- A contract or arrangement (onshore)
- A software licence
- A donation or sponsorship
- A scholarship
- A building project
- A building refurb or fit out
- A change in space allocation
- Insurance program for the best cover

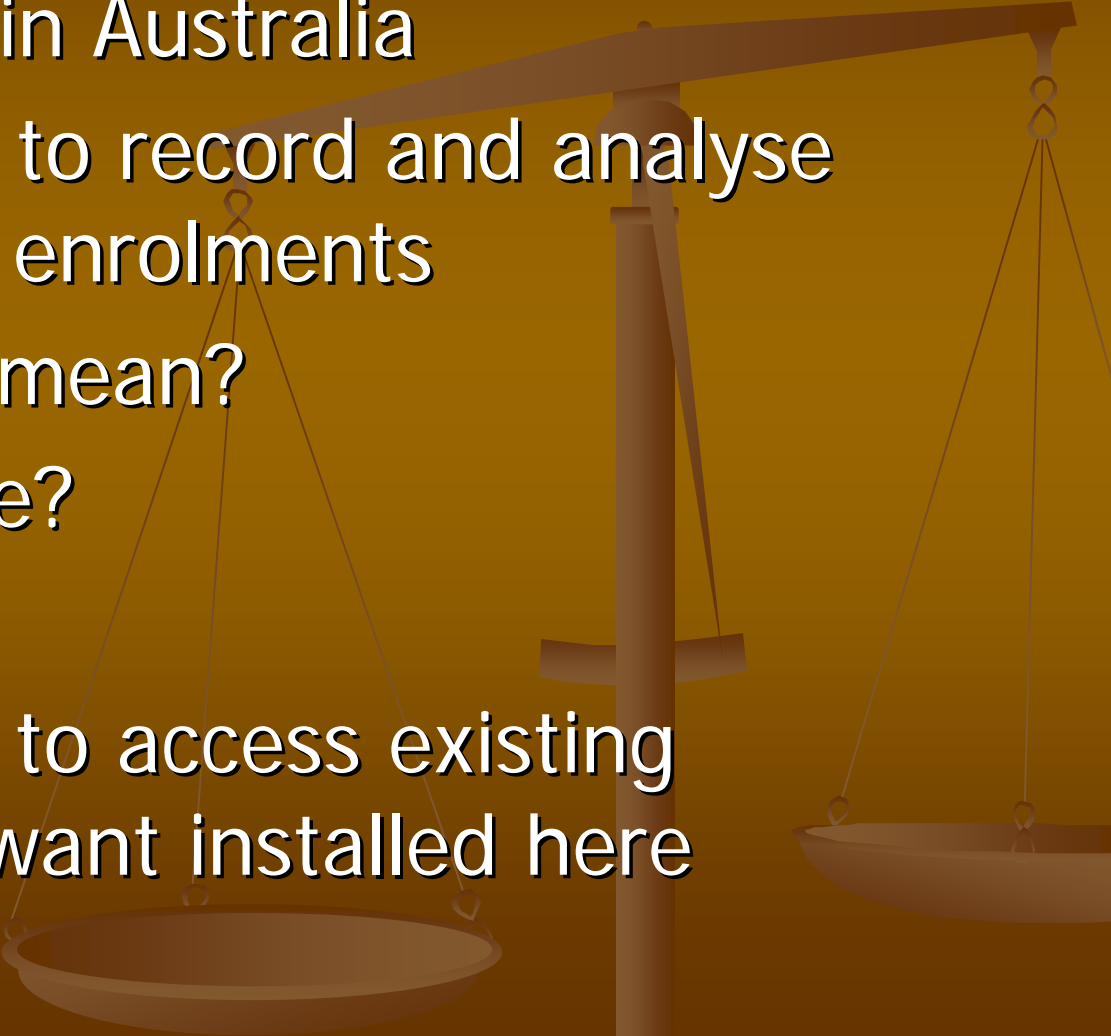


Keep it Simple

- Always reduce to the simplest
- The childlike
- Come and play in my sandpit
- Bring your toys
- I have some toys you might like to play with
- There are rules about the sandpit, the toys, throwing sand, going home

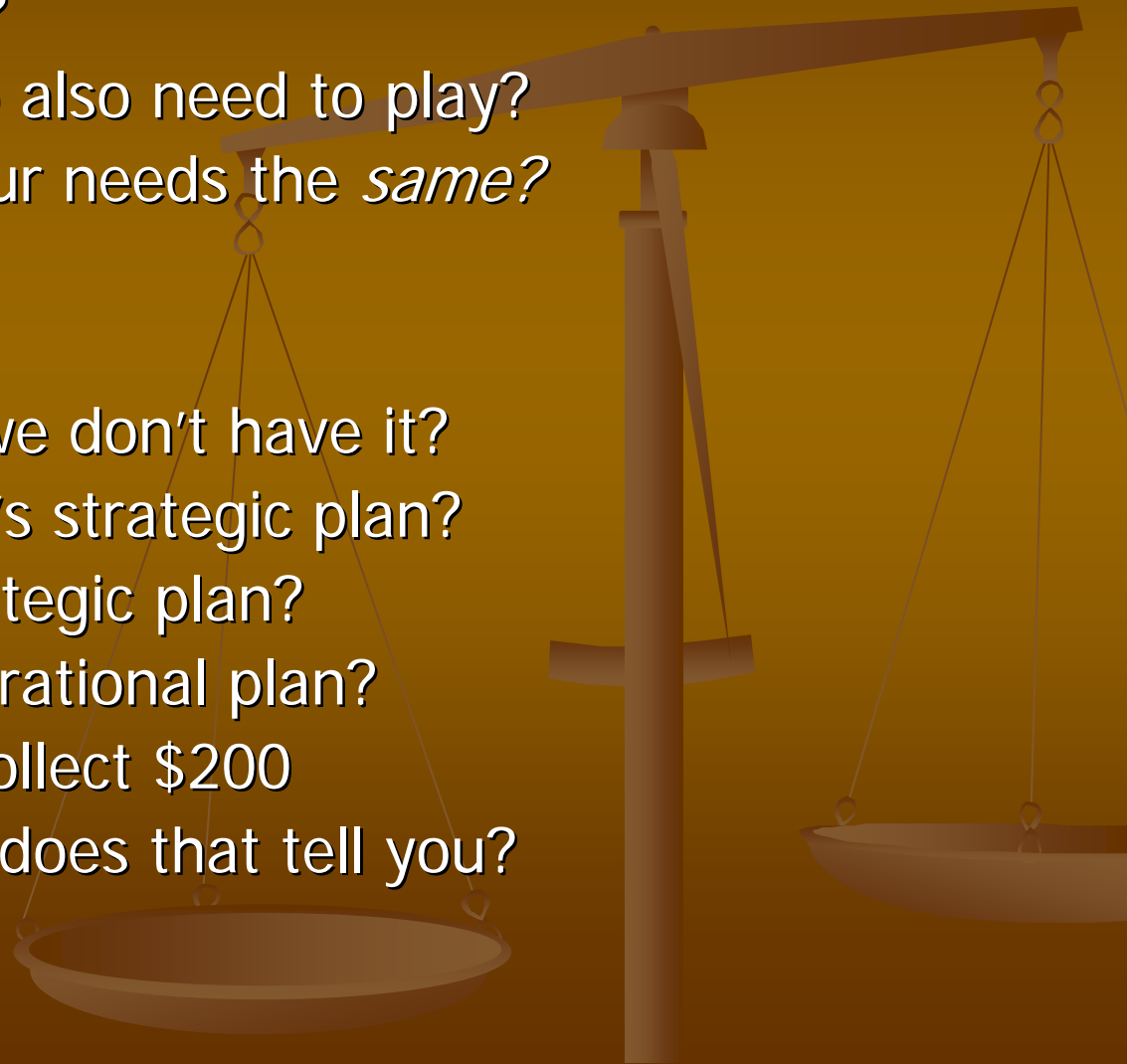


An Example

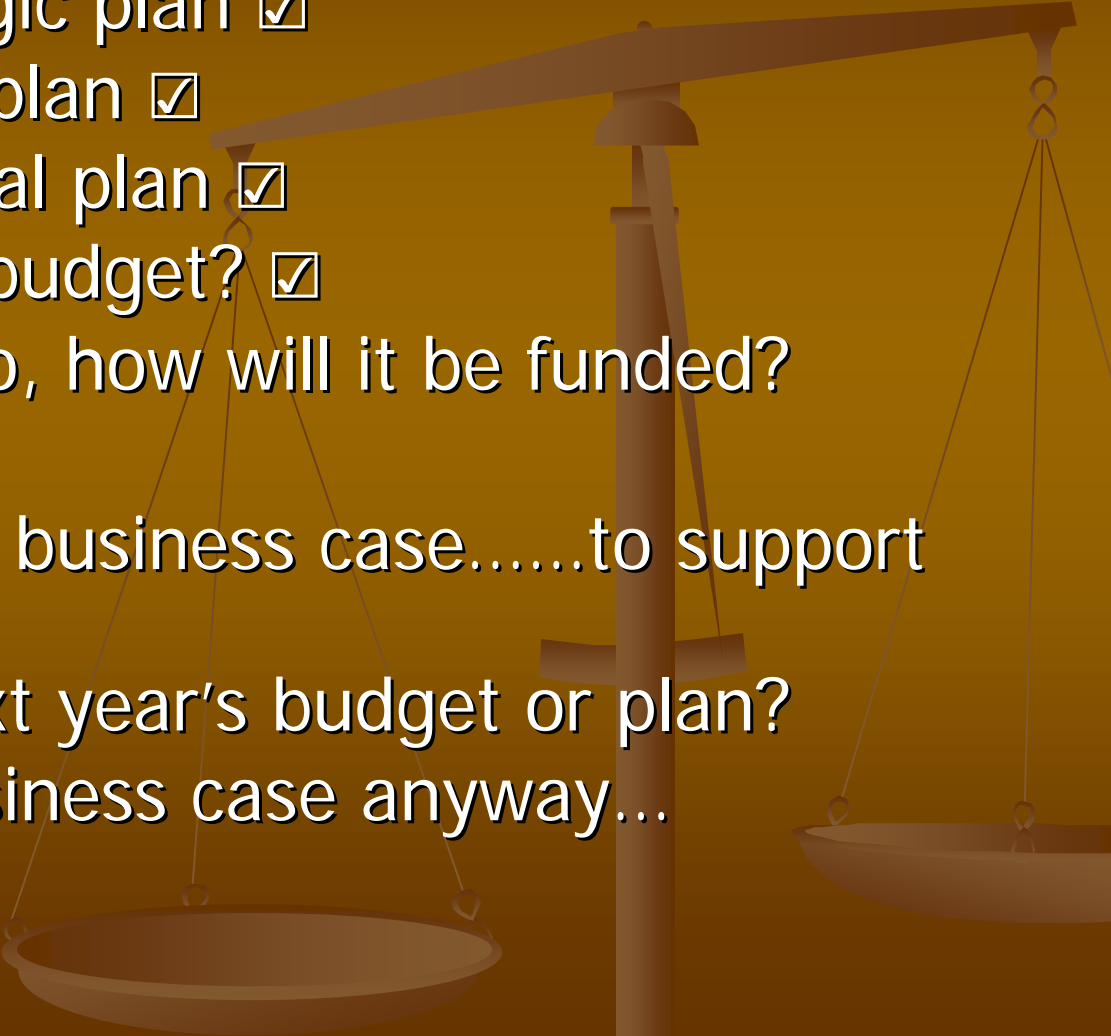
- Who? Microsoft in Australia
 - What? Software to record and analyse data on student enrolments
 - What does that mean?
 - Existing software?
 - New software?
 - I need a licence to access existing software that I want installed here
- 

What is “it”

- Is this in my sandpit?
- Are there others who also need to play?
- Who are they? Are our needs the *same*?
- Is this essential?
- Why?
- What will happen if we don't have it?
- Is it in the University's strategic plan?
- Is it in my area's strategic plan?
- Is it in my area's operational plan?
- Yes.....pass go and collect \$200
- No....why not? What does that tell you?



My Sandpit

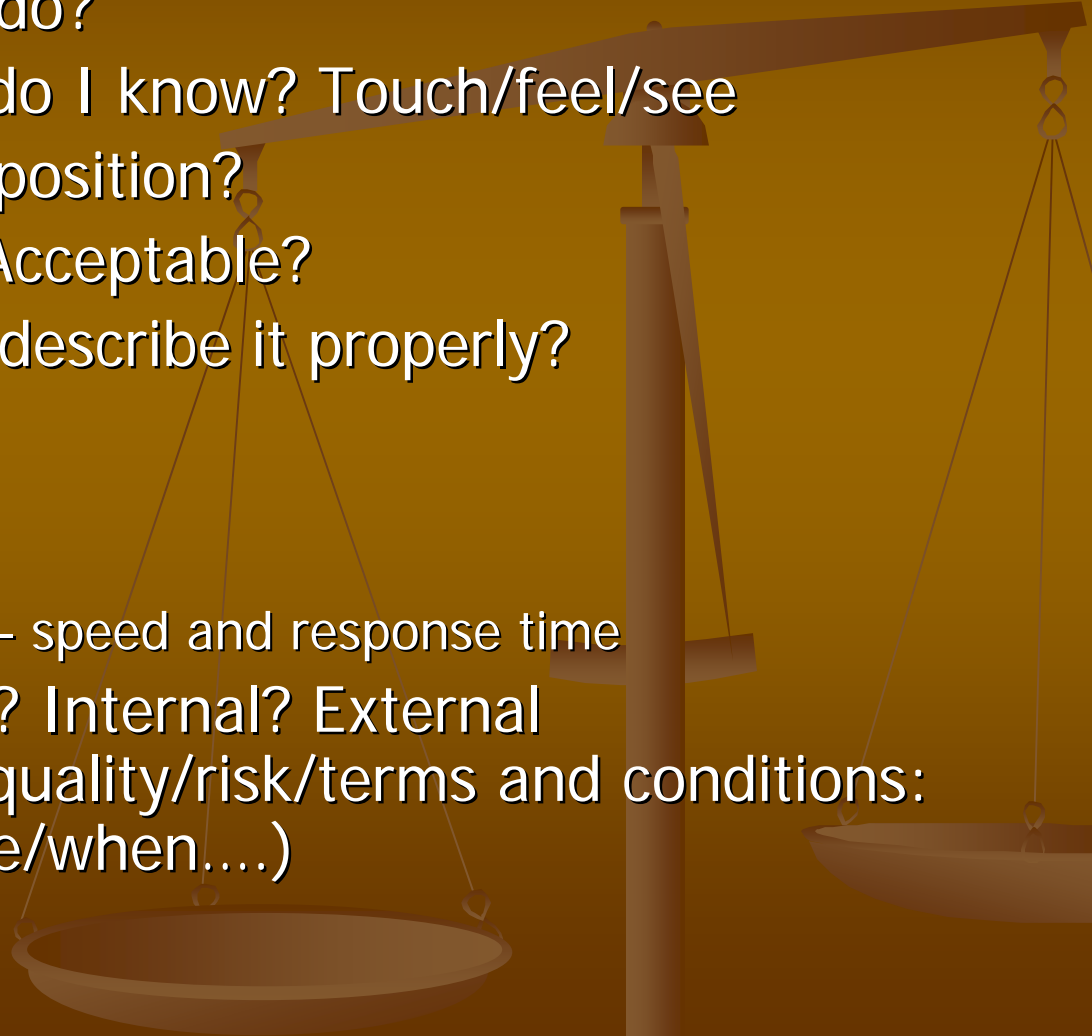
- University's strategic plan
 - School's strategic plan
 - School's operational plan
 - Is it in this year's budget?
 - If the answer is No, how will it be funded?
 - Who will fund it?
 - They will need my business case.....to support the expense
 - Should it be in next year's budget or plan?
 - I will need the business case anyway...
- 

The detailed Example

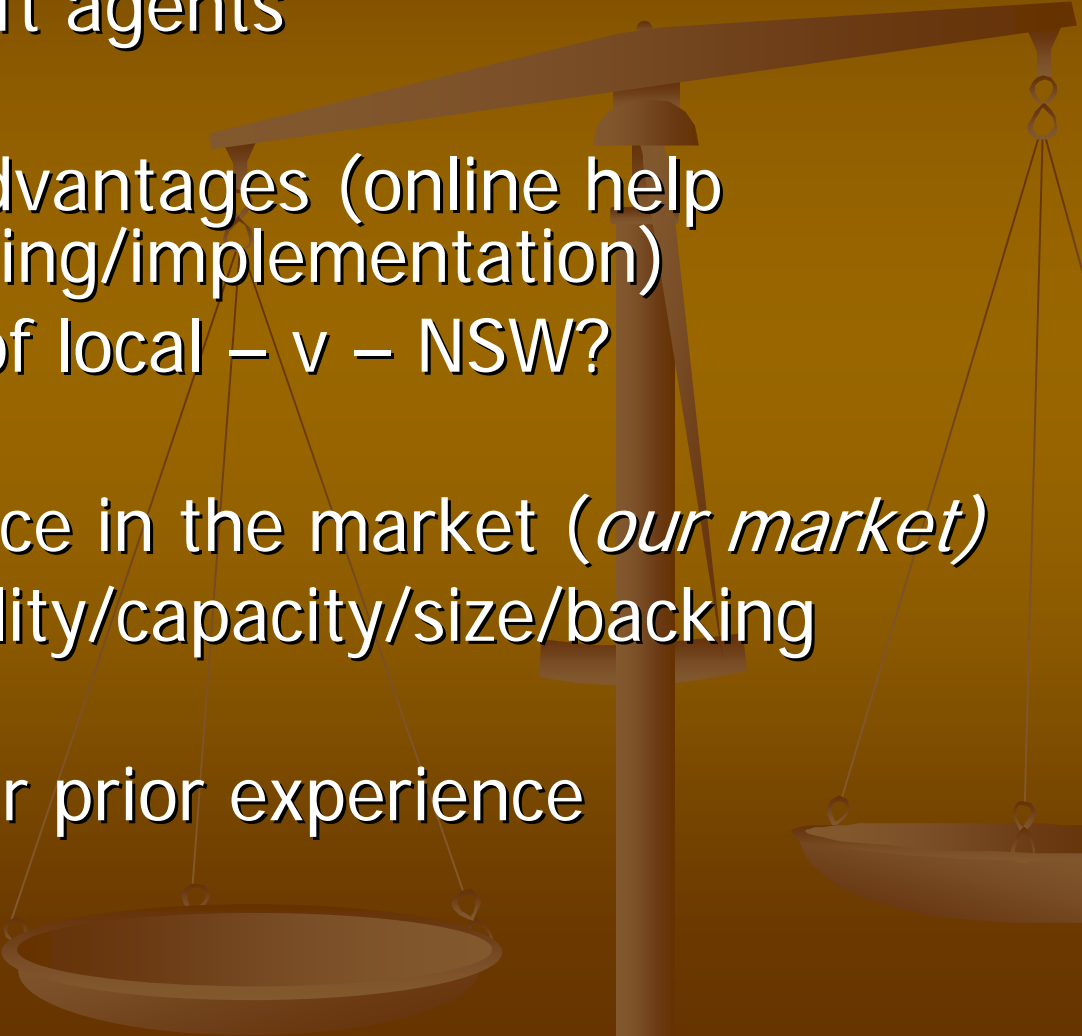


- Microsoft Licence agreement
- To buy existing software to do a task I need done within my budget this year
- Is it small? Is it big? Is it easy? Is it hard?
- Does it need to interface with other things?
- Finance/IT/preferred suppliers – Who should be in the project team?
- No “I” in team...don't fly solo

What?

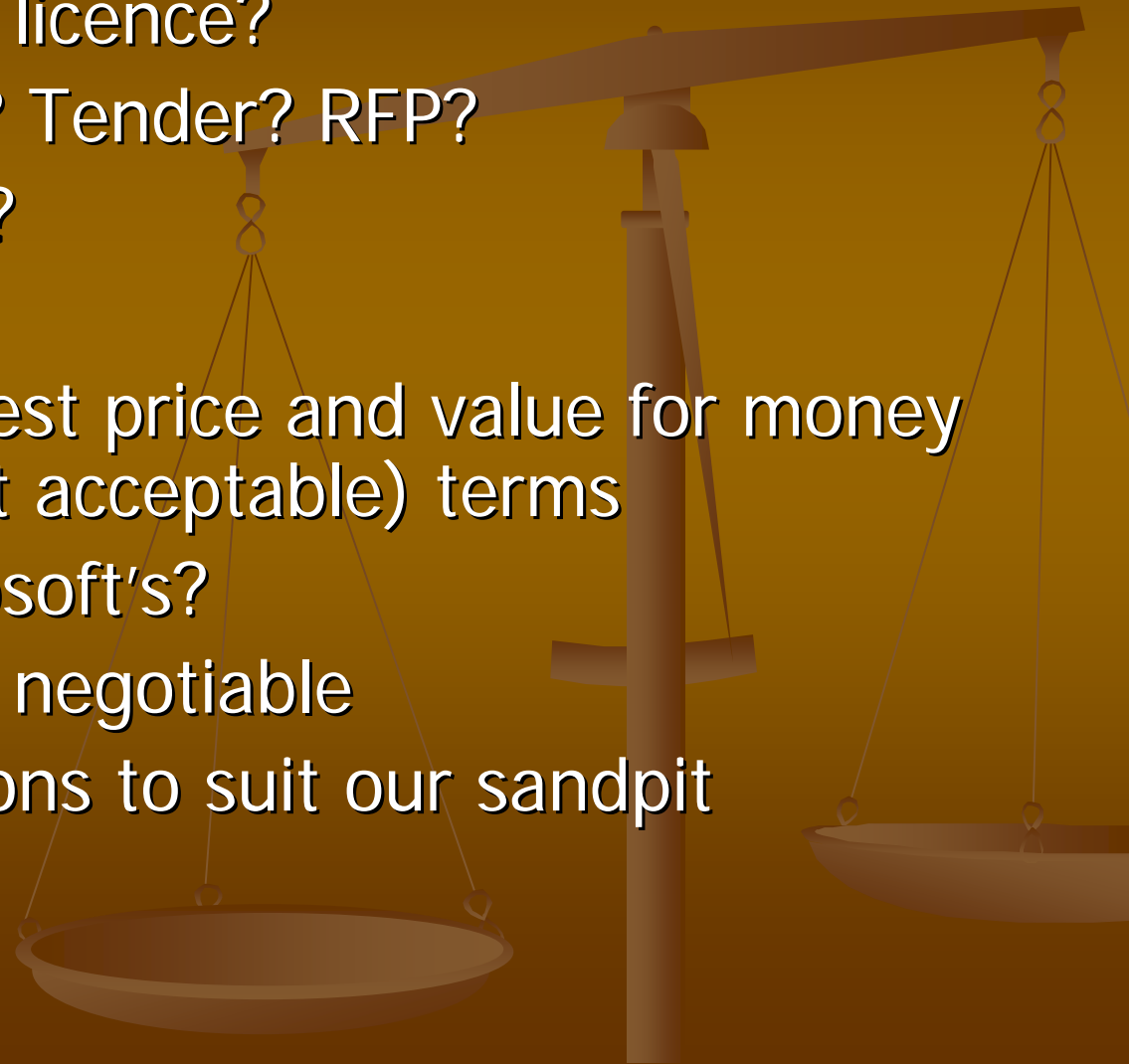
- What do I want it to do?
 - Can it do that? How do I know? Touch/feel/see
 - Is that my preferred position?
 - Is it a compromise? Acceptable?
 - Specifications: Can I describe it properly?
 - Functional
 - Technical
 - Performance
 - Example: RACV case – speed and response time
 - Do I need other help? Internal? External (time/cost/selection/quality/risk/terms and conditions: who/how/what/where/when....)
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How (do I get what I want)?

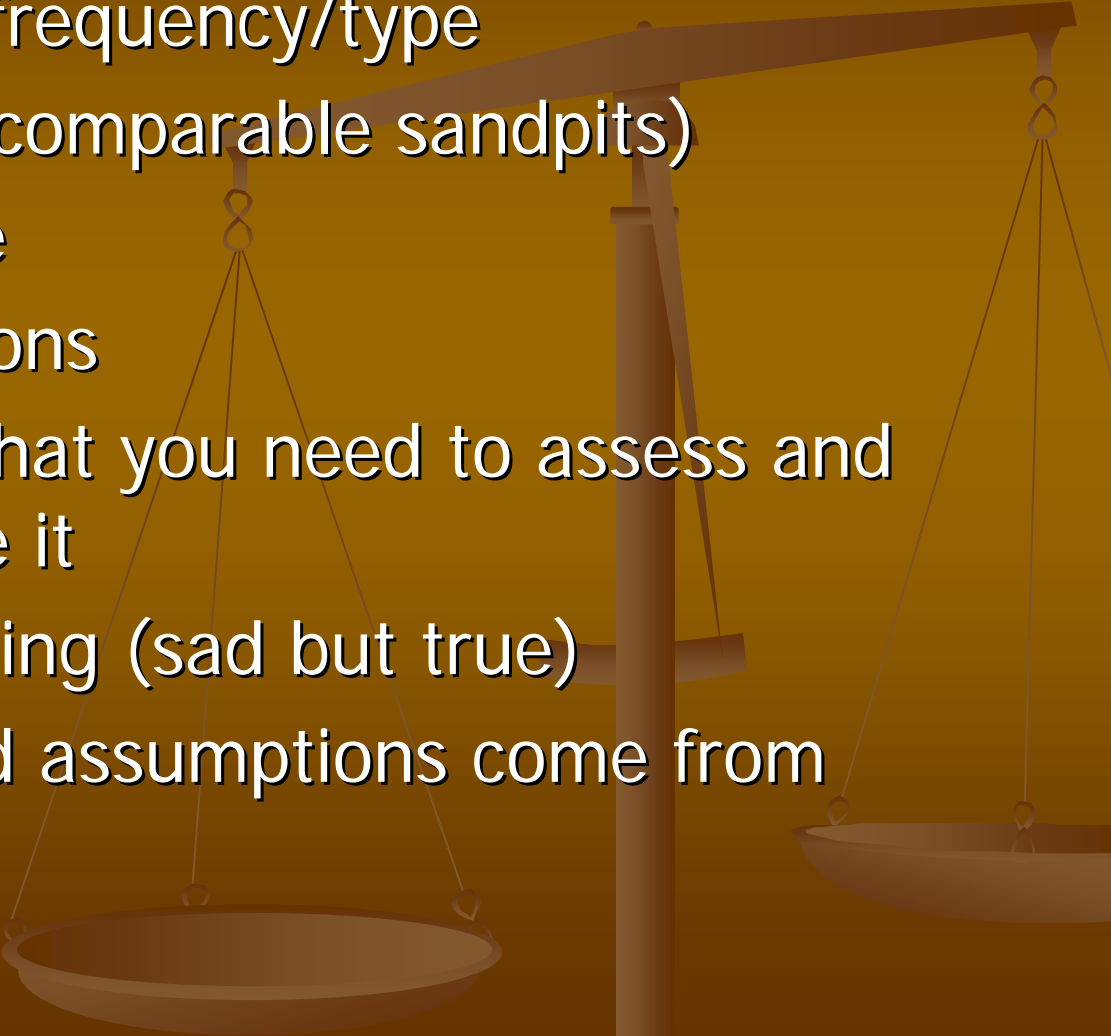
- 3 certified Microsoft agents
 - Local? Interstate?
 - Advantages? Disadvantages (online help desk/support/training/implementation)
 - Cost implications of local – v – NSW?
 - Policy?
 - Reputation/presence in the market (*our market*)
 - Experience/capability/capacity/size/backing
 - Reference sites?
 - Track record or our prior experience
- 

More of the “How”

- How will I get the licence?
- Letter? Invitation? Tender? RFP?
- Only one supplier?
- How do I choose?
- Best outcome – best price and value for money with best (or most acceptable) terms
- My terms or Microsoft's?
- Licence terms not negotiable
- Requested variations to suit our sandpit



More of the “how”

- If I know volume/frequency/type
 - Tender (certainty/comparable sandpits)
 - Structure and time
 - Terms and conditions
 - Go out knowing what you need to assess and how you will judge it
 - Words are everything (sad but true)
 - Understanding and assumptions come from words
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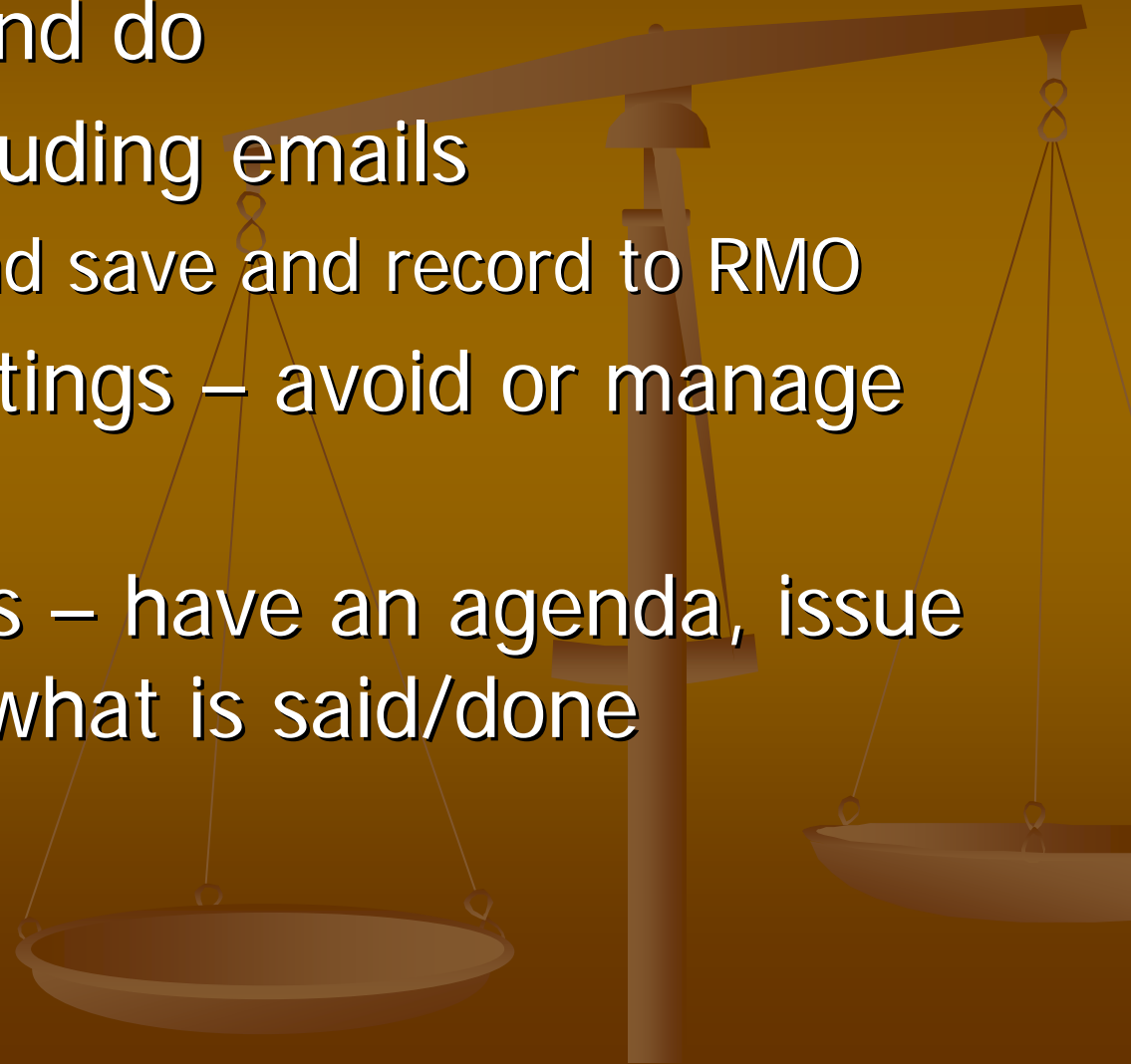
The Tender Trap



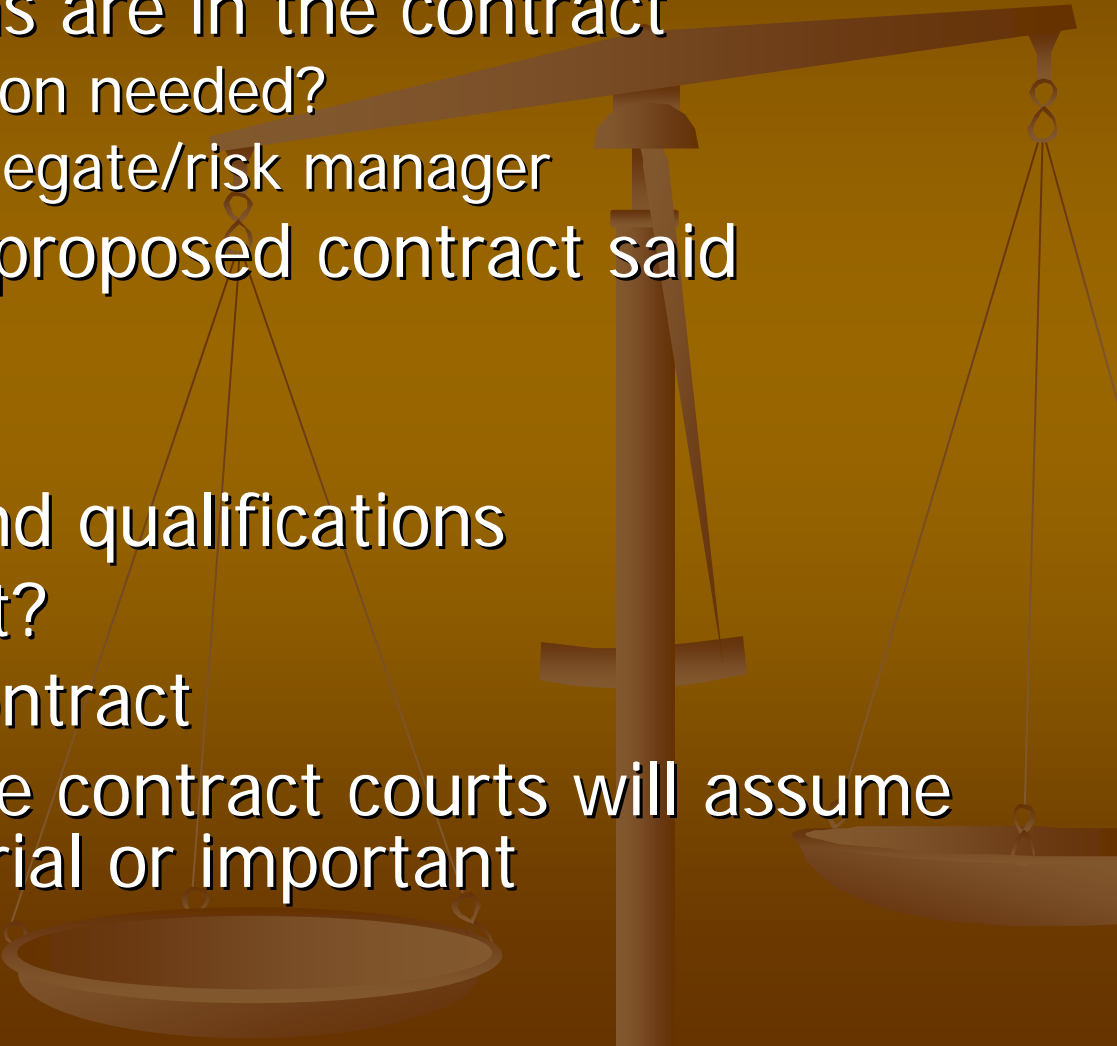
- What did you say you would do?
- How did you tell them you would deal with them?
- Did you agree to be bound (by the lowest price)
- Did you reserve the right not to proceed?
- You may be bound to proceed
- Courts and laws impose conduct from expectations and what you say/do

The Tender Trap

- What you say and do
- In writing – including emails
 - Do you print and save and record to RMO
- Telephone/meetings – avoid or manage with great care
- Tender Briefings – have an agenda, issue papers, record what is said/done

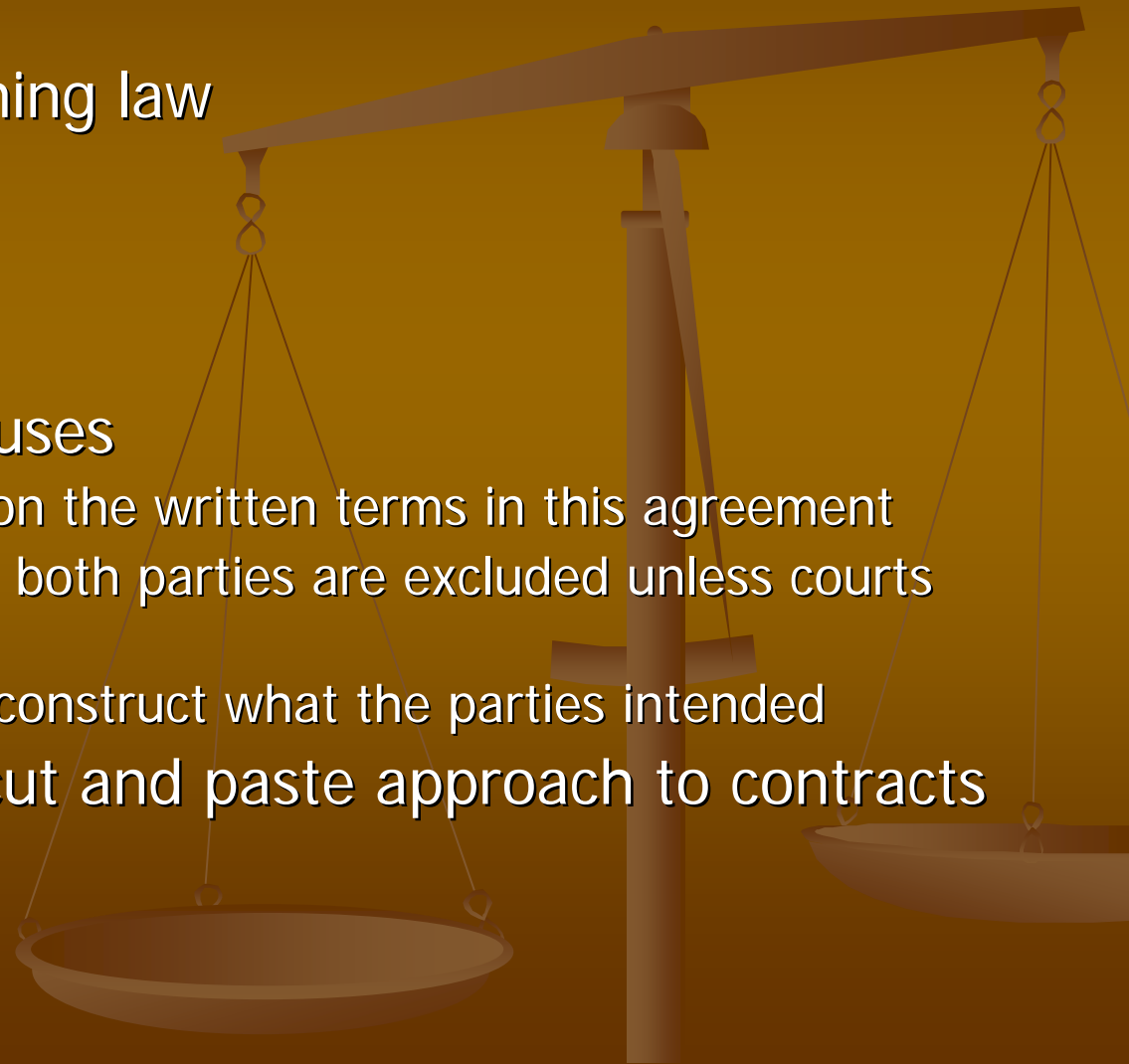


Awarding the Contract

- Make sure all terms are in the contract
 - Further authorisation needed?
 - The authorised delegate/risk manager
 - Not just what the proposed contract said
 - Your emails
 - Their emails
 - Mix of promises and qualifications
 - Are they important?
 - Put them in the contract
 - If they're not in the contract courts will assume they are not material or important
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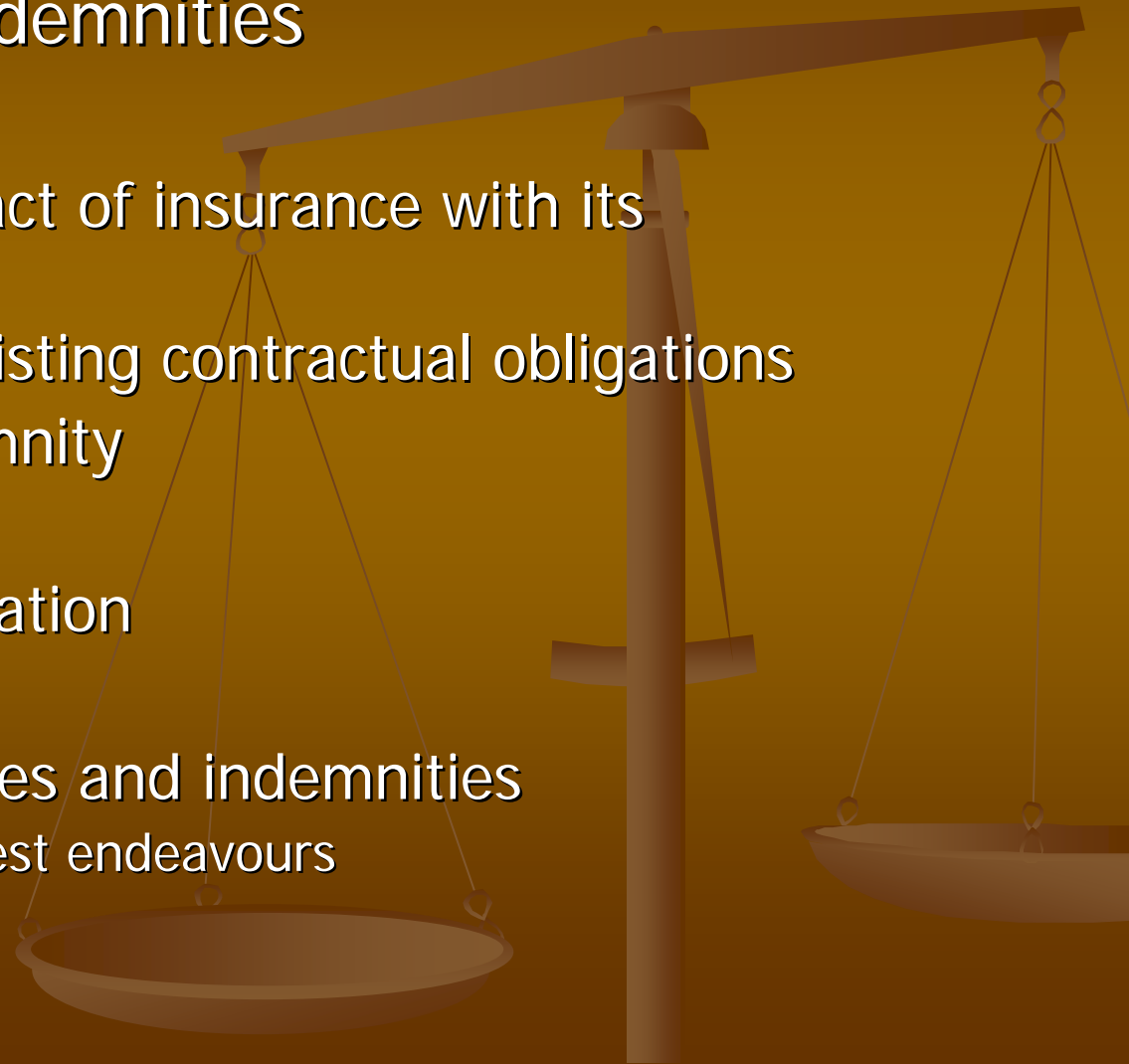
Danger Clauses

- Boiler plate clauses
- Jurisdiction or governing law
- Severance of clauses
- Waiver
- Interpretation
- entire agreement clauses
 - The parties rely only on the written terms in this agreement
 - Email exchanges – by both parties are excluded unless courts permit otherwise
 - Courts reluctant to reconstruct what the parties intended
- Indicates danger of cut and paste approach to contracts



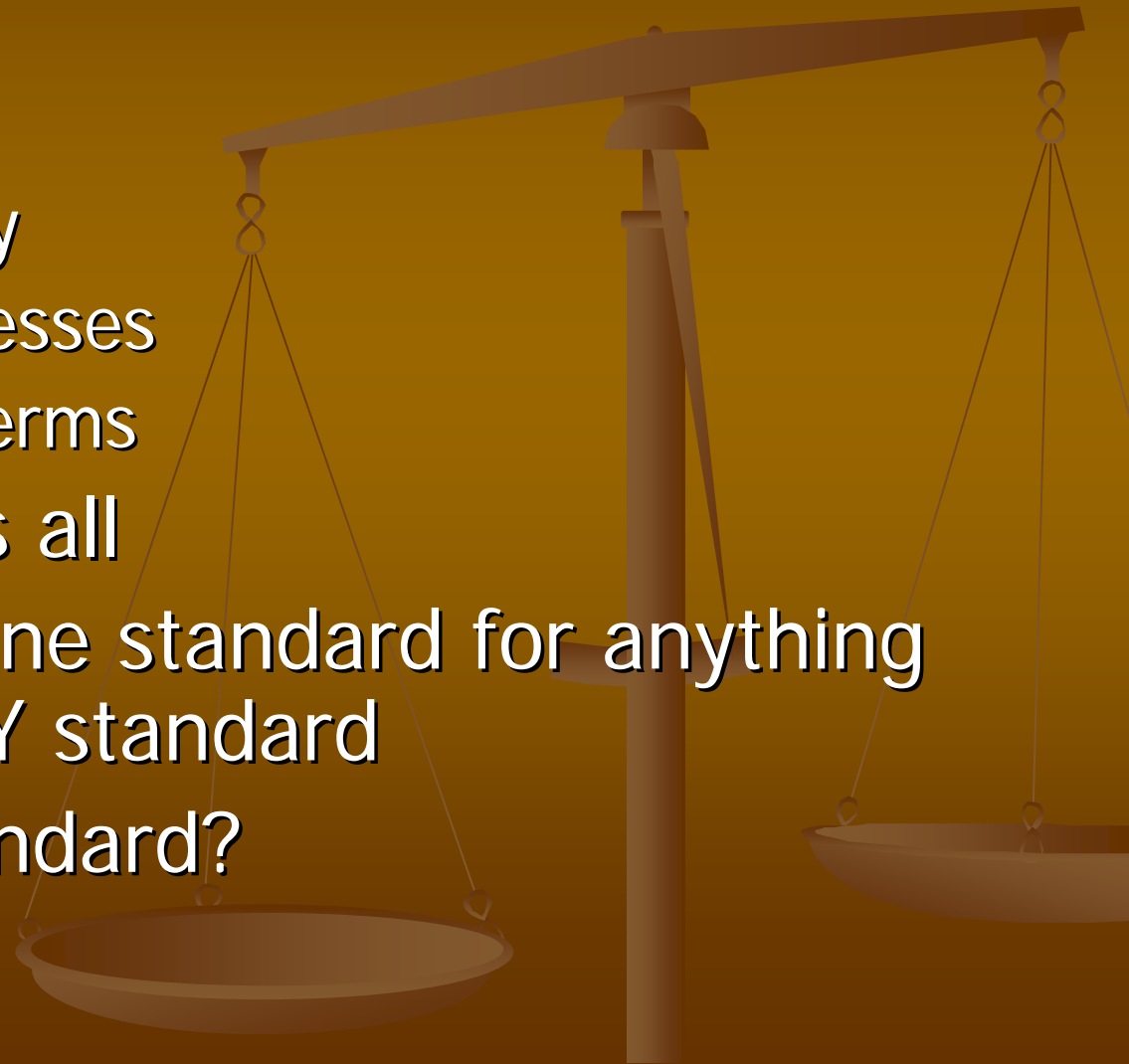
Danger Clauses

- Warranties and indemnities
- Insurance
 - University's contract of insurance with its underwriters
 - Can't undo our existing contractual obligations
 - Professional indemnity
 - Public liability
 - Workers compensation
 - Hold harmless
 - Extent of warranties and indemnities
 - Will ensure/use best endeavours



Danger Clauses

- Jurisdiction
 - Another state
 - Another country
 - Costs and processes
 - Enforcing the terms
- Not one size fits all
- Can't produce one standard for anything other than VERY standard
- What's very standard?



PAN Example

■ Services

- Consultant
- Professional hours for professional deliverables
- Legal services
- Specific project
- Known time line
- Known outputs



PAN: Our Position

Preferred	Acceptable	Not Negotiable	Risks	Consequences
\$250	\$260-290	>\$300	Exceed budget approved by HoS	Compromise budget & compromise service/skill set of lawyer
Start 1/11/07	15/11/07	> 1/12/07	Late delivery	Can't report to council
On site	Off site	Off site but not accessible	Difficult to communicate & hold mtgs	Can't easily meet with personnel
KPI's known in advance	KPI's agreed @ start	No kpi's	What are you getting?	No benchmark to measure/assess
PI of \$20M	PI of \$10M	PI of < \$2M	Exposure to risk	Who wears the risk: UoA bearing the load?

PAN: Their Position

Preferred	Acceptable	Not negotiable	Risks	Consequences
\$350	\$310-340	<\$300	Lower profit	Commitment?
Start 15/11/07	08/11/07	< 1/11/07	Commitment to another client	Juggle other commitments & underestimate required time
Off site	On site with higher rate	On site with lower fees	Access to other email and client calls	Compromise other clients
Known KPI's	Agree @ start	KPI's that exceed value of contract	Balance b/w what is expected & what has been paid for	Both parties unhappy with outcome
PI of \$10M	PI of \$15M	PI of \$20M or >	Exposure to risk	Increase to insurance cost