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Queensland: 6th Annual Contract Law Masterclass

Applying contract law principles
in a changing environment

3-5 March 2009
Marriott Hotel
Brisbane



CONTRACT

Don't miss this opportunity to:

- Examine the latest developments in courts' interpretations of exclusion, indemnity, liquidated damages and termination
- Discover the most recent views on the application of the doctrine of good faith
- Learn from the experts on best practice contract drafting
- Keep up to date with emerging international contract law trends
- Consolidate your understanding of the impacts of impending policies on contract drafting

Plus essential workshops on:

Driving successful government procurement for your clients

Martin McEniery, Partner, and Michael Grosser, Solicitor, DLA Phillips Fox

Drafting essential clauses – indemnities, exclusions and liquidated damages provisions

Jay Leary, Partner, Freehills

Hear from over 12 expert firms including:

Mark Brookes, Partner, Carter Newell Brisbane

Julian Courtney-Stubbs, Partner,
Gilbert & Tobin, Sydney

Michael Creedon, Special Counsel, Minter Ellison
Emeritus Professor Jim Davis, ANU College of Law

Jeffrey Goldberger, Special Counsel, Blake Dawson

Peter James, Partner, Allens Arthur Robinson

Scott Lambert, Partner, Holding Redlich

Margaret Mertens, Special Counsel,
Allens Arthur Robinson

Frazer Moss, Partner, Clayton Utz

John Swinson, Partner, Mallesons

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Queensland: 6th Annual Contract Law Conference

Applying contract law principles in a changing world

Day One: Tuesday 3 March 2009

8:30 **Conference registration**

8:50 **Opening remarks from the Chairperson**
Dr Malcolm Quirey, Special Counsel and General Counsel, Piper Alderman

9:10 **Reducing liability by drafting exclusion, indemnity and liquidated damages provisions**



- Examining enforceable exclusion and limiting of liability for tort, equitable and statutory losses
 - Preventing the use of unenforceable methods of prohibition and control of liabilities
 - Ensuring indemnities for breach of contract are effective
 - One year on – *Environmental Systems Pty Limited v Peerless Holdings Pty Ltd* [2008] VSCA 26 – categorising losses intended to be covered by provisions
 - Comparing a breach of a duty of care with the failure to take reasonable care
 - Analysing how proportionate liability schemes affect drafting considerations
 - Securing your clients' position with effective liquidated damages provisions
 - Preventing unenforceability of a liquidated damages provision
 - *State of Tasmania v Leighton Contractors Pty Ltd* [2005] TASSC 133 – is there a special rule for government contracts?
 - Drafting indemnities against liquidated damages
- Michael Creedon, Special Counsel, Minter Ellison**

10:10 **Minimising risk of breach of good faith in negotiating and performance**



- Applying common law good faith to contract negotiations
 - Common law good faith in performance of contracts
 - When can good faith legitimately be used to prevent someone enforcing a contractual right?
- Michael Batch, Senior Associate, Holding Redlich**

11:00 **Morning tea**

11:30 **Key developments in contract law cases**



- Breach and fundamental breach after *Koompahtoo Local Aboriginal Land Council v Sandpine Pty Ltd* [2007] HCA 61 and *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* [2008] HCA 10
 - Restitution and *Matthew Lumbers v W Cook Builders (in liquidation)* [2008] HCA 27
 - The application of *Hadley v Baxendale* after *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 3 WLR 345 (House of Lords)
 - Managing the pitfalls of contract termination: *Chint Australasia Pty Ltd v Cosmoluce Pty Ltd* [2008] NSWSC 635
 - Interpreting contractual indemnities in light of *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton* [2008] NSWCA 114
- Jeffrey Goldberger, Special Counsel, Blake Dawson**

12:25 **Ensuring the commercial utility of your contracts through negotiating and implementing durable terms**

- Ensuring you understand your client's environments and desired outcomes
- Eliciting all the information you need – the client, its customer and the business

- Drafting the contract with enduring commercial relationships in mind – recognising the potential for changing conditions over the life of the contract
- Offering practical solutions for threats to the operation of the contract
- Ensuring valid formation and avoiding misrepresentation and mistake
- Advising your client prior to contract formation:
 - Admissibility of extrinsic evidence in contract cases
 - Conduct rendering a contract voidable
 - How equitable mistake can operate

John Swinson, Partner, Mallesons Stephen Jaques

1:20 **Networking lunch for speakers and delegates**

2:20 **Avoiding Trade Practices Act 1974 encroachments on enforcement of contracts**

- Reviewing the scope of the *Trade Practices Act 1974*:
 - Misleading and deceptive conduct - sections 52 and 53
 - Unconscionable conduct s 51AA(1) s 51AB(1) and s 51AC
- Investigating the consequences of the state Fair Trading Acts
- Comparing contractual warranties with statutory liability for breach of warranty
- Examining personal liability for breaches - *Houghton v Arms* [2006] HCA 59
- Drafting damages provisions with *Trade Practices Act* in mind
- Scrutinising the scope of permissible disclaimers, conduct, warranties and representations

Peter James, Partner, and John Hedge, Senior Associate, Allens Arthur Robinson

3:10 **VIDEO PRESENTATION PLUS Q&A SESSION: People's Republic of China - Contracting with confidence**



- Brief introduction to contract law in the PRC
- Major features of PRC contract law
- Examining the political context and its impact on contractual transactions
- Understanding the cultural issues which feature in PRC commerce
- Tips for doing business in China

King & Wood, China and Julian Courtney-Stubbs, Partner, Gilbert & Tobin Sydney

4:00 **Afternoon tea**

4:30 **Applying international law to contract drafting**

- Analysing whether exclusive or non-exclusive jurisdiction is appropriate
 - Selecting choice of law – what is the scope of permissible election?
 - Enforcement of Australian judgments and arbitral awards overseas
 - Enforcement of foreign judgments and arbitral awards in Australia
 - Scrutinising the special relationship with New Zealand - the proposals of the Trans Tasman Working Group on Jurisdiction and Enforcement of Judgments
 - Preventing the enforcement of foreign judgments with the *Trade Practices Act*
 - Using anti-suit injunctions
 - Investigating the application of the Free Trade Agreements
- Emeritus Professor Jim Davis, ANU College of Law**

5:20 **Closing remarks from the Chair**

5:30 **Close of Day One**

Day Two: Wednesday 4 March 2009

8:30 **Conference registration**

8:50 **Opening remarks from the Chairperson**
Margaret Mertens, Special Counsel, Allens Arthur Robinson

9:00 **Five principles you need to know when terminating contracts**

- When is termination for convenience valid?
- Analysing the types of breaches – material, intermediate or innominate terms
- Advising your client on the consequences of termination and entitlement to damages
- What happens when you elect to accept termination – when does this become wrongful repudiation?
- Using good faith in termination action

Janelle Kerrisk, Senior Associate, Holding Redlich



9:50 **Discovering the best remedies for breach of contract**

- Steps of terminating a contractual relationship
- Utilising rescission
- Obtaining performance standards through the use of a court order
- Looking at the differences between interim and mareva injunctions
- Understanding the appropriate usage
- Minimising expense through resolving contractual breach disputes out of court
- Utilising restitution in order to restore and outline rights

Mark Brookes, Partner, Carter Newell

10:35 **Morning tea**

Commercial contracts essentials

Select two sessions from these four for the topics which best complement your practice:

Construction stream

11:05 **Preparing construction documentation with clarity and purpose**

A

- Introduction – risk allocation principles
- Examining the document suite governing the whole of project
 - Effective use of standard form and bespoke contract documents
 - Identifying and managing the risk of inconsistency between project documents
- Focussing on key issues in project documentation:
 - Exclusions and limitations of liability
 - Warranties and indemnities
 - Liquidated damages
 - Variations
 - Extension of time
 - Termination
 - Dispute resolution

Scott Lambert, Partner, Holding Redlich

12:00 **Drafting, enforcing and avoiding time bars**

B

- Drafting challenge-proof time bar clauses
- Protecting the enforceability of time bars through proper administration of delay, disruption, variation and other claims
- Challenging or avoiding time bars
- Time bars and security of payment legislation
- Time bars and statutory causes of action

Frazer Moss, Partner, Clayton Utz

12:55 **Networking lunch for speakers and delegates**

Commercial stream

11:05 **Key contractual intellectual property issues**

C

- Understanding and applying the intellectual property fundamentals
- Properly scoping intellectual property contracts
- Understanding the impact of timing issues
- Identifying key areas of intellectual property contractual risk
- What cannot be excluded or limited?
- Disclaimers - when are they relevant and how effective are they?
- Contractual clauses to manage infringements:
 - By licensees
 - Of licensed products
 - By third parties
- Types of remedies provided for by the contract and how they can be used by both suppliers and customers as part of a risk management system

Anna Sharpe, Lawyer, Communications, Technology & Corporate Advisory

12:00 **Managing vendors through practical contracts**

D

- Structuring effective supply agreements
- “Just put it on one page” - drafting Plain English terms and conditions
- Describing essential terms:
 - Price and price adjustments
 - Delivery
 - Specifications and quality
 - Title and Romalpa clauses
- Tips for avoiding inconsistencies in original versions and amendments to the contract

Kirsten Bowe, Senior Associate, Mallesons Stephen Jaques

1:55

Dissecting the impact of the Emissions Trading Scheme on contract provisions



- Overview of the Emissions Trading Scheme
- Which contract party will be liable for emission permit compliance?
- Passing through emission costs
- How do you deal with non-reviewable existing contracts?
- Drafting and enforcing change of law provisions - will they work?
- How do you price future carbon costs into contracts to be entered now?

Graeme Dennis, Partner, **Clayton Utz**

2:45

Managing government contracts

(stretch break/afternoon tea 3:30-4:00 pm)



- Understanding the relevance of the government procurement guidelines
- Negotiating with government entities – what aspects are negotiable?
 - Formulation of contract
 - Process and procedure implementation
 - Processes for amending or updating the contract
 - Liquidated damages
 - Termination for convenience
- Government immunities and derivative immunity
- Questions from the floor

Panellists:

Dr Nicholas Seddon, Special Counsel, **Blake Dawson**

Linda Richardson, Special Counsel Commercial,

Australian Government Solicitor

Michael Creedon, Special Counsel, **Minter Ellison**

4:40

Closing remarks from the Chair

4:45

Close of Day Two

Who Should Attend?

- Partners
- Solicitors
- Barristers
- Associates
- Senior Associates
- In-house Counsel / General Counsel / Legal Counsel
- Government Lawyers
- Litigators
- Dispute Resolution Specialists
- Contract Managers and Officers
- Procurement Managers
- Purchasing Managers and Buyers
- Commercial and Business Development Managers
- Supply Chain and Logistics Managers
- Project Managers and Officers
- Alliance Managers
- Construction and Engineering Managers

Upcoming events:

4th Annual Cutting Edge Practical Advocacy Skills

13 February, Stamford Plaza, Brisbane

5th Annual Construction Law Masterclass - QLD

18-19 February, Marriott Hotel, Brisbane

5th Annual Property Law Masterclass - QLD

19-20 February, Marriott Hotel, Brisbane

For more information please visit

www.lexisnexis.com.au/pd or phone 1800 772 772

Day Three: Thursday 5 March 2009

Practical Workshops

8:30 **Workshop A registration**

9:00 **Workshop A:
Driving successful government procurement for
your clients**

- Reviewing *Financial Management and Accountability Act 1997* and its relevance
- Understanding the procurement process
- The process contract
- Implied terms and acting in good faith
- Avoiding the pitfalls of tendering
- Developing compliance procedures
- The procurement framework
- Documentation supporting the tender process
- Contract finalisation
- Freedom of information – what can a tenderer access?
- Complaints and whistleblowers

Martin McEniery, Partner, DLA Phillips Fox and Michael Grosser, Solicitor, DLA Phillips Fox

Martin has major projects experience spanning 20 years from projects in Europe, Africa, Asia, the Pacific and Australia. He has extensive major infrastructure, resource and large technology project experience, gained from projects including oil refineries, power stations, desalination plants, wharf infrastructure, IT, tolling and telecommunications infrastructure projects, both offshore and in Australia. Martin has a wide knowledge of the regulatory compliance and finance issues relating to major projects throughout Australia and the Asia Pacific region. He acts as a lead partner in managing legal teams advising on multibillion dollar projects involving bridges, telecommunications, tolling, road and desalination plant delivery. Part of his role involves early involvement in structuring the project entity and advising on delivery models, including public private partnerships (PPPs). Martin advises on board and corporate responsibilities for project delivery and reporting throughout Australia and South East Asia and draws heavily on general corporate governance principles through the CLERP releases, and releases such as the Sarbanes - Oxley Act in the US. He also monitors regulatory agencies' governance pronouncements in the US and UK.

Michael is an information technology lawyer in the Technology Media and Commercial team at DLA Phillips Fox Brisbane. Michael acts for both private and public sector clients in a range of commercial areas including major infrastructure projects, transportation, technology, tolling, digital media, information technology and e-commerce, licensing and government procurement.

Prior to becoming a lawyer Michael was the co-founder of the Australian e-learning company Catalyst Interactive, and was involved in managing and developing the business across Australia and in the USA, Canada and the UK. Michael has also assisted private companies and government agencies commercialise their technology products and services for worldwide markets. This industry experience allows Michael to balance both the legal and commercial issues and interests of his clients.

Michael has recently advised corporate, state, federal and local government agencies on procurement and probity acquisitions including ferry services, bus and aviation services, information technology hardware, software and systems integration projects, tolling, construction and energy projects.

Michael has experience with a range of contracting frameworks including joint ventures, alliance contracts, early contractor involvement and hard risk contracts.

12:00 **Close of workshop A**

12:00 **Networking lunch for facilitators and delegates**

12:30 **Workshop B registration**

1:00 **Workshop B:
Drafting essential clauses – indemnities, exclusions
and liquidated damages provisions**

- Understanding the mechanics of these clauses
- Working with your client to elicit all relevant information and providing useful advice
- Drafting commercially acceptable and legally effective indemnity, exclusion and liquidated damages clauses

Jay Leary, Partner, Freehills

Jay is a graduate of the Murdoch University School of Law, Perth, Western Australia. He was the associate to Justice Carr of the Federal Court. Jay practices as a commercial lawyer with particular experience in energy & resources, major infrastructure and general contractual and commercial matters. Jay assists clients to implement a wide range of transactions including development agreements, joint ventures, EPC contract, EPCM agreements, O&M agreements, commodity sales agreements and transportation agreements. Jay has also advised extensively on Queensland third party access regulation issues. Major projects that Jay has been involved with include acting as adviser to:

- Rio Tinto & Titanium in relation to the development of a mineral sands mine and port in Madagascar, Africa
- Babcock & Brown Infrastructure on the \$1.1 billion expansion of the Dalrymple Bay Coal Terminal
- InterGen in relation to a merchant, project financed greenfield 800MW gas-fired CCGT power station in Singapore
- Babcock & Brown Infrastructure in relation to the Dalrymple Bay Coal Terminal Access Undertaking
- Barrick Gold Corporation on its development of a new gold mine at Cowal and electricity transmission line from Temora
- Queensland Rail in relation to the Bauhinia Regional Rail Project including access agreements and rail haulage agreements the proponent of the PNG to Queensland Gas Pipeline
- Comalco in relation to the development of the Comalco Alumina Refinery and associated materials handling and unloading facilities
- North Limited in relation to the development of the West Angelas Mine, construction of rail infrastructure and upgrade of the Cape Lambert Port
- Rio Tinto Iron Ore in relation to the Dampier Port Upgrade, the development of Eastern Ranges, the upgrade of Yandicogina, the expansion of Brockman, and the expansion of Ton Price.

4:30 **Close of workshop B**

Priority registration form QLD: 6th Annual Contract Law Masterclass

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Position: _____

Organisation: _____

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Suburb Postcode State

Telephone: _____

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Delegate 2 details

Mr/Ms/Dr: _____
First name Last name

Position: _____

Telephone: _____

Fax: _____

Email (required**): _____

Delegate 3 details

Mr/Ms/Dr: _____
First name Last name

Position: _____

Telephone: _____

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B CONFERENCE RESOURCES

I am unable to attend but would like to purchase a set of conference papers for Queensland: 6th Annual Contract Law Masterclass \$360.00 + GST = \$396.00

TEAM DISCOUNTS*

Register a team of 2 for Queensland: 6th Annual Contract Law Masterclass at the same time, from the same organisation and receive a free pass for the 3rd delegate.

* Early Bird, team discounts and any other discount cannot be taken concurrently

C Please tick as many practice areas you work in which apply:

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D Event Pricing (please tick your selection)

ADVANCE PRICING* (register and pay before 19 December 2008)

<input type="checkbox"/> Two day conference + 2 workshops	\$2400.00 + GST = \$2640.00
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<input type="checkbox"/> One day conference + 1 workshop#	\$1700.00 + GST = \$1870.00
<input type="checkbox"/> One day conference only#	\$1150.00 + GST = \$1265.00
<input type="checkbox"/> Two workshops only	\$650.00 + GST = \$715.00

I would like to attend: Day One Day Two

If attending only one workshop: Workshop A Workshop B

Stream sessions (Choose two only): Session A Session B Session C Session D

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