



Contracts 2010

Optimising contract performance
and mitigating risk

9 – 10 February 2010
Workshop Day: 11 February 2010
Hilton Sydney

Program highlights

- MASTER new **contract drafting techniques** to ensure enforceability
- ACCELERATE **contract performance** throughout its lifecycle
- MITIGATE **contractual risk** through due diligence and risk assessment strategies
- PREVENT **unfair terms** in consumer contracts and **cartel conduct** in joint ventures
- RESOLVE **breach of contract** and enforce contractual rights in the event of an **insolvency**

Speakers



Kon Panagakos
*IS Global Vendor & Procurement
Manager, Bluescope Steel*



Rashda Rana
General Counsel, Bovis Lend Lease



Peter Pether
*Partner, Mallesons Stephen Jaques
– Chambers Global 2009 – leading
lawyer in Construction*



Keith Robinson
*Partner, Minter Ellison – Chambers
Global 2009 – leading lawyer in
Information Technology*



Ian Bailey SC
Barrister, Wentworth Chambers

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Contracts 2010

Post-conference workshop day – 11 February 2010

8:30 **Workshop A registration**

9:00 – 12:00 Including morning tea

Workshop A

The Tender Process – Legal issues and risks when inviting and responding to tenders

- Types of tender processes
- Why run a tender process
- Innovative approaches to market testing (ECI / ETI / BAFO)
- Legal risks and compliance in a tender process
- Challenging the decision - issues for government and the private sector
- What does value for money really mean
- Successfully evaluating tenders
- Probity – what it is and when to use it

Scott Alden, Partner, DLA Phillips Fox

12:00 **Networking lunch for speakers and full day delegates**

12:30 **Workshop B registration**

1:00 – 4:00 Including afternoon tea

Workshop B

A practical approach to drafting and negotiating contracts

- Basic rules of contract interpretation
- Understanding the commercial deal and defining the content of the agreement
- Contracting parties and duration of contracts
- Avoiding pitfalls associated with performance commencement prior to formal contract documentation
- Guides to good drafting
- Techniques for controlling liability under contract
 - indemnities
 - liability caps
 - exclusion clauses
 - liquidated damages
- Drafting termination regimes
- Negotiating successful contracts
- Dispute resolution provisions and best practice ADR

Leighton O'Brien, Partner, Allens Arthur Robinson

Christopher Larcos, Senior Associate, Allens Arthur Robinson

4:00 **Close of workshops**

Who should attend?

Non-legal professionals

- Contract managers and Officers
- Procurement Managers
- Purchasing Managers & Buyers
- Commercial and Business Development Managers
- Supply Chain and Logistics Managers
- Project Managers and Officers
- Alliance Managers
- Construction and Engineering Managers

Legal Professionals

- In-house Counsel / General Counsel / Legal Counsel
- Government Lawyers
- Partners and Senior Associates
- Solicitors, Associates and Litigators
- Barristers
- Dispute Resolution Specialists

Other Contracts 2010 dates

Perth 11–12 February | Melbourne 16–17 February | Brisbane 18–19 February



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Contracts 2010

Day 1 – Sydney, 9 February 2010

8:30 **Registration**

8:50 **Welcome from the Chairperson**

Ian Bailey SC, Barrister, Wentworth Chambers

Drafting and interpretation

9:00 **Limiting liability and risk by contract: Indemnity, limitation and exclusion provisions**

- Drafting techniques to distribute risks
- Negotiating indemnity, limitation of liability and exclusion clauses
- Recent case law and developments – investigating court's interpretation of indemnity and exclusion clauses
- Exclusion and limitation clauses in commercial context
- Probing into the changing definition of consequential loss – *Environmental Systems Pty Ltd v Peerless Holdings Pty Ltd [2008]*
- Direct v consequential loss – judicial interpretation
- Revisiting contracts which contain clauses excluding consequential loss

Stuart Cosgriff, Partner, Clayton Utz

9:50 **Liquidated damages and penalties – ensuring enforceability**

- How to draft effective liquidated damages provisions
- Differentiating liquidated damages from penalties
- Application of prevention principle and impact on liquidated damages
- Anticipating problems in enforcement
- Recent case law: *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd [2008]* NSWCA 310, *J-Corp Pty Ltd v Mladenis [2009]* WASCA 157, *Silent Vector Pty Ltd t/as Sizer Builders v Squarcini [2008]* WASC 246 and others

Rashda Rana, General Counsel, Bovis Lend Lease

10:40 **Morning tea**

11:00 **Recent developments in contract law and vital case law**

- Prior negotiations as part of factual matrix in contract interpretation – *Chartbrook Ltd v Persimmon Homes [2009]* 3 WLR 267
- Loss of contractual rights by conduct: Waiver, election and estoppel: *Agricultural and Rural Finance v Gardiner [2009]* HCA
- Agreements to negotiate in good faith – *United Group Rail Services Ltd v Rail Corporation New South Wales [2009]* NSWCA 177 and others
- Implied Terms – *Attorney-General of Belize v Belize Telecom Ltd [2009]* and others
- Developments in the law of restitution – *Sopov v Kane Constructions Pty Ltd (No 2) [2009]* VSCA 164 and *Perpetual Trustees Australia Pty Ltd v Heperu Pty Ltd [2009]* NSWCA 84

Jeffrey Goldberger, Special Counsel, Blake Dawson

11:40 **Intellectual property issues in contracts: Hints, tips and practical guidance**

- Major issues in dealing with IP in contracts
- What do you need to consider beyond the contract
- Steps to minimise risk in infringing third party IP
- Dealing with your brand – minimum protections in contracts
- Traps in negotiations with IP

Kristin Stammer, Partner, Freehills with client

Chambers Global 2009: Leading lawyer in Intellectual Property

12:20 **Networking lunch for speakers and delegates**

1:20 **Writing, forming and agreeing to terms in contracts online**

- Does electronic writing satisfy statutory requirements for writing?
- Forming an electronic contract online – what is the offer? what is the acceptance?
- What terms of the electronic contract have we agreed to?

Dr Simon Blount, Barrister, State Chambers

Lexis Nexis Author, "Electronic Contracts: Principles from the Common Law"

2:00 **Termination: Practical issues in construction and interpretation**

- Distinguishing between conditions and warranties – test of essentiality
- Drafting effective early termination clauses – conditions and limitations
- Termination for convenience clauses – is there implied duty of good faith?
- What happens when contract is terminated half-way through – assessing financial consequences, continuity of services and disengagement
- Termination of contract by repudiation – what's the impact on damages?
- Recent case law

Peter Pether, Partner, Mallesons Stephen Jaques

Chambers Global 2009: Leading lawyer in Construction



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2:40 **Implied conditions and warranties: 'Lemon laws' to protect consumers**

A review of Australian law on implied conditions and warranties by the Commonwealth Consumer Affairs Advisory Council (CCAAC) was announced on 12 March 2009. This session will cover:

- Implied terms in the *Trade Practices Act 1974*
- Limiting liability for breach of an implied term and remedies
- Protection for consumers for failure to meet standards of performance and quality
- Existence of extended term/warranties
- Div.2 & 2A of Pt V of the TPA – non-excludable conditions and warranties (eg. 12 mo warranties, extended warranties)
- Exclusions
- Recent case law

Nicholas Seddon, *Special Counsel*, **Blake Dawson**
Lexis Nexis Author, Cheshire & Fifoot's Law of Contract

3:20 **Afternoon tea**

3:40 **Good faith: Practical applications in contract law**

- Pre-contract: good faith in contractual negotiations
- During the contract: interpretation of express good faith terms; implication of good faith requirements by courts; - the present debate regarding whether good faith inherent to a contract
- Termination of contract: relevance of good faith obligations to the exercise of termination rights
- Application of good faith in commercial and government contexts
- Recent case law including: *Clough Engineering Limited v Oil and Natural Gas Corporation Limited* [2008] FCAFC 136 (22 July 2008); *Insight Oceania P/L v Philips Electronics Australia Ltd* [2008] NSWSC 710

Leighton O'Brien, *Partner*, **Allens Arthur Robison**
2008 Chambers Global: Leading lawyer in Construction

Hot topic

4:20 **Trade practices reform: Exerting precautions in Joint Venture agreements – criminalising cartel conduct**

- Dissecting the Trade Practices Amendment (*Cartel Conduct and Other Measures*) Act 2009 – what are the critical changes, how does this affect corporations and what precautions must be undertaken?
- Distinguishing cartel provisions
- Penalties for cartel conduct and exceptions
- ACCC enforcement
- Joint venture defence to the new cartel provisions

Richard Flitcroft, *Partner*, **Corrs Chambers Westgarth**

5:00 **Close of Day One**

Networking drinks



Day 2 – Sydney, 10 February 2010

8:30 **Registration**

8:50 **Welcome from the Chairperson**

Contract management

Case study

9:00 **Strategic relationship management to ensure contract performance and drive cost savings**

- Establishing a vendor management network – ranking relationships of strategic importance
- Commercial execution using a lifecycle approach – non-disclosure agreements, evaluation, risk analysis, negotiation, recommendation, execution and debrief
- Contract management and formulation – foundations of managing successful relationships
- Managing supplier performance – driving expected behaviours using the balanced scorecard approach, penalty-reward and increasing competitive tension
- Formulating global agreements – lessons learnt
- Delivering cost savings

Kon Panagakos, *IS Global Vendor & Procurement Manager*,
Bluescope Steel

Case study

9:40 **Limiting liability and mitigating contractual risk through inculcating effective risk assessment and transfer**

- Reducing risk exposure throughout project lifecycles
- Incorporating effective risk assessment strategies and risk management frameworks for project work, outsourced services, goods procurement and your compliance and governance structures
- Minimising risk of contractual disputes
- How to address these risks in your particular business model (online or traditional)

Olga Ganopolsky, *Head of Legal – Compliance and Regulatory*,
Veda Advantage

10:20 **Morning tea**

10:40 **Your people, your intellectual property assets: Guarding business interests and limiting risk through restraint of trade**

- Ensuring clear and reasonable protectable interest when drafting restraint of trade clauses
- Performing a raincheck on validity and enforceability
- Is garden leave a viable option?
- Delineating the risks
- Restraint clauses with cascading provisions
- Observing resistance in enforcement of restraint of trade clauses and injunctions sought
- Review of recent cases *Bulldogs Rugby League Club Ltd v William and Ors* [2008], *Marlov Pty Ltd v Col* [2009] NSWSC 501, *BearingPoint Australia Pty Ltd v Hillard* [2008] and others

Joe Catanzariti, *Partner*, **Clayton Utz**
Chambers Global 2009: Leading lawyer – Employment

Hot topic

11:20 **Preventing unfair terms in consumer contracts – assessing the impact of new National Consumer Legislation**

- Standardising terms in relation to unfair terms in business-to-consumer contracts – unfair and prohibited contract terms
- What will be a standard form contract? How can we determine whether a term is unfair?
- Enforcement and remedies under the *Trade Practices Act 1974*
- Reviewing unconscionable conduct provisions of the *Trade Practices Act 1974* and the Franchising Code of Conduct: the new penalty regime
- Progress regarding *Trade Practices Amendment (Australian Consumer Law) Bill 2009* – timeframes and how we can prepare
- Avoiding breaches of unfair contracts provisions

Paul Schoff, Partner, Minter Ellison

Interactive Panel/Commentary

12:00 **Unfair contracts: are the new consumer law changes fair?**

Panellists:

Nicholas Seddon, Special Counsel, Blake Dawson
Paul Schoff, Partner, Minter Ellison
Simon Writer, Manager, Consumer Policy Frameworks, Consumer Affairs Division, Department of Treasury

Invited: Rod Stowe, Deputy Commissioner, Fair Trading National Reform Agenda, Department of Fair Trading

12:30 **Networking lunch for speakers and delegates**

Case study

1:30 **Assuring the enforceability of online contracts in the age of ecommerce and web 2.0**

- Discovering clickwrap, browsewrap and shrinkwrap contracts – do these have a place in common law?
- What is sufficient notice of terms in online or electronic contracting?
- Examining the enforceability of online contracts
- Rise of e-commerce and emerging case law in the online realm
- Practical lessons for the online environment

Katrina Johnson, Director of Legal and Government Affairs, eBay

2:00 **Examining best practice in developing and managing outsourcing agreements**

- Local or offshore manufacturer? – making an informed decision
- Key questions to ask during the due diligence and risk assessment stage
- Essential structure of an outsourced agreement
- Factoring in service-level and change management procedures
- Including incentives to achieve or exceed service levels
- Defining termination, expiration and exit clauses of arrangement
- Governance issues

Keith Robinson, Partner, Minter Ellison
Chambers Global 2009: Leading lawyer in Information Technology

2:40 **Stretch break / working afternoon tea**

Interactive Panel Discussion

2:50 **Trends, challenges and best practice in contract management: what lies ahead in 2010?**

- Delineating the contractual risks in outsourcing and offshoring
- Best practice and challenges encountered in e-procurement
- Building and managing strategic relationships and alliances
- Managing relationships with contractors, consultants, financiers and the legal team
- How the global financial crisis is transforming contract management and procurement – securing competitive advantage
- Unearthing value from existing contracts
- Resolving disputes and overcoming challenges in contract management

Panellists:

Tony Coburn, Partner, Freehills
Alex Mitchell, Senior Corporate Counsel, Unisys
Olga Ganopolsky, Head of Legal/Compliance, Veda Advantage

3:40 **Selecting and managing contractors in the GFC**

- Asking the right information – getting your tender right
- Doing the right searches – conducting due diligence
- Knowing what your contract says
- Using your contract to preserve your rights
- Traps for the unwary
- Some practical tips

Scott Alden, Partner, DLA Phillips Fox

4:20 **Enforcing contractual rights, damages and claims in event of insolvency**

- Contracting with insolvent or near insolvent parties – challenges in contracted obligation in downturn
- Dealing with insolvency of a contracting party
- Enforcing contractual rights
- Recuperating damages from liquidated businesses
- Reviewing insolvency provisions of the Corporations Act 2001 (Cth) and its applications
- Prosecuting breach of contract in economic downturn
- Minimising contracted obligation in downturn – techniques to get out of obligation
- Recent case law

Scott Hedge, Partner, Kemp Strang
Voted as one of Australia's best lawyers in Insolvency & Reorganization

5:00 **Close of Conference**

Priority registration form Contracts 2010

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Please complete sections A, B, C, D

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Mr/Ms/Dr: _____
First name Last name

Position: _____

Organisation: _____

Postal address: _____

Suburb Postcode State

Telephone: _____

Fax: _____

Email (required**): _____

Delegate 2 details

Mr/Ms/Dr: _____
First name Last name

Position: _____

Telephone: _____

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CONFERENCE RESOURCES

- I am unable to attend but would like to purchase a set of the
Contracts 2010 NSW papers for \$360 + GST = \$396

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|--------------------------|--------------------------|--|-------------------------|--|
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| | | | | |
|--------------------------|--------------------------|--|-------------------------|--|
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| <input type="checkbox"/> | Full day workshop only | | \$1,150 + GST = \$1,265 | |
| <input type="checkbox"/> | Half day workshop only # | | \$650 + GST = \$715 | |

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TOTAL

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+ I would like to attend: Day 1 or Day 2

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