

Introduction

This book of essays addresses a topic which is paradoxically both familiar and elusive: the long term contract. Contracts of a long duration are of great antiquity, with many trading relationships, such as those in terms of colonialism, spanning over decades. As the Hon Justice Carmel McLure observes in the introductory remarks of her essay, there is no definition of a long term contract and none is required: you know one when you see one.

There are three central concerns affecting the formation, construction, and operation of long term agreements.

The first is that a contract's extended duration creates complexity but is not in and of itself transformative in the sense that established, fundamental principles are altered. Duration does not affect basal content. In other words, fundamental contractual doctrine relating to matters such as interpretation, duties, and damages remain unaffected but become harder to apply to long term agreements and, in the face of the possibility for a combination of applicable doctrines, more difficult to determine with specificity in advance of a particular matrix of circumstances.

The second is that the common law does not inevitably and dogmatically proceed on a predicate for the necessity of substantive fairness. In the absence of such a predicate, the common law has not yielded methods for the alleviation of such unfairness as may arise in view of changed circumstances over the life of a long term agreement. The only doctrines that evolved relate to extreme circumstances. It can reasonably be assumed that, other than perhaps frustration (a topic dealt with in the paper by Professor David Campbell, and subject to insightful commentary by Anthony Patten, in Chapter 5), no common law rule developed a nuanced and distinct response to contracts of an extended duration.¹ It soon became apparent that it was for the parties to decide the mechanisms for their protection, in the interests of certainty, and to anticipate the consequences of changed circumstances. Typical clauses the parties could include in their contracts cover topics such as *force majeure*, the grounds for termination, and provisions enabling the adjustment of prices.

Thirdly, parties may deal with each other for a number of years, even decades, without a formal written instrument. The essence of their bargain

1 The longer a contract's duration, the greater the likelihood of circumstances arising that were not within the contemplation of the parties at the time of contracting. That is, frustration has more work to do in the context of long term contracts.

need not be formalised into writing and they may trade with each other without much in the way of specific provisions guiding their behaviour. However, such a state of affairs is unlikely to continue in the face of anything other than the most simple of transactions. In most contracts of a long duration, parties will be torn between a desire for certainty and a desire for flexibility. This will inevitably make for complex and involved negotiations. The consequence of this is that long term contracts will, in one way or another, cater to the individual circumstances of the particular transaction the subject of negotiation. This customised configuration of rights and responsibilities requires close attention to the particular objectives and wishes within each transaction. It calls for what Justice Posner described, in another context, as ‘bottom up reasoning’; that is, both for the purposes of an individual transaction and for reflecting on contractual doctrine in the abstract, attention must begin with the particular circumstances giving rise to the arrangement and proceed from there.²

Despite the importance and prevalence of long term agreements, particularly in the energy and resources sector, there is a surprising dearth of material on the subject. This book aims to fill that gap in the literature by providing perspectives on long term contracts from ‘womb to tomb’.

Beginning with Chapter 1, Selwyn D’Souza deals with elements of the preparation and negotiation of long term agreements and Rupert Lewi and Chris Lockwood explain how this process is viewed from the perspective of two of Australia’s major trading partners, Japan and China.

Chapter 2 is concerned with what is perhaps both the most significant and difficult aspect of long term contracts: drafting. Sharon Wilson, Michelle Cole and Barry Irwin discuss particular drafting considerations applicable to the fundamental terms of payment and termination, and John Kelly provides a general guide to the drafting of long term agreements.

Turning from formation to performance, Chapter 3 deals with rights and obligations in the context of long term agreements. The Hon Justice Carmel McLure and Paul Finn explore the impact of a contract’s duration on key contractual doctrine, good faith, and fiduciary obligations. Gavin Ryan provides practical commentary from the perspective of an in house lawyer in the petroleum industry.

Chapter 4 focuses on a common feature of Australia’s resources landscape: the State Agreement. The chapter examines critical issues that arise, together with a guide to State Agreements by John Southalan.

Chapter 5 covers frustration and *force majeure*, topics which assume particular importance in long term agreements where unanticipated changed circumstances are almost inevitable. Professor David Campbell, drawing upon his expertise in relational contract theory, explores the

2 RA Posner, ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *U Chi L Rev* 433.

limitations of the common law's response to changed circumstances and explains the importance of properly drafted *force majeure* clauses. Anthony Patten provides commentary with a particular emphasis on *force majeure* clauses in long term LNG supply agreements.

Chapter 6 considers the interaction between long term agreements, particularly for the supply of commodities, and competition in the market. Francis Douglas QC's paper includes an informative discussion of the history of long term gas supply arrangements in Australia and Colin Lockhart explores the ways in which a long term contract can have a detrimental effect on the market and attract the attention of the ACCC.

The final aspect of long term contracts which calls for consideration is: what happens when it goes wrong? Chapter 7 deals with the assessment of damages for breach of long term contracts. Brahma Dharmananda SC analyses the law governing the assessment of damages in Australia and Professor George Triantis offers insights into how damages can be tailored to the particular contractual arrangement. Owain Stone provides an illuminating explanation of the assessment process from the perspective of an accounting and finance expert who is often engaged to give evidence in support of damages assessments.

Chapter 8 covers the formal dispute resolution process and the enforcement of judgments and awards. Lucy Reed considers the key issues of choice of law, enforcement, investment treaties and the drafting of arbitration clauses. Stephen Boyle explores the arbitration of disputes under long term contracts and Mark Darian-Smith provides practical perspectives on dispute resolution and enforcement with a particular emphasis on how to maximise the effectiveness of the arbitration procedure.

The book concludes with remarks from the Hon Chief Justice Wayne Martin on the history and destiny of long term contracts.

The essays in this book arose from a conference held in Perth in May 2012, opened by the then-Attorney General of Western Australia the Hon Christian Porter, which brought together members of the judiciary and bar, academics, and energy and resource practitioners from both Australia and abroad to consider the commercial and legal issues arising under contracts of an extended duration. This book, which includes additional materials by way of commentary, sample clauses, and checklists, and the conference which led to it would not have happened without the support of the Law School of the University of Western Australia, the then-Dean, Professor Stuart Kaye, and the conference's sponsors, Freshfields Bruckhaus Deringer, Corrs Chambers Westgarth, Holman Fenwick Willan, Ashurst, Clayton Utz, Allen & Overy, Allens, Freehills and AMPLA, each of we gratefully thank. We wish also to acknowledge the assistance of Jennifer Rhodes, Simon Allison, Natalie Barris, Michael Workman, Eleni Pratt, Belinda Teh, and Emma Salsano.