

## CHAPTER 3

# Duties and Liabilities

### Introduction

The commercial considerations underpinning the negotiation and agreement of long term contracts, and the key clauses that require the draftsperson's particular attention, have been covered by Chapters 1 and 2. Long term arrangements rest on inherent uncertainty and incompleteness and the draftsperson's task in seeking to deal with known unknowns is an unenviable one.

The next question that logically arises is: what happens next, after the agreement has been signed and the contract is to be performed?

Chapter 3 explores the content of long term contracts, with a particular emphasis on the impact of a contract's duration on the legal doctrines of contractual interpretation, implied terms, rectification, estoppel, waiver, and fiduciary and good faith obligations.

The chapter begins with some key propositions on the law of fiduciary obligations in the context of long term contracts and a checklist for analysing claims based on duties of good faith (whether express or implied); allegations which are commonly made in the context of long term arrangements because trust and cooperation are often essential to unlocking the full benefit available under the contract.

The first paper, by the Hon Justice Carmel McLure, provides a general overview of the impact of a contract's duration on key contractual doctrines but with a particular emphasis on recent developments in the rules governing contractual interpretation.

In the second paper, Paul Finn draws on his experience in adjudicating disputes over long term contracts in the Federal Court of Australia to provide an insightful analysis of the nature and operation of fiduciary obligations and duties of good faith.

The chapter concludes with practical observations by Gavin Ryan on the papers delivered by Justice McLure and Paul Finn. The author provides perspectives from his role as an in house practitioner in the energy and resources industry on the implementation and operation of key contractual doctrine in practice.

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