

# Long Term Contracts: Principles for Determining Content

*The Hon Justice Carmel McLure*

## **Key points**

1. Despite the parties' best efforts, events may occur over the course of a long term contract that are not directly addressed by the terms of the contract. This paper considers how the following orthodox contractual principles respond: contractual interpretation, the implication of terms, rectification, variation, estoppel, and waiver.
2. The High Court has recently emphasised textualism over a purposive approach to contractual interpretation. As a general rule, extrinsic evidence can be used as an aid to interpretation unless the contract's language is so plain that such recourse would constitute an attempt to contradict or vary the terms of the contract. There are, however, broader questions about whether the law should construe contracts in this way.
3. Despite the rules governing extrinsic evidence, it remains important to provide the court with general background information, particularly relating to the broader commercial and economic considerations at play. This is not the same as relying on extrinsic evidence as an aid to construction.
4. On the present state of Australian law, evidence of post-contractual circumstances cannot be taken into account when construing a contract. In the context of long term contracts, this means that seemingly helpful evidence of how the parties have performed a long term contract over its extended duration does not assist (but the issue is likely to be revisited).
5. There are a number of significant impediments to the implication of terms in long term contracts because these contracts are typically complex and bespoke documents which purport to record the entire agreement reached between the parties.
6. In the context of variations, a common trap is to forget that a promise to do no more or less than a party is already obliged to do under a contract does not constitute consideration.

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