

A TEN POINT MASTERCLASS – GET YOUR 10 CPD UNITS

Managing Commercial Risk in Contractual Documents: A One Day Online Masterclass

Friday 16 February 2024
Online

- You, Me and the Indemnity: A Drafting Guide
- Unfair Contract Terms - Drafting to Ensure Compliance
- Drafting Effective Penalty Clauses in Commercial Agreements
- Promises Promises: Drafting Watertight Warranties
- Time's Up: Drafting Effective Termination Clauses
- Don't Ask, Don't Tell: Drafting Confidentiality and Data Protection Clauses

Earn 10 CPD units including the compulsory subjects – attend this one-day live online Masterclass and we'll supply 4 free on demand video webinars – 3 covering each of the compulsory subjects plus one other substantive law program to view at your leisure



Leaders in online CPD for Lawyers & Accountants

THE FACULTY:

Ben Zipser Barrister, Fifth Floor Selborne Chambers, Sydney, NSW (Chair)

The Honourable Justice Elisabeth Peden, Judge, Supreme Court of New South Wales, Sydney

Hugh Smith, Senior Associate, Chamberlains Law Firm, Canberra

Michael Creedon, Partner, MinterEllison, Brisbane, Qld (Chair)

Lynda Reid, Partner, Mills Oakley, Sydney, NSW

Alex Ottaway, Special Counsel, HWL Ebsworth Lawyers, Sydney, NSW

Jason Sprague, Partner, Bartier Perry, Sydney, NSW

9.00 – 9.10am

Introduction and Welcome

9.10 – 10.00am

Session 1: You, Me and the Indemnity: A Drafting Guide

The use of indemnities in commercial agreements to allocate risk brings with it significant consequences to the indemnifying party. This session will examine the key components of an indemnity clause and provide options together with drafting suggestions to assist practitioners with drafting, negotiating and amendment, including:

- Why include an indemnity clause?
- Understanding the impact of an indemnity on risks and relationships
- What are the key features of an indemnity clause?
- Drafting considerations including nature of the indemnity, mitigation obligations and quantification of loss
- Tips for negotiating indemnities and drafting amendments
- Cases and examples

9.55 – 10.10am

Questions and Discussion

10.10 – 11.00am

Session 2: Unfair Contract Terms - Drafting to Ensure Compliance

Over the years, the scope of Australia's unfair contracts regime has steadily broadened, capturing a great number of contracts between consumers and businesses. With significant reforms introduced in late 2023, it has never been more important for commercial lawyers to understand current playing field and the strategies to implement when preparing commercial contracts. This session covers:

- Understanding unfair contract terms - what makes a term unfair?
- Consequences of a finding of unfairness
- Factors to consider in determining unfair contract terms:
 - Breadth of term,
 - Standard form contract
 - Contract purpose
- Some examples of unfair contract terms:
 - Automatic renewal clauses
 - Unilateral price increases
 - Price setting after contract formed
 - Restricting commentary about a business
 - Unfair indemnity clauses
- Drafting tips to avoid risk of an unfair contract term
- Case update

11.00 – 11.10am

Questions and Discussion

11.10 – 11.30am

Morning Break

11.30am – 12.20pm	Session 3: Drafting Effective Penalty Clauses in Commercial Agreements Penalty clauses can be an attractive mechanism to reduce contract risk, but imprecise drafting can lead to unenforceability and significant cost consequences. This session will examine the legal issue concerning penalty clauses and provide a guide to drafting robust clauses that will withstand intense scrutiny, including: <ul style="list-style-type: none">• What distinguishes penalty clauses from other damages clauses• What are their purpose and benefit?• Examples of types of penalty clauses, including liquidated damages clauses• Essential elements of valid penalty clauses• Assessing legitimate business interests and estimates of likely loss• Documenting the basis for genuine pre-estimates and calculation of loss• How to build in proportionality while avoiding punishment• Characteristics of unenforceable penalty clauses• Examples, drafting tips and cases: <i>Paciocco v Australia and New Zealand Banking Group Limited</i> [2016] HCA 28; <i>Simcevski v Dixon (No 2)</i> [2017] VSC 531
12.20 – 12.30pm	Questions and Discussion
12.30 – 1.15pm	Lunch Break
1.15 – 1.20pm	Introduction and Welcome
1.20pm – 2.10pm	Session 4: Promises Promises: Drafting Watertight Warranties Warranties provide greater certainty for both vendor and purchaser in contracts for the provision of good, services or property. To achieve that certainty and meet the expectation of the parties, precision in drafting is essential. This session provides practitioners with a step-by-step guide to drafting watertight warranties and avoiding costly mistakes, including: <ul style="list-style-type: none">• Key features of a warranty• When is a warranty essential?• At what point does a warranty become effective and at what point does it end?• The relationship between disclosure and a warranty• Remedies for breach of a warranty• Drafting tips including:<ul style="list-style-type: none">○ Time-specific warranties○ General limitations and exclusions○ Liability limitations○ Calculating loss and damage○ Remedies• Consideration of relevant implied and statutory warranties and required compliance• Making sure your client understands the warranties – advice and review• Cases and examples
2.10 – 2.20pm	Questions and Discussion



2.20pm – 3.10pm	Session 5: Time’s Up: Drafting Effective Termination Clauses The ability to draft effective termination clauses is a crucially important tool for commercial lawyers to possess. The key drafting techniques and practice points – which apply in all areas of front-end commercial legal practice – have been scrutinised by the High Court and provide practitioners with useful guidance on drafting effective termination clauses. This webinar explores the key issues, including: <ul style="list-style-type: none">• Lessons from the High Court in <i>Shevill v Builders Licensing Board</i> and <i>Gumland v Duffy Bros</i> on:<ul style="list-style-type: none">○ the way termination clauses are drafted○ the types of drafting that is and is not effective• Key parts of the conceptual foundation that a contract-drafter requires to ensure that the implications of a proposed termination clause are understood• How to ascertain whether the clause will do what the parties intend it to do• Drafting techniques and practice points that are necessitated by the ipso facto moratorium, the doctrine of good faith and unfair contract terms legislation on termination clauses
3.10 – 3.20pm	Questions and Discussion
3.20 – 3.40pm	Afternoon Break
3.40 – 4.30pm	Session 6: Don’t Ask, Don’t Tell: Drafting Confidentiality and Data Protection Clauses Many commercial arrangements involve the disclosure of confidential information and the exchange or collection of data by one or more parties. The challenges in protecting information lies in clear and precise drafting of appropriate obligations. This session will clarify the difference between confidentiality and privacy which is often misunderstood, and provide a guide to drafting appropriate protections for information, including: <ul style="list-style-type: none">• When are confidentiality clauses appropriate?• When to use a preliminary or stand-alone non-disclosure agreement and what it should cover• Key elements of confidentiality clauses and drafting tips• Distinguishing confidentiality from privacy and an overview of the Australian privacy regimes and requirements• Appropriate contractual clauses for data collection, access and disclosure• Tips for protecting data moving into the hands of third parties through contractual provisions.
4.30 – 4.40pm	Questions and Discussion
4.40pm	Masterclass Close



In addition, all delegates will receive 4 on-demand video webinars.

These webinars will be provided online by end February 2024 for you to view at your leisure by 31.3.24 to make up the 10 CPD units.

Substantive law – 1 unit	<p>The Choice Is Yours: Preserving Rights Of First Refusal And Options</p> <p>At the heart of modern-day commerce and property development lies the concept of the right of first refusal and options. While most lawyers have a broad understanding of such legal concepts, it can be quite difficult to recognise in practice when they arise and the extent of the complexities that can be involved. This session shall:</p> <ul style="list-style-type: none">• Provide a refresher on the law surrounding rights of first refusal and options• Dive deeper into issues surrounding their interpretation and look at how ordinary rules regarding the true construction of contracts apply to this type of contract• Explain in a practical way what to look out for and how to deal with common issues that arise in practice <p><i>Speaker: Ben Zipser, Barrister, 5 Selborne Chambers, Sydney, NSW</i></p>
Professional Skills – 1 unit	<p>Shutting the Gate before the Horse has Bolted: Drafting Effective Dispute Resolution Clauses</p> <p>Dispute resolution clauses are an indispensable part of most contracts, potentially reducing costs and risks by setting out a defined mechanism for initiating or responding to a dispute. Careful drafting is required to craft a clause which is both workable and meets the needs of both parties. This session provides a step-by-step guide, including:</p> <ul style="list-style-type: none">• Planning the process and input from the other party• Tips for achieving certainty and clarity• What will trigger the start of a dispute resolution process?• Notice periods and timelines• The key essentials of an initial informal process• Considerations for conciliation, mediation and/or arbitration, including binding decisions or not• The role of lawyers and experts in the process• Options for litigation where all else fails – timing and location• Allocation of costs and responsibilities. <p><i>Speaker: David Bailey, Barrister, Melbourne, Vic</i></p>



<p>Ethics – 1 unit</p>	<p>Acting In Your Client's Best Interests – How Far is Too Far?</p> <p>The ethical duty to act in the best interests of clients is a paramount principle for lawyers, driving their professional conduct and reputation. However, recent High Court decisions have shed light on the potential consequences when this duty is taken to extremes. This paper delves into the intricate ethics surrounding advocating for clients and explores the delicate balance between zealous representation and overstepping ethical boundaries. By examining case examples and their implications, we aim to navigate the nuanced territory where acting in the client's best interests can go too far. This session will examine:</p> <ul style="list-style-type: none"> • Understanding the ethical duty: Exploring the foundational principle of acting in the client's best interests and its significance in legal practice • The ethical rules, codes of conduct, and professional standards that provide guidance on maintaining the appropriate balance in advocating for clients • Zealous advocacy vs. overzealous representation: Differentiating between appropriate advocacy and behaviour that exceeds ethical limits • Framework for lawyers to make sound ethical judgments when faced with challenging situations where the line between zealous advocacy and overstepping exists • Examining recent High Court decisions and their lessons for practitioners: spotlight on <i>Thorne v Kennedy</i> and <i>Stubbies v James 2</i> <p>Speaker: Caroline Hutchinson, AccS(ComLit), Principal/Director, Coleman Greig Lawyers, Sydney, NSW</p>
<p>Practice Management & Business Skills – 1 unit</p>	<p>Strengthening Your Defences Against Scams, Phishing and Cyber Security Attacks</p> <p>Around 300,000 cyber crimes are committed in Australia every year. Many of these incidents arise not from hacking but from the behaviour of people who fall prey to scams, phishing and other social engineering methods. Lawyers are no exception. This session assists practitioners keep on top of their cyber-security risk by examining:</p> <ul style="list-style-type: none"> • The different methods currently employed for scams • Tips for how to identify scams and fraudulent communications • Suggestions for systems, policies and steps lawyers can take to minimise their risk • Spotlight on cyber security awareness with deposit-taking and release • Potential consequences that can arise following a breach and what practitioners should do if they suspect a breach <p>Speaker: Alexandra Wedutenko, Partner, Sparke Helmore Lawyers, Canberra, ACT</p>



GENERAL INFORMATION

Masterclass Registration Fee

The registration fee includes attendance at the live online masterclass and 4 recorded webinars.

Masterclass Papers

Access to the papers and PowerPoints will be available online to all delegates in the lead-up to the masterclass (as they become available). The materials will be available in .pdf format for easy download.

CPD – Lawyers

10 CPD units – 6 substantive law units for attending the Masterclass **PLUS** we will provide you with **4 free** on demand video webinars – 3 covering each of the compulsory subjects (Ethics, Practice Management & Business Skills and Professional Skills) plus one other substantive law program - for you to view at your leisure prior to 31 March 2024. The recorded webinars will be made available for viewing by end February 2024.

Please check your CPD rules to ensure that you are able to claim 4 CPD units from viewing recorded webinars. Most states have allowance for claiming CPD for viewing recorded webinars. **[WA practitioners – you cannot claim our recorded webinars as we are unable to verify that you have viewed them].**

CPD Certificate

All delegates will receive a CPD certificate confirming registration and the CPD units applicable



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 - b. "you" means the person who has registered to attend or the person or persons who attend(s) the conference (if different from the person registered)
 - c. "conference" means the live face to face or live or recorded online educational event or which you have registered (by whatever name called and includes conferences, masterclasses, webinars and webinar series).
 - d. "live conference" means a conference other than a recorded conference.
 - e. "recorded conference" means a recording of a presentation or a series of presentations which you can view at a time of your choosing
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General – all conferences

2. TEN may change the program for a live conference as described in the brochure you have downloaded or in the TEN website without notice to you in any manner and at any time.
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 - a. State or national border closures
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7. If TEN converts the conference from face to face to online or postpones the conference and as a result you are not able to attend you will be entitled to a full refund of registration fee paid or a credit equal to that fee to use for a future purchase of a TEN product.

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8. The copyright in materials prepared by presenters at a conference and made available to you by TEN is and remains the property of each presenter.
9. You are entitled to use those materials for private study and research only.
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Conference cancellation by TEN – all conferences

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13. If TEN cancels the conference, you will be entitled either to a refund of the registration fee you have paid or to a credit equal to that fee which you can use to purchase another TEN product within 12 months of the first day of the cancelled conference.

Cancellation by You – all conferences

14. Refunds for registration cancellation by you other than under Clause 6(b):
 - a. If notice of cancellation is actually received by TEN more than 10 days before the first day on which the conference is to be held, 85% of the registration fee you have paid
 - b. Otherwise, no refund.

Governing Law – all conferences

15. The agreement between TEN and you is governed by the laws in force in the State of Victoria and the courts and tribunals of that State have sole jurisdiction to determine disputes arising in relation to it.



Registration Form

REGISTRATION IS SIMPLE: complete the form below and fax or post your registration to us or register online.
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Mail: GPO Box 61, Melbourne, Victoria 3001 **Phone** (03) 8601 7700
Enquiries: Contact our Event Co-Ordinator, Jason Hooker (jason@tved.net.au) [direct: (03) 8601 7719]
Register online: www.tved.net.au – go to Masterclasses

Please register me for the **Managing Commercial Risk in Contractual Documents: A One Day Masterclass** to be held online on Friday 16 February 2024. [code: SXCFEB24]

Delegates will receive **4 free on demand video webinars** - 3 covering each of the CPD compulsory subjects + 1 additional substantive law unit to view at your leisure. Delegates will earn their 10 CPD units for the CPD year ending 31.3.24.

- Discount Registration** – for registrations paid on or before **2 February 2024** - **\$1100** (\$1000 + \$100 GST)
 Full Price Registration – **\$1210** (\$1100 + \$110 GST)

NAME & ADDRESS DETAILS

Mr/Mrs/Miss/Ms (circle appropriate) Name:
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PAYMENT DETAILS (Note: This form will be a Tax Invoice for GST when you make payment)

I enclose a cheque for \$..... payable to: **Television Education Network Pty Ltd** or

Please debit my: **Amex** **Mastercard** **Visa**

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