Foreword

The Honourable William Gummow AC

In Australia we have come to associate the expression 'long term contract' primarily with the operation of resource projects, in particular long term supply contracts for the export of minerals to foreign buyers. The cash flow derived from these contracts supports the provision of finance for the resource project.

With these matters in mind, it is not surprising that the initiative for the series of papers collected in this book has come from members of the legal profession based in Perth. Perth lawyers have played a significant part in the development of the legal framework upon which rests what popularly is referred to as the 'resources boom'.

Provision and maintenance of the supporting infrastructure has involved the participation of State governments with supporting legislation. The statute book of Western Australia at last count contained some 20 bespoke laws, each for a particular iron ore project. At the federal level, what in the United States was judicially developed as the 'essential facilities doctrine' has its counterpart in the provisions of Part IIIA of the *Trade Practices Act 1974* (Cth)[1] for access by third parties to infrastructure owned by others. The processes by which that access may be obtained received attention by the High Court in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*.[2]

I still remember a time when all this lay ahead. As a young lawyer, from what then in Perth was known as 'the East', I worked with Mr Rory Argyle (and an even younger Mr Dudley Stow) on the documentation for iron ore resource developments. In the 1960s this was a new field for Australian lawyers. With hindsight, it is fair to say that they rose to the challenge.

In their essay published in 1987 under the title 'The Contract',[3] Sir Anthony Mason and Justice Gageler (then Frank Knox Memorial Scholar at Harvard) saw difficulty in applying to consumer and standard form contracts 'principles derived in the rarefied atmosphere of considerations of negotiated commercial arrangements'. They also, and, for present purposes, significantly, observed:

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1 Now styled the *Competition and Consumer Act 2010* (Cth).

2 [2012] HCA 36; (2012) 246 CLR 379.

3 PD Finn (ed), *Essays on Contract* (1987), Ch1, 1-34.

> Absent compelling justification to the contrary, a court must be loathe to depart from the clear words of a commercial agreement freely entered into between competent parties. It has never been the function of the court merely to relieve a party to a disadvantageous bargain or to mitigate the effects of a course of commercial conduct unwisely chosen.

This spirit has animated the consistent attitude of the High Court, recently exemplified in *Western Export Services Inc v Jireh International Pty Ltd,*[4] to attempts to have admitted evidence of what are said to be 'surrounding circumstances' of, say, a price adjustment or royalty clause or a *force majeure* provision in a long term contract.

Contractual formation, with attendant doctrines concerning misrepresentation, mistake, and relationships of trust and confidence, and the remedy of rectification, is one thing; contractual performance is another. With respect to performance, rather too much is sought to be made of a 'good faith' doctrine.

In his reasons as trial judge in *United States Surgical Corporation v Hospital Products International Pty Ltd,*[5] McLelland J referred to the proposition in § 205 of the *Restatement of Contracts* (2d) (1981), that 'every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement'. It appears to be widely accepted in the United States that the implied duty of good faith and fair dealing does not override or undermine the express terms of the contract.[6]

In *United States Surgical Corporation,* McLelland J accepted expert evidence that in the law of New York State (and that of Connecticut) the obligations identified in § 205 extended only to performance of express terms, and did not provide a basis for the implications of other implied terms, but did require that neither party impede performance of the agreement or injure the right of the other to the proposed contractual benefit. McLelland J concluded[7] that in substance § 205 probably represents the implied term stated by Griffith CJ in *Butt v McDonald,*[8] that each party do all such things as are necessary on its part to enable the other party to have the benefit of the contract.

Finally, it may be observed that 'long term contracts' may by no means be lengthy in their text and may not be expressed in terms of detailed specificity familiar in the drafting by common lawyers. Issues of choice of law and of classification between procedure and substance then become of considerable importance. With respect to 'framework' agreements, it may be noted that the litigation in *Forrest v Australian Securities and*

4 [2011] HCA 45; (2011) 282 ALR 604.
5 [1982] 2 NSWLR 766 at 800.
6 *Sabetay v Sterling Drug Inc* 69 NY 2d 329 at 335; 506 NE 2d 919 (1987).
7 [1982] 2 NSWLR 766 at 800.
8 (1896) 7 QLJ 68 at 70-71. See also *Fitzgerald v FJ Leonhardt Pty Ltd* [1997] HCA 17; (1997) 189 CLR 215 at 219.

Investments Commission[9] had been determined by the Full Federal Court on the assumption (rejected by the High Court) that the legal character and effect of the 'framework' agreements was to be determined merely by looking to Australian domestic law; no attention had been given to the character of each counterparty as an entity owned or controlled by the People's Republic of China; and, indeed, in the absence of a choice of law clause, no consideration had been given by the Full Court to the governing law of the agreements.[10]

The essays in this book provide much-needed food for thought to practitioners in an important field of national economic endeavour. The editors are to be congratulated in bringing this project to a successful conclusion.

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9 [2012] HCA 39; (2012) 291 ALR 399.

10 [2012] HCA 39 at [44]-[46]; (2012) 291 ALR 399.