

SEMINAR OVERVIEW

On 28 October 2014, Jackson McDonald was honoured to host a presentation on the recent ANZ banking fees cases by keynote speaker, William Edwards, who is a barrister and one of the counsel on the *Paciocco v ANZ case*.

Discussion was focused on the changes to the law against penalties that came from the banking fees cases. A number of key issues were canvassed in the subsequent panel discussion, including the implications of the cases on other types of commercial contracts in the energy, mining and construction industries.

KEY POINTS

The following are some of the key points from the presentation:

- **Breach no longer a requirement:** a payment triggered by non-performance or non-satisfaction of a term (i.e. a “primary stipulation”) may now be a penalty even if it is not a breach of the contract.
- **Nature of payment:** a distinction should be made between
 - a payment that is consideration for the provision of additional services or additional “accommodation”, which is not a penalty; and
 - a payment that secures performance of a primary stipulation (i.e. has a deterrent effect), which may be a penalty if the amount is extravagant or unconscionable.
- **Extent of unenforceability:** a payment that constitutes a penalty will only be unenforceable to the extent that it exceeds the actual loss suffered. That is, the provision is no longer struck down as wholly unenforceable.
- **Enforceability:** a payment is more likely to be enforceable where
 - it has been negotiated between parties of comparable bargaining power; and
 - there is a connection between the payment and the anticipated loss that would be suffered on non-performance.
- **Calculation:** where possible, a payment should be calculated by reference to the anticipated loss that would be incurred if the “primary stipulation” is not performed.
- **Take or pay and minimum purchase clauses:** take or pay and minimum purchase clauses are now subject to scrutiny as potential penalties, but should still be enforceable if they reflect the underlying reality of the circumstances and do not provide a windfall gain.
- **Liquidated damages clauses:** liquidated damages clauses must still reflect a genuine pre-estimate of the loss; the payment should not be extravagant or excessive in amount.
- **Clause to reflect reality:** the clause should in substance reflect the reality of the circumstances (e.g. if payment is for services, those services should actually be provided).

SEMINAR PANELLISTS

WILLIAM EDWARDS

BARRISTER

LEVEL 22 CHAMBERS

KEYNOTE SPEAKER



William Edwards practices primarily in commercial law in New South Wales, Victoria and Western Australia, and has particular experience in representative proceedings (class actions). He also has extensive experience in constitutional law and has been briefed in a number of significant matters in the High Court of Australia.

After graduating from the University of Sydney with a Bachelor of Laws (Hons I and University Medal), William gained experience as Associate to the Hon. Justice W.M.C. Gummow AC of the High Court of Australia, and in practice as a solicitor before being called to the Bar in 2008.

MATT BOWEN

PARTNER

JACKSON McDONALD

PANELLIST



Matthew practises in commercial law with particular emphasis on energy law, competition law and infrastructure access. He's been involved in the State's energy sector reforms since 1994, and advises both buyers and sellers on gas and electricity sale, purchase and transportation agreements. Matthew was recognised in 2014 Best Lawyers Australia for Energy, Government Practice, Mining, Oil and Gas and Regulatory Practice Law.

THOMAS JACOBS

PARTNER

JACKSON McDONALD

PANELLIST



Thomas is a dual qualified lawyer, admitted in Western Australia in 1992 and England & Wales in 1997. He has extensive front and back end experience in providing construction support to both public and private sector clients and assisted on the successful delivery of numerous significant infrastructure projects in the health, logistics, education, energy and water sectors.

DARREN PRATT

PARTNER

JACKSON McDONALD

PANELLIST



Darren advises on all aspects of dispute resolution, commercial litigation and arbitration. Darren has appeared in numerous Courts and Tribunals. Darren works closely with other partners within the firm in order to ensure the cost efficient and effective management of client litigation matters.

JOHN REYNOLDS

SENIOR CONSULTANT

JACKSON McDONALD

PANEL MODERATOR



John practises in dispute resolution and has particular expertise in large infrastructure and project disputes. He has worked on disputes in Australia, USA, the European Union and a number of ASEAN countries.

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