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Drafting Contracts Under Pressure

Practical skills for managing risk in commercial drafting

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We would like to begin by acknowledging the Traditional Owners and Custodians of Country throughout Australia and their continuing connection to the land on which we are meeting today.

We pay our respects to them and their cultures, and to the Elders both past and present, and extend that respect to all Aboriginal and Torres Strait Islander people attending today.

Barry Atkinson *Field of Dreams* 2022

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Agenda

- How drafting risks arise in practice
  - The precedent trap and how to avoid it
  - Pressure-testing definitions, formulas and assumptions
  - The dangers of last-minute amendments and poor records
- Knowing when to slow down
- Practical risk management tools
- Building your team capability

The precedent trap

The 'just roll the precedent' mindset

- Using a precedent without interrogating its assumptions
- Assuming the last transaction is sufficiently similar
- The dangerous phrase: ‘It was fine last time'

When precedents become dangerous

- Outdated terms that no longer reflect current law or practice
- Deal-specific provisions carried into a different transaction (e.g. because the user ‘recycled’ an old contract rather than returning to the precedent)
- Residual party names, dates and details from the original
- Assumptions about regulatory environment that have changed
- False sense of security: 'It was signed before, so it must be right'

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Safely adapting a precedent: a framework

- Identify the deal structure — is this precedent comparable?
- Read the entire document — don't just search and replace
- Verify every defined term against the current transaction
- Check all cross-references and schedules
- Ask: 'What was unique about the original deal?'

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Pressure testing your drafting

Definitions: the foundation of your document

- A single incorrect definition cascades through the entire agreement
- Terms that are defined but never used (or used but not defined)
- Circular definitions that create ambiguity
- Definitions that don't align with operative clauses

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Formulas and calculations

- Always run worked examples with real numbers
- Test edge cases: what happens at zero? At maximum?
- Check rounding provisions — do they produce sensible results?
- Adjustment mechanisms: do they work in both directions?
- Ask: 'If this formula produces $X, is that what the parties intended?'

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Unstated assumptions

- Commercial assumptions: pricing, timing, party capabilities
- Legal assumptions: regulatory environment, applicable law
- Structural assumptions: who performs first? What triggers obligations?
- Ask yourself: 'What needs to be true for this clause to work?'

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Special conditions vs general conditions

- Do your special conditions actually override the general terms?
- Is there a clear precedence/priority clause, and does it work?
- Watch for defined terms used differently in each part
- Cross-references that point to the wrong clause after amendments

Before you send: the pressure-test checklist

- Have I read every defined term against its operative use?
- Have I tested every formula with actual numbers?
- Do the special conditions clearly override the general terms?
- Are all cross-references correct after my amendments?
- If I read this with fresh eyes in two years, would I understand the deal?

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Last-minute amendments and record keeping

Scenario: Friday afternoon amendments

- 4:30pm Friday — client calls with 'a few minor changes'
- Counterparty wants to sign Monday morning
- You make the changes, send a markup, leave for the weekend
- What can go wrong?

Documenting what was agreed

- Always confirm verbal instructions in writing — same day
- Record not just what changed, but why it changed
- File notes after every significant call or meeting
- Mark-ups should be traceable to specific instructions
- If it's not in writing, it didn't happen

Communication failures in teams

- The senior who assumed the junior understood the context
- Instructions given in the corridor, never recorded
- Multiple team members working on the same document
- Handovers without adequate briefing
- The gap between 'I told them' and 'they understood'

Version control: which document was signed?

- Multiple versions circulating simultaneously
- Tracked changes accepted in one version but not another
- The 'final' that wasn't final
- Electronic signatures on the wrong version
- No clear audit trail from negotiation to execution

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Knowing when to slow down

The pressure environment

- Client expectation: 'Can you turn this around by COB?'
- Reduced team sizes mean fewer review checkpoints and greater reliance on templates
- Commercial urgency drives compressed timelines
- Fee pressure means less time budgeted for careful review
- The assumption that 'it's just a simple contract'

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The instruction gap

- What the client thinks they told you vs what you understood
- Verbal instructions without written confirmation
- Multiple people giving instructions on the same matter
- Assumed knowledge: 'I thought you knew that...'
- The lawyer who took the call but didn't ask the right questions

Red flags: elevated risk of error

- You're working outside your usual area of practice
- The transaction structure is unusual or unfamiliar
- Multiple documents need to work together
- You're making changes you don't fully understand
- Working off second-hand instructions
- It's late, you're tired, and errors are creeping in

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The courage to push back

- 'I can turn this around by tomorrow if we confirm instructions today'
- 'I need 30 minutes to check the downstream effects'
- 'Let me send a brief email confirming what we've agreed'
- Frame it as quality and protection, not as delay
- Ask: 'What would I want to see if reviewing this file in two years?'

Building in review checkpoints

- Even under pressure, build in a 'pause and check' moment
- Before sending: read the whole document one more time
- After amendments: check every cross-reference affected
- Before execution: confirm this is the final agreed version
- Buddy or peer check: five minutes of a colleague's time saves hours

Practical risk management tools

Negotiation logs and issues registers

- Track the issues raised, by whom, and how resolved
- Record the commercial rationale for key decisions
- Flag issues that were parked or deferred
- Maintain a running list of open items
- Review the log before every drafting session and before execution

Sample: issues register structure

Issue number/ID	Raised by	Clause ref	Description of issue	Owner of action	Status (open/ parked/closed)	Resolution

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Term sheets and confirmation emails

- Term sheets anchor the negotiation before detailed drafting
- They surface disagreements early, when cheap to resolve
- Confirmation emails create contemporaneous records
- These documents become your evidence if things go wrong

Explaining consequences to clients

- Clients don't always understand downstream effects of changes
- 'If we remove this clause, the consequence is...'
- Document your advice when the client proceeds against it
- Use plain language in your explanations
- A client who understands risk makes a better decision

Building the team: supervision and mentoring

Developing the 'risk radar'

- Juniors need to learn to recognise what 'feels wrong'
- Teach pattern recognition: 'Every time you see X, check Y'
- Debrief after matters: 'What could have gone wrong here?'
- Share near-misses as learning opportunities (without blame)
- Build a culture where questioning is valued

Effective supervision

- Supervision isn't just 'more senior eyes on the document'
- Brief properly: explain the deal, the client, the risk areas
- Set expectations about what level of review you're doing
- Create space for practitioners to ask questions without judgement
- Review and agree on the approach before the drafting (first principles)

Practical team strategies

- Drafting buddies: pair a senior and junior on complex matters
- Peer review before supervisor review
- Debrief sessions: 'What did we learn from that one?'
- Shared checklists and standard operating procedures
- Create a safe environment to flag concerns

Creating a culture of quality

- Make it safe to say 'I don't understand' or 'I'm not sure'
- Celebrate catches, not just execution of the contract
- Share examples of good practice, not just mistakes
- Recognise that asking for help is professional, not weak
- Invest time now to save problems later

Key takeaways

- Most drafting failures are process failures, not legal failures
- Confirm instructions in writing
- Test every definition, formula and assumption before you send
- Precedents are starting points, not shortcuts
- When your risk radar fires, slow down (even when under pressure)
- Build a team culture where quality is everyone's responsibility

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