

**DUNCAN MILLER SC**

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**Educational / Professional Memberships**

LLB (University of Sydney)  
 LLM (Hons) (University of Technology, Sydney)  
 New South Wales Bar Association

**Current Position**

Senior Counsel

**Professional Experience**

Solicitor - 1988 to 1995  
 Former lecturer in commercial and common law  
 Barrister - admitted 1996  
 Appointed Senior Counsel in 2011

**Background**

Over 25 years' experience primarily in construction / infrastructure, mining, arbitration, planning, commercial and common law.

Practice mainly concerned with the resolution of construction-related and insurance disputes covering buildings, roads, railway infrastructure and rolling stock, (mining and manufacturing) processing operations, ports, airports and pipelines, and, in planning and environmental disputes for both councils and developers.

Experience as the expert retained to determine disputes under dispute resolution provisions in construction contracts.

Listed in Chambers & Partners 2015 & 2016 – Construction and arbitration law.

Listed in Best Lawyers 2011 – 2016 – Commercial Law, Construction and Infrastructure Law.

Listed in Doyles Guide 2012 – 2011 – Construction Law and Planning / Environmental Law.

### **Example recent matters (hearings, arbitrations, mediations)**

#### **Appellate**

1. *Cummins Generator Technology Technologies Germany v Johnson Controls Australia & Ors*.
  - *Trade Practices Act / Australian Consumer Law* claim arising from augmentation of backup electrical supplies at the IBM data warehousing centre.
2. [Young v Hones \[2014\] NSWCA 337 and 338](#)
  - [Professional \(barrister\) negligence claim. Reach of the advocate's immunity.](#)
3. [Ball v McInerney \[2014\] NSWCA 331](#)
  - Construction dispute. All grounds appeal.
4. [Allianz Australia Insurance Ltd v BlueScope Steel Ltd \[2014\] NSWCA 276](#)
  - Insurance / indemnity dispute. Breach of policy conditions and operation of s.18 of the *Insurance Act* NSW. Consideration of indemnity policies, good faith obligations on an insurer, waiver and estoppel.
5. [K and M Prodanovski Pty Ltd v Wollongong City Council \[2013\] NSWCA 202](#)
  - Planning appeal – substantial commencement under s.95(4) *Environmental Planning & Assessment Act* 1979 (NSW).
6. [St Hilliers Construction Pty Ltd v Fitzpatrick Investments Pty Ltd \[2013\] NSWCA 104](#)
  - Construction contract dispute – effect of consultant certificates issued under the contract and the satisfaction of certain prerequisites for the reduction of the security provided by the Contractor.
7. *Rennie Golledge Pty Ltd v Ballard* [2012] NSWCA 376
  - Surveyor negligence. Proportionate liability dispute. Pleadings and procedure.
8. *Allianz Australia Ltd v Sim; WorkCover Authority NSW, Wallaby Grip BAE (in liq)* [2012] NSWCA 68
  - Torts: causation – whether increase in risk can be equated with factual causation, and whether liability requires satisfaction of the necessary condition test. Admissibility of expert evidence.
9. *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588
  - Expert evidence and admissibility. Section 79C *Evidence Act* 1995 (NSW) threshold requirements.

## Construction / Arbitration / Insurance

1. *Bellevarde Constructions Pty Ltd v Cosmas Pty Ltd* [2016] NSWSC 406
  - Attempt by plaintiff to force judicial sale of a property under a contractual charging clause so as to enforce a favourable BCISOP Act determination.
2. *Wiggins Island Coal Export Terminal Pty Ltd (WICET) v Monadelphous Engineering Pty Ltd & Ors (MMM)*
  - Queensland Supreme Court proceedings concerning the design and construction of a 1.8km jetty and offshore wharf for the Wiggins Island Coal Terminal project.
3. *DDG Fortescue River Pty Ltd - ats – Monadelphous KT Pty Ltd*
  - Ongoing Supreme Court of Western Australia proceedings concerning the construction of the Fortescue River gas pipeline.
4. *Kellogg Brown & Root Pty Ltd and Ors – ats – Downer EDI Rail Pty Ltd (and John Holland Pty Ltd)*
  - Ongoing NSW Supreme Court proceedings, and separate arbitration proceedings, concerning a D&C contract for the construction of a rolling stock maintenance facility in Sydney.
5. *Vopak Terminals Sydney Pty Ltd – Lend Lease Services Pty Ltd*
  - Ongoing domestic arbitration (IAMA) matter arising from the development a bitumen facility at Port Botany.
6. *Owners Strata Plan 74602 v. Brookfield Multiplex and G James Glass & Aluminium Pty Ltd* [2015] NSWSC 1916
  - NSW Supreme Court proceedings concerning an owners' corporation's claim for damages said to arise from a defective glass and aluminium façade over a multi storey residential development
7. *Thiess Pty Ltd and John Holland Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2016] NSWSC 173
  - NSW Supreme Court proceedings arising from the collapse of a section of the Lane Cove road tunnel.
8. [St Hilliers Construction v Fitzpatrick Investments](#) [2013] NSWSC 1856 / [2012] NSWSC 804
  - Construction contract dispute – effect of consultant certificates issued under the contract and the satisfaction of certain prerequisites for the reduction of the security provided by the Contractor.
9. [Owners Corporation Strata Plan 72535 v Brookfield Multiplex](#) [2012] NSWSC 712
  - Whether strata development was adapted for commercial use as a tourist holiday or overnight accommodation, and if so whether the owners' corporation is entitled to the benefit of the statutory warranties implied under the *Home Building Act 1989* (NSW). Whether the developer or builder owed a tortious duty of care owed to an owners corporation.

10. [\*Dymocks Book Arcade Pty Ltd v Capral Ltd \(formerly Alcan Australia Ltd\) & anor\* \[2011\] NSWSC 1423 / \[2013\] NSWSC 130](#)
  - [Claim in tort: defective structure. Duty of care, limitations and engineering issues.](#)
11. *Laing O'Rourke (Australia) Constructions Pty Ltd / Karara Mining Pty Limited.*
  - Contract disputes re: port and civil works at Geraldton WA.
12. *Laing O'Rourke (Australia) Constructions Pty Ltd v Cairns Airport Authority*
  - Disputes arising from terminal redevelopment contract.
13. *Landtwo Pty Ltd v Coffey Geosciences* (NSW Supreme Court)
  - Proceedings concerning adequacy of geotechnical investigations at an industrial development site.
14. *URS Australia Ltd & Ors – ats - Transgrid*
  - NSW Supreme Court proceedings re: a cable tunnel project in Sydney.
15. *Thiess-Hochtief Joint Venture v Parsons Brinkerhoff & Ors* (NSW Supreme Court)
  - Geotechnical engineering dispute re: failure of a section of the Lane Cove rail tunnel.
16. *Lend Lease Engineering – Zurich Insurance*
  - Disputed insurance claim re: delays to the construction of Peninsula Link in Victoria.
17. *John Holland (Australia) v JKC and Macmahon Contractors*
  - International arbitration and NSW Supreme Court disputes arising from the construction of components of the INPEX Darwin LNG project.
18. *GR Engineering Services Ltd v. Gold Ridge Mining Limited*
  - International arbitration (Model Law) proceedings re: gold processing plant in the Solomon Islands
19. *Laing O'Rourke Constructions v Stockland Trust Management*
  - Delay and defects disputes / Stockland Townsville refurbishment and extension project.

#### **Planning and environment**

1. [\*Environment Protection Authority v Du Pont \(Australia\) Ltd\* \[2013\] NSWLEC 99 / \[2013\] NSWLEC 98](#)
  - Pollution prosecution under the *Protection of the Environment Operations Act 1997*. Statutory construction: whether the whether defendant could be liable for land pollution occasioned by deposit of herbicide in the form of dust. Whether the relevant legislation a penal statute to be construed in favour of a defendant or construed as a beneficial statute.
2. *Wentworth Property Trust v Leichhardt Council* (NSW Land & Environment Court)
  - Appeal from refusal of development application to redevelop an industrial site and vacant land for residential use.
3. *Blacktown City Council v Riverstone Developments* (Land & Environment Court)
  - Proposed of around 8 sq/km of land for industrial purposes. Class1 appeal against refusal.

4. *Penrith Lakes Development Corporation v Penrith City Council*
  - Subdivision application for proposed residential development under the State Environmental Planning Policy (Penrith Lakes Scheme). Class 1 appeal against refusal.
5. *Lane Cove Council v Orca Partners Management Pty Ltd*
  - Class 4 appeal in respect of development approval for large industrial zoned site.
6. *Sell & Parker Pty Ltd v Blacktown City Council*
  - Class 1 appeal in respect of conditions concerning metal recycling facility.

#### **Common Law / Dust Diseases**

1. *(Re Hastings) Amaca Pty Ltd v AAI Limited and CGU Insurance Limited* (Matter No.197/2015/1) – decided March and April 2016
  - Claim between insurers – s.151AB *Workers Compensation Act* 1987 attribution of liability to a particular insurer last on risk.
2. [\*Lee v Carlton Crest Hotel \(Sydney\) Pty Ltd\* \[2014\] NSWSC 1280](#)
  - Negligence: Council liability. Power and functions exercised by Council in relation to development approval for a car park, building approval for same, and inspection and licensing thereof. Whether Council owed user and occupants of car park a duty of care in respect of exercise of statutory powers. Whether Council committed misfeasance or nonfeasance. Whether Council breached any duty and extent to which Council was protected from liability by s 43A of *Civil Liability Act* - applicability of s 44 of the *Civil Liability Act*.
3. *Amaca Pty Ltd ats Wickham* (NSW Dust Diseases Tribunal)
  - Dust diseases: mesothelioma. Home renovations exposure.
4. *King v Caltex Petroleum Pty Ltd* [2013] NSWDDT 4
  - Dust disease: mesothelioma. Issues of onus and weight of evidence. Verdict for the defendant.

#### **Publications**

- [Non-Confidential Arbitration Proceedings](#) with The Hon Andrew Rogers QC, (1996) [Arbitration International](#) 319. Amended version published in (1997) 71 [Australian Law Journal](#)
- [Restitutionary and Exemplary Damages for Copyright Infringement](#) (1996) 14 [Australian Bar Review](#) 143
- [Damages for Defective Works: Reasonableness and Restitution](#) (1995) 11 [Building and Construction Law](#) 379
- *Milpurruru v. Indofurn Pty Ltd* - [Collective Ownership of the Copyright in Spiritually Sensitive Works](#). (1995) 6 [Journal of Intellectual Property Law](#) 185
- *Bryan v. Maloney* - [Builders' Liability in Negligence to a Subsequent Purchaser: The High Court Reopens the Duty of Care Debate](#) (1995) 41 ACLN 43. Also published in the (1995) [Lloyd's Maritime and Commercial Law Quarterly](#)

- Transfer of Title: A New Legal Regime in Only Three Paragraphs", (1994) Lloyd's Maritime and Commercial Law Quarterly 322
- Privatisation and Project Finance in Russia and Poland and the Problems of Valuation (1994) Review of Central and East European Laws ( Part I Vol. 20 (1994) 157 and Part II in the September 1994 Release)
- The Certifier's Duty of Care to the Contractor - Pacific Associates v. Baxter Reconsidered (1993) International Construction Law Review 172
- Public Policy in International Commercial Arbitrations in Australia (1993) 9 Arbitration International 167
- Foreign Investment in the Russian Oil and Gas Industry", with G. P. Campbell, (1992) 10 Oil and Gas Law and Tax Review 8
- A Reformulation of the Concept of Duty of Care and Entitlement to the Recovery of Pure Economic Loss in Negligence with G. Miller QC (1991) 7 Australian Bar Review 65
- Numerous conference papers in the areas of construction, commercial, environmental and local government law including most recently a paper in March 2016 at the University of NSW annual Building and Construction Law seminar (and reprised in May 2016 at a presentation organised by the Australian Chapter of the Society of Construction Law.).

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