

## DUNCAN MILLER SC

### 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

Around 30 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 operations, ports, airports and pipelines, and further in planning and environmental disputes for both councils and developers.

Acting occasionally as the parties' appointed expert to determine commercial disputes under dispute resolution provisions in construction contracts. Occasional appointments as arbitrator / Referee in construction disputes.

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

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

Listed in Doyle's Guide since 2011 – Construction Law and Planning / Environmental Law.

### Recent matters (hearings, arbitrations, mediations)

#### Appellate

1. *CSR Limited v Adecco (Australia) Pty Ltd* [\[2017\] NSWCA 121](#)
  - Contractual construction and indemnity disputes arising from a labour hire agreement.
2. *Cummins Generator Technology Technologies Germany v Johnson Controls Australia & Ors* [\[2015\] NSWCA 264](#).

- *Trade Practices Act / Australian Consumer Law* claim arising from augmentation of backup electrical supplies at the IBM data warehousing centre.
3. [Young v Hones \[2014\] NSWCA 337 and 338](#)
    - [Professional \(barrister\) negligence claim. Reach of the advocate's immunity.](#)
  4. [Ball v McInerney \[2014\] NSWCA 331](#)
    - Construction dispute. All grounds appeal.
  5. [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.
  6. [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).
  7. [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.
  8. *Rennie Golledge Pty Ltd v Ballard* [\[2012\] NSWCA 376](#)
    - Surveyor negligence. Proportionate liability dispute. Pleadings and procedure.
  9. *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.
  10. *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. *Kellogg Brown & Root Pty Ltd and Ors – ats – Downer EDI Rail Pty Ltd (and John Holland Pty Ltd) – proceedings heard by Stevenson J in November and December 2017 (judgment reserved).*
  - NSW Supreme Court proceedings concerning a D&C contract for the construction of a rolling stock maintenance facility in Sydney.
2. *STP&I Public Company Limited v JGC Corporation & ors* (2017/2018)
  - International arbitration (SIAC) proceedings concerning the Darwin INPEX LNG facility. Arbitration being conducted before a panel of three arbitrators.
3. *IT International v Telstra Corporation* (2017)
  - International (ICC) arbitration proceedings (acting for the claimant) that were heard and determined by A Thompson QC as arbitrator.

4. *Ottoway Engineering Pty Ltd v McConnell Dowell Ltd* – 2017 domestic arbitration proceedings (acting for the claimant) that were heard and determined by Mr J Sharkey as arbitrator.
5. *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.
6. *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.
7. *DDG Fortescue River Pty Ltd - ats – Monadelphous KT Pty Ltd*
  - Ongoing (since 2016) Supreme Court of Western Australia proceedings concerning the construction of the Fortescue River gas pipeline.
8. *Vopak Terminals Sydney Pty Ltd – Lend Lease Services Pty Ltd*
  - Acting for the claimant in 2016/2017 domestic arbitration (IAMA) matter arising out of the development a bitumen facility at Port Botany.
9. *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
10. *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.
11. [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.
12. [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.
13. [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.](#)
14. *Laing O'Rourke (Australia) Constructions Pty Ltd / Karara Mining Pty Limited.*
  - Contract disputes re: port and civil works at Geraldton WA.

15. *Laing O'Rourke (Australia) Constructions Pty Ltd v Cairns Airport Authority*
  - Disputes arising from terminal redevelopment contract.
16. *Landtwo Pty Ltd v Coffey Geosciences (NSW Supreme Court)*
  - Proceedings concerning adequacy of geotechnical investigations at an industrial development site.
17. *URS Australia Ltd & Ors – ats - Transgrid*
  - NSW Supreme Court proceedings re: a cable tunnel project in Sydney.
18. *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.
19. *Lend Lease Engineering – Zurich Insurance*
  - Disputed insurance claim re: delays to the construction of Peninsula Link in Victoria.
20. *John Holland (Australia) v JKC and Macmahon Contractors*
  - International arbitration and related NSW Supreme Court disputes arising from the construction of components of the INPEX Darwin LNG project.
21. *GR Engineering Services Ltd v. Gold Ridge Mining Limited*
  - International arbitration (Model Law) proceedings re: gold processing plant in the Solomon Islands
22. *Laing O'Rourke Constructions v Stockland Trust Management*
  - Delay and defects disputes / Stockland Townsville refurbishment and extension project.

### **Planning and environment**

1. *Tweed Shire Council – ats – Denning Tweed Heads Pty Ltd (2017) NSWLEC.*
  - Appeal proceedings concerning large subdivision application. Appeal heard in December 2017. Judgment presently reserved.
2. *Penrith Lakes Development Corporation v Penrith City Council* [\[2015\] NSWLEC 1329](#)
  - Subdivision application for proposed residential development under the State Environmental Planning Policy (Penrith Lakes Scheme). Class 1 appeal against refusal.
3. *Blacktown City Council v Riverstone Parade Pty Ltd* [\[2015\] NSWLEC 1009.](#)
  - Proposed of around 8 sq/km of land for industrial purposes. Class1 appeal against refusal.
4. *Lane Cove Council v Orca Partners Management Pty Ltd (No.2)* [\[2015\] NSWLEC 52](#)
  - Class 4 appeal in respect of development approval for large industrial zoned site.
5. [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.

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

1. *(re Berro) State of NSW v Amaba Pty Ltd* [2017] NSWDDT 17
  - Cross claim for contribution to plaintiff's damages.
2. *(re Dargan) Amaca Pty Ltd v Northern Sydney Area Health Service* [2017] NSWDDT 1
  - Arguments re: double compensation arising from settlement of proceedings and operation of Queensland statutory compensation regime.
3. *(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.
4. [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*.
5. *King v Caltex Petroleum Pty Ltd* [2013] NSWDDT 4
  - Dust disease: mesothelioma. Issues of onus and weight of evidence.

### **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
- [Milpurrurru 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 a paper in March 2016 at the University of NSW annual Building and Construction Law seminar (reprinted in May 2016 at a presentation organised by the Australian Chapter of the Society of Construction Law.).

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