

Separate
Property &
Construction
Days

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Overcoming the complexities in Property Law Transactions & Minimising disputes & liability in Construction Law

Property Law
23 September 2008

Construction Law Workshop
24 September 2008

Construction Law
25-26 September 2008

Swissotel
Sydney

Property law:

- Refresh on key areas relating to **caveats, easements and covenants**
- Manage challenges associated with **climate change**
- Explore practical solutions to **your mortgagor and mortgagee dilemmas**
- Examine the **tax implications** of **property transactions**
- Driving successful projects by **understanding planning and assessment impacts**

Construction law:

- Review the **ramifications of the dynamic case law developments** this year
- Examine recent **key reforms in legislation**
- Hear from the experts on **green ratings issues**
- Analyse **contract formats, clauses and trends** with the benefit of your expert peers' experience
- Protect your clients by providing commercial advice on **dispute prevention and resolution**

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Property law key speakers:

Dennis Bluth, Partner, **HWL Ebsworths Lawyers**
Robert Harper, Senior Counsel, **Queens Square Chambers**
Dr Steven Berveling, Barrister, **Martin Place Chambers**
Debra Townsend, Partner, **Mallesons Stephen Jaques**
Tony Hill, Partner, **Blake Dawson**

Construction law key speakers:

Robin Mellon, Executive Director, **Green Building Council Australia**
Frank Corsaro, Senior Counsel, **State Chambers**
Alex Harmann, Partner, **DLA Phillips Fox**
Keith Redenbach, Partner, **Deacons**
Menachem M Hasofer, Partner, **Mayer Brown JSM Hong Kong**
Michael Rudge, Senior Counsel, **Nigel Bowen Chambers**

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Overcoming the complexities in P

Achieving commercial solutions

Property Law Conference: 23 September 2008

- 8:30 **Conference Registration**
- 8:50 **Opening remarks from the Chair**
Dennis Bluth, Partner, HWL Ebsworths Lawyers
- 9:00 **The way forward – aligning national property law and practice**
 - Examining the existing barriers to inefficient business practice
 - Current proposals to unify law and processes
 - Status of public consultation and progress within governments*Dennis Bluth, Partner, HWL Ebsworths Lawyers*
- 9:45 **Running vendor and purchaser matters with confidence**
 - Considering recent decisions on
 - disclosure obligations, errors and misdescriptions, warranties, rectification
 - Clarifying rescission, termination and repudiation
 - Examining alternative remedies for the disrupted agreement*Robert Harper, Senior Counsel, Queens Square Chambers*
- 10:30 **Morning tea**
- 11:00 **Managing the mortgagor and mortgagee relationship**
 - Assessing security risks during term of the mortgage – fatal or rectifiable?
 - Considering options, including refinancing, guarantees, entry into possession, appointing a receiver to the land and foreclosures
 - Understanding the effect of liquidation or bankruptcy of borrower – *Bankruptcy Act 1966 (Cth)*
 - Exercising the mortgagee's power of sale – s111A *Conveyancing Act 1919 (NSW)*; s420A(1)(a) *Corporations Act 2001 (Cth)*; *Fortson Pty Ltd v Commonwealth Bank of Australia* [2008] SASC 49
 - Identifying practical methods where there are additional security holders present
 - Reasonable care for a selling financier who is a mortgagee in possession compared to selling developer – *Glodale Pty Ltd v Investec Bank (Australia) Ltd* [2007] VSC 27
 - Examining the limits of indefeasibility of title and forged mortgages – *Permanent Custodians Ltd v Yazgi* [2007] NSWSC 279 – section 42(1) of the *Real Property Act 1900 (NSW)*; *Provident Capital Ltd v Printy* [2008] NSWCA 131*Mark Hilton, Partner, Henry Davis York*
Jeanette Barbaro, Senior Legal Counsel – Recoveries, National Australia Bank Limited
- 11:50 **Exploring the scope and enforceability of caveatable interests**
 - What to disclose on the face of the valid caveat – concise but specific
 - Avoiding wrongful lodgement of caveats and exposure to damages – determining whether there is a genuine interest in the land
 - The status of equitable interests and trusts
 - Contractual prohibitions on lodging a caveat – *Broster v Brueckner* [2003] NSWCA 281
 - Eliminating the overreaching caveat
 - *Black v Garnock* (2007) 237 ALR 1 – changing conveyancing practice?
 - lodging a caveat after each exchange
 - lodgment of caveats and final title searches close in time
- 12:40 **Networking lunch for speakers and delegates**
- 1:40 **Drafting and interpreting easements and covenants**
 - Examining Section 88K
 - *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45 – construction of easement using extrinsic evidence
 - Considering section 28 of the *Environment Planning and Assessment Act 1979 (NSW)*
 - Restrictive covenants – *Jessica Estates v Lennard* [2007] NSWSC 1175; *Lennard v Jessica Estates Pty Limited* [2008] NSWCA 121
 - Distinguishing between a positive right granted by an easement or a right of way to an instrument purporting to impose restrictions on the carrying out of development – *Cracknell and Lonergan Pty Limited v Council of the City of Sydney* [2007] NSWLEC 392
 - *Handley & Anor v Gunner* [2008] NSWCA 113 – implication of a reasonable time
 - *Stephenson v Dwyer* [2008] NSWCA 123 – binding agreements*Dr Steven Berveling, Barrister, Martin Place Chambers*
- 2:30 **Highlights from the Tax Catwalk 2008**
 - *Commissioner of Taxation v Reliance Carpet Co Pty Ltd v* [2008] HCA 22 – forfeited deposit to constitute “supply”
 - Clarifying the appropriate method for calculating the margin between acquisition value and sale value for developers – *Brady King Pty Ltd v Commissioner of Taxation* [2008] FCAFC 118
 - Valuations and the consideration method
 - Use test for GST purposes – *South Steyne Hotel Pty Ltd ABN 69 094 240 767 v Commissioner of Taxation of the Commonwealth of Australia* NSD783/2007
 - GST on property as part of going concern
 - CGT developments
 - Statutory demands by Commissioner – *Neutral Bay Pty Ltd v DCT* [2007] QCA 312 on appeal to High Court of Australia
 - The availability of tax relief for climate change impacts – carbon credit and offsets
 - State Revenue Legislation Amendment Bill 2008 – stamp duty*Amrit MacIntyre, Partner, Baker & McKenzie*
John Walker, Partner, Baker & McKenzie
- 3:25 **Afternoon tea**
- 3:55 **Structuring successful projects by understanding planning and assessment principles**
 - Analysing the changes to the *Environmental Planning and Assessment Act 1979 (EP&A Act)* and the Draft Building Professionals Amendment Bill 2008.
 - Reviewing the powers of the Planning Assessment Commission
 - How have hearing and rights to appeal been affected?
 - Examining projects and plans under Part 3A of the EP&A Act “critical infrastructure” and “major strategic projects” within purview of the Minister and Department
 - Planning Arbitrators and the scope of their powers
 - Looking at section 95 of the Act – “physically commenced” requirement*Debra Townsend, Partner, Mallesons Stephen Jaques*

- 4:30 **Discharging your duty to exercise climate change expertise in property law matters**
This session focusses on how property lawyers will be expected to adapt their advice and practice to cover off environmental aspects of their clients' businesses.
- What are ecologically sustainable development principles?
 - How do the green building rating systems work – designers, developers, owners and occupiers?
 - Understanding clients' obligations under the reporting framework of the National Greenhouse and Energy Reporting System and emissions trading scheme
 - Applying the bilateral approach in development applications – *Walker v Minister for Planning* [2007] NSW NSWLEC 741
 - Green leases examined

- Remedial environmental refurbishment – who can demand it, who pays?
- Revaluations of existing and future property interests affected by carbon schemes and rating systems – mortgagees' and insurers' perspectives
- Liability and quantum of damages for climate affected property
Tony Hill, Partner, Blake Dawson

5:20 **Closing remarks from the Chair**

5:30 **Close of conference**

Construction Law Conference

Pre-conference Workshops: 24 September 2008

8:30 **Workshop A Registration**

- 9:00 **Identifying and Managing Project Risks**
This workshop takes participants through practical exercises to explore the way in which project risks can be identified and managed. The workshop considers and explores the following issues through various construction scenarios including:
- Understanding legal and commercial risks
 - Understanding the contractual models
 - Choosing the contractual model
 - Identifying project requirements
 - Risk identification and minimisation
- Scott Alden, Partner, DLA Phillips Fox**

Workshop A

12:30
Networking
lunch for full
day delegates

1:00 **Workshop B Registration**

- 1:30 **Nailing construction litigation matters**
Construction litigation can be fast moving and process driven. Practitioners in this area combine commercial, technical and legal analyses to lead disputed matters to the best conclusion for their clients. Construction litigators can use this workshop to streamline their practice and gain confidence in their skills.
- Brief overview of the litigation process within the Supreme Court Construction List
 - An outline of the documents used in construction litigation
 - Apply and refine your skills in a safe environment
 - Considering some case scenarios
 - Discussion of the reference out system and adoption of Referees' Reports
 - Exercises in identifying issues for expert evidence and conclaving
 - Debriefing and discussion of options
Julie Wright, Partner, Nuala Shaw, Senior Associate, and Kelly Wilshire, Senior Associate, Mallesons Stephen Jaques

Workshop B

4:30 **Close of Workshop**

Who should attend

- Construction law specialists
- Property lawyers
- Government lawyers
- Developers
- Construction project managers
- Contractors
- Admitted solicitors with 1-3 Years PAE
- Mortgage recovery lawyers
- Environment and planning lawyers
- In-house counsel
- Senior executives in the property sector



Construction Law Conference: 25 September 2008

8:30 Conference Registration

8:50 Opening remarks from the Chair

Luke Aiken, Partner, Cutler Hughes & Harris

9:00 Analysing developments in construction case law

- Act constituting repudiation – *Sopov v Kane Constructions Pty Ltd* [2007] VSCA 257
- Exclusions for consequential loss – *Environmental Systems Pty Limited v Peerless Holdings Pty Ltd* [2008] VSCA 26
- Economic loss – *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors (No 6)* (2007) 63 ACSR1
- Liquidated damages – *State of Tasmania v Leighton Contractors Pty Ltd* [2005] TASSC 133
- Tortious breach of duty – *Eden Construction Pty Ltd v New South Wales (No 2) 9 May 2007* [2007] FCA 689
- Negotiating in good faith – *Jobern Pty Ltd v BreakFree Resorts (Victoria) Pty Limited* [2007] FCA 1066; *Laing O'Rourke (BMC) Pty Ltd v Transport Infrastructure Development Corp* [2007] NSWSC 723
- Remedies – *Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors* [2007] NSWCA 253

Frank Corsaro, Senior Counsel, State Chambers Sydney

9:55 Drilling down to contemporary issues in damages

- Challenging enforceability of damages clauses – avoiding a construction of the clause as a penalty
- Liquidated damages in a public sector contract – considering the loss of public utility of loss of profit and what is the revenue/dollar outcome of the event?
- How relevant is intention in quantifying damages?

Sydney Jacobs, Barrister, 13 Wentworth Chambers

10:50 Morning Tea

11:20 Protecting your clients' interests through indemnities and exclusions

- Examining the types of events and incidents of risk which should be contemplated
- Exposing the limits to the enforcement of contractual obligations
- Examining courts' interpretation of indemnity and exclusion clauses
 - *Environmental Systems Pty Limited v Peerless Holdings Pty Ltd* [2008] VSCA 26 – consequential loss
 - “All liability” considered in *BI (Contracting) Pty Limited v AW Boulderstone Holdings Pty Limited* [2007] NSWCA 173
 - Interpretation of ambiguity in indemnities – *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235
 - Exclusion clauses and repudiation: *Lime Telecom Pty Ltd v Powertel Ltd* [No1] [2008] NSWSC 324 (unrep) BC200802748
 - Limitation of liability for consequential loss – *Paper Australia Pty Ltd v Ansell Ltd* [2007] VSC 484
- Protection from tort, equitable and other liabilities
- Common law damages and indemnities
- Avoiding pitfalls and spotting weak points
- Drafting an exclusion clause in relation to consequential loss

Nick King, Senior Associate, Minter Ellison Lawyers

12:15 Investigating unjust enrichment and quantum meruit claims

- Extensions of bare claims for work and labour done or money paid
- Exploring when a valid contractual payment might be unjust enrichment without impacting the agreed risk allocation within the contract

- Identifying gaps in contractual risk allocation – classes of unforeseeable events
- How pervasive is the application by the courts of reasonableness of expectations?
- Judicial willingness to permit windfalls to remain in hands of receiver compared to redistributing risk
- Unconscionability in context – receiver's willing and informed acceptance and the opportunity to accept or reject benefit: communication of request for benefit
- Comparing the claim of saving of expense with conferral of benefit
- Categorising unjust enrichment categories: *Pavey & Matthews* (1987) 162 CLR 221
- Legislative restraints on restitutionary claims
- Case study: *Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27 – the paramountcy of contractual relations upheld
- Looking at other approaches taken by the courts

David Weinberger, Barrister, 13th Selborne/Wentworth Chambers

1:10 Networking lunch for speakers and delegates

2:10 Exploring the duty to warn on construction projects

- Examining the nature of the duty to warn on construction project
- Must a contractor warn the principal if it becomes aware of defects in the owner's design?
- Must a superintendent warn a contractor if it thinks the contractor is making a mistake?
- Does it make a difference if the defect or mistake poses a safety risk?
- Can a party claim for pure economic loss arising from breach of duty to warn?

Owen Hayford, Partner, Clayton Utz

3:00 Understanding impacts of the Trade Practices Act 1974 (Cth) on construction agreements

- The relevant sections: 52, 51A, 51AA, 87 and 87AB
- Statements in tender documents – *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No 2)* [2006] NSWCA 282
- Precontractual statements – *EK Nominees Pty Ltd v Woolworths Ltd* [2006] NSWSC 1172

Martin Luitingh, Barrister, Level 44 Edmund Barton Chambers

3:45 Afternoon Tea

4:15 Structuring effective dispute resolution strategies – current trends and future directions


- Examining law and jurisdiction clauses – What are they, how do they work, why use them?
- When are dispute resolution clauses enforceable by a court?
- Negotiation in good faith *Laing O'Rourke v TIDC* [2007] NSWSC 723
- Ramifications and commercial considerations
- Domestic and international jurisdictions – point of difference and preference affecting choices
- *Fluor Australia Pty Ltd v ASC Engineering Pty Limited* [2007] VSC 262
- ADR clauses – what are they and how do they work?
- Dispute resolution boards – theory and practice

Alex Hartmann, Partner, DLA Phillips Fox

5:00 Closing remarks from the Chair

5:10 Close of day one

Day two: 26 September 2008

8:30	Conference Registration	12:30	Networking for speakers and delegates
9:00	Opening remarks from the Chair <i>Keith Redenbach, Partner, Deacons</i>	1:30	Contract administration framework in the international context <ul style="list-style-type: none">• Trends in International Contracting (FIDIC and NEC3 forms)• The changing role of the 'independent' contract administrator• The emerging role of the Employer's Representative or Project Manager• Effective procedures for challenging interim decisions• The role and powers of the statutory "project manager" in Mainland China• Contrasting Australian and UK case law on the role of the contract administrator Menachem Hasofer, Partner, Mayer Brown JSM Hong Kong
9:10	Evaluating current trends in construction contracts on major projects <ul style="list-style-type: none">• Implementing the best structure for client arrangements in an environment of increasing contractual fusion<ul style="list-style-type: none">– Design and construct– Alliance contracts – the enforceable limits of best for project approach– Public Private Partnerships– Other pain share/gain share and hybrid procurements, and what type of projects are most likely• Keeping the financiers happy with secured assets and revenue streams• Examining Infrastructure Australia and implications for the construction industry Keith Redenbach, Partner, Deacons	2:20	Resolving construction disputes – mediate, arbitrate or litigate? <ul style="list-style-type: none">• Deciding if a dispute resolution clause is necessary• Selecting the most appropriate dispute resolution and arbitration clauses for project• What are the advantages of expert determination to your client?• Does mediation work in the construction context?• Escalating disputes and immovable positions – saving the commercial relationship• Fast track arbitration• The point of no return and the decision to litigate• Considering the availability of enforcement in relevant jurisdiction Scott Laycock, Partner, Gadens Lawyers
10:00	Reinforcing commercial implications in PPP <ul style="list-style-type: none">• Understanding the policy impetus of transferring public assets, funding liability and operational risk to the private sector• Considering the unique performance standards of the PPP – ensuring revenue flow for debt servicing and securing project viability• Negotiating service obligations and assumption of risk across long term arrangements• Putting into place the termination regime• Overview of Division 250 <i>Income Tax Assessment Act 1997</i><ul style="list-style-type: none">– tax treatment of leasing and similar arrangements between PPP operators and government agencies– Applying the predominant economic interest test– Tax preferred uses– Calculating the project period– What are the financial benefits of the arrangement?– Structuring to ensure taxpayer receives the financial benefits from tax preferred entities– Specific exclusions from Div 250• When should you seek a private binding rule from the ATO? Peter Capodistrias, Paul Paxton and Keith Rovers, Partners, Minter Ellison Lawyers	3:10	Afternoon Tea
	Part 1	3:40	Dissecting regulatory changes in 2008 <ul style="list-style-type: none">• <i>Building Professionals Regulation (2007)</i>• <i>Building Professionals Act 2005 (NSW)</i><ul style="list-style-type: none">– Section 63 – Certifier's insurance, conflicts of interest• Reviewing directly and indirectly funded Australian Government Building and Construction Projects under the <i>Building and Construction Industry Improvement Act 2005 (Cth)</i>• <i>Independent Contractors Regulations 2007 (Cth)</i> – unfair contracts applications• Understanding how the National Code of Practice for Precast, Tilt-up and Concrete Elements in Building Construction affects your clients' business• Rights and protections for owners of lots who are not developers – <i>Strata Management Legislation Amendment Act 2008</i>• Looking to the re-write of the <i>Home Building Act 1989 (NSW)</i> – what can we expect? Grant Carolan, Barrister, Ground Floor Wentworth Chambers
	Part 2	4:20	Highlights from the Security of Payments Act <ul style="list-style-type: none">• Dispute resolution• Payment schedules• Adjudication response• Considering the binding force of adjudicators' decisions – <i>Brodyn Pty Limited v Davenport</i> (2004) 61 NSWLR 421; <i>John Holland Pty Ltd v Roads and Traffic Authority of New South Wales</i> [2007] NSWCA 19 Michael Rudge, Senior Counsel, Nigel Bowen Chambers Sydney
11:00	Morning Tea	5:00	Closing remarks from the Chair
11:30	Going green <p>Understanding the impact of Ecologically Sustainable Development (ESD) on your clients' businesses and how this phenomena affects contractual and risk arrangements.</p> Green Buildings Framework <ul style="list-style-type: none">• Considering green building frameworks – ESD implementation phases and rating systems• Green Star rating tools• National Australian Built Environment Ratings System including NABERS Energy (formerly ABGR) Robin Mellon, Executive Director, Green Building Council Australia <p>Implementing practical risk assessment and enforceable contractual provisions:</p> <ul style="list-style-type: none">• Examining builders', operators' and occupiers' obligations• Looking at incidents of ESD in design, development and construction, including:<ul style="list-style-type: none">– Energy, water and waste requirements– Floor layout– Occupancy use– Performance measurements and incentives• Who pays for it? Emanuel Confos, Partner, Swaab Attorneys	5:15	Networking drinks for delegates and speakers <p>Take this opportunity to unwind and mingle with conference delegates and speakers.</p> 
		6:30	Close of conference

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- I am unable to attend but would like to purchase a set of conference papers for Property & Construction Conference \$300 + GST = \$330

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