

Philip Bambagiotti
Barrister at Law, Arbitration Counsel



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Clerks: Richard Bolton, Michael Gooch

Academic: B Ec (Macq), LLB (UNSW), G Dip Leg Prac (UTS)

Admission: *NSW Bar*: called: 14 February 1997
(as a solicitor – from 26 June 1992)

Registered foreign lawyer:
Singapore International Commercial Court (SICC)

Registered Legal Practitioner:
Dubai International Financial Centre Court (DIFC Court)

Rights to appear in the
Qatar International Court and Dispute Resolution Centre (**QICDRC**)

Areas of Practice:

Commercial, Building & Construction, Insurance, Planning & Development, Property and Strata matters, Professional Negligence, Equity, Transport.

Experience as a Solicitor:

Solicitor with Messrs Dunhill Madden Butler (1993 - 1995) and with Messrs Gadens Ridgeway (1995 - 1996) (appointed Senior Associate in mid 1996). In both practicing primarily in commercial / construction law.

Speaking:

Frequently speaks on topics such as:

Building & Construction Issues (including contract drafting, dispute management, professional liability, The *Home Building Act 1989*, Security of Payments, and Strata law),

Commercial Law issues as well as the *Convention for the International Sale of Goods (CISG)*.

In 2015 to 2017, he has delivered papers in Hong Kong on: the NEC3 Contract and its use in Hong Kong, Adjudication under the proposed Hong Kong Security of Payments regime, the Use and Presentation of Evidence in Commercial Disputes including BIM, and the Society of Construction Law *Delay & Disruption Protocol*.

He is a Fellow of the International Dispute Resolution Academy (IDRA) and has been a delegate for the IDRA course in international arbitration in Shanghai PRC in 2016, and represents and presents for the IDRA. The IDRA focuses upon teaching arbitration, mediation, and advocacy skills in the PRC.

Guest judge - 14th CIETAC Cup Moot, Beijing PRC, November 2016, and the 3rd Young International Mediation Competition 2017 in Hong Kong.

In July 2017, he was invited to deliver a major address to the Hong Kong Department of Justice on the proposed Security of Payments Adjudication scheme.

He regularly speaks and presents in Australia and in Asia (predominantly in Hong Kong & PRC) on arbitration & building /construction issues.

Publications:

Building Disputes and the Home Building Act 1989 (NSW) published by Thomson Reuters (2012) (with a 2nd edition in preparation). This is the leading text on residential building dispute in NSW.

In the foreward, His Honour, Justice David Hammerschlag (Head of the Commercial, Technology & Construction, and Arbitration List of the NSW Supreme Court) described the book as “practical and scholarly at the same time.”

The Home Building section of the *Building Service (NSW)* (a looseleaf service published by Thomson Reuters).

National Building Service (a looseleaf service annotating, inter alia, the Building Code of Australia, also published by Thomson Lawbook Co), General editor.

Various papers, including, as co-author with Marcus Jacobs QC and Prof Katerin Cutbush Sabine, “*The U.N. Convention For The International Sale of Goods (CISG) In Australia — To — Date An Elusive Quest For Global Harmonisation?*” (delivered at the 2002 Sydney Congress of the Union Internationale des Avocats, and which was subsequently published internationally (in the United States – *Mealeys International Arbitration Reports (No 17, 2002)* and in China in the *Commercial Arbitration Report* (vol 1, 2005, by CITIC)).

Committees

Past Chairman of the Fair Trading Advisory Council, appointed pursuant to the *Fair Trading Act 1987* (2013-2015).

Member of the NSW Bar Association ADR Committee (2016, 2017)

Member of the Law Council of Australia, Business Law Section, Construction & Infrastructure Law Committee

Member of the Commercial Litigation Advisory Committee for the NSW College of Law (Masters of Applied Law (Commercial Litigation) Advisory Committee);

Notable Cases and Activities

Many of the cases and matters in which he has been involved have resolved before hearing and on confidential bases, meaning that the details and circumstances cannot be divulged. Commercial confidentiality is preserved with these, where some details are significant.

Planning & Environmental

Planning & environmental law are an integral part of a construction/property practice, and has always been a feature of his practice. Apart from commercial and similar kinds of matters for and against local government and planning bodies, he has also been involved in matters such as:

- (a) In 2014, he advised upon the options for re-development on a complicated strata site (that involved a town-house development with a substantial undeveloped stage). The developer wanted to expand the, as then, incomplete part of a staged development. The issue being the opposition of the owners of the rest of the development and the validity of the consent.
- (b) In 2012, he acted in an application for the change of use of a workshop to a specialised medical facility. This involved contested appeal to the joint regional planning panel and thereafter strategy for merit appeal to the relevant Court.

- (c) In 2011, he advised a local government authority as to development obligations and options in respect of the future and remediation of a large regional tipping facility.
- (d) He regularly acts in matters involving encroachment and compulsory easements for access. He has acted in case involving claims for rectification of a common driveway and large retaining wall arising from disputes as to the construction of a deposited plan (and the consequence of the construction of that plan). These as well as various disputes about relative property rights and obligations arising from strata plans and the development/redevelopment of strata sites.
- (e) He has acted for, and provided advice to, local councils in enforcement of environmental and planning laws, as well as in respect of challenges to consents and assessments. In particular, he has acted for the Penrith City Council in a range of matters over the years, and continue to be retained by them for specialist matters.

Building, Engineering, & Construction and Commercial, Insurance

His practice focuses on all aspects of, and relating to, Building, Engineering, & Construction law. He also practises in all aspects of Commercial law and Insurance, as well as areas related to these.

He appears as a barrister in courts and tribunals, as well as in arbitrations, mediations, security of payments adjudications, and other alternative dispute resolution procedures in Australia. He appears in arbitrations internationally.

At the NSW Bar, Philip is regarded as one of the foremost practitioners in the specialist area of Building & Construction Law. Apart from his extensive experience in acting for different interests in construction disputes, he authored the leading text on residential building dispute in New South Wales, *Building Disputes and the Home Building Act 1989 (NSW)*, of which a 2nd Edition is underway. He is the general editor of the *National Building Service*.

Cases

Construction & Property

1. ***Ku-ring-gai Council v Chan*** [2017] NSWCA 226 (7 September 2017) in which he appeared on the appeal from *Chan v Acres* for a local council defending a case for a claim in negligence for economic loss arising from allegedly faulty certification of building work.

This is now one of the significant case on this point in NSW, following as it does the question of the extension of duty of care to statutory building certifiers, and is an important case on the application of the principles identifying economic loss in the building/construction context.

2. ***The Owners – Strata Plan No 76841 v Ceerose Pty Ltd*** [2017] NSWCA 140 (23 June 2017) which involved the question of the jurisdiction of the Court in limiting the scope for plaintiff recovery on a later amended claim.

3. ***The Owners Strata Plan No 66375 v Suncorp Metway Insurance Ltd (No 2)*** [2017] NSWSC 739 which involved the question of agency in the execution of building contracts for the purposes of the *Home Building Act 1989*.
4. ***The Owners-Strata Plan No 21372 v Banovic (No 2) [2017] NSWSC 734*** which involved whether proceedings for relief pursuant to the Strata legislation should be brought in the Supreme Court or transferred to the Civil & Administrative Tribunal pursuant to the approach in *North Wind Pty Ltd v Proprietors – Strata Plan 3143* [1981] 2 NSWLR 809.
5. ***Home Site Pty Limited v ACN 124 452 786 Pty Limited (formerly known as Nahas Construction (NSW) Pty Limited)*** [2017] NSWSC 698 which involved the question of recovery following Security of Payment adjudication of building claim entitlements and compromise of claims.
6. ***Hoque v ARZ Building & Constructions Pty Ltd*** [2017] NSWCATAP 71 (29 March 2017) being a successful appeal from a building claim.
7. ***Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd*** [2017] NSWSC 232 (14 March 2017) per Ball J, being an application for judicial review of a security of payments adjudication.
8. ***Re Ply (ACT) P/L (in admin) Acton Developments (ACT) P/L v Ply (ACT) P/L (in admin)*** in the Supreme Court of the Australian Capital Territory, No: SC522/2016, 3 March 2017 per Walmsley AJ, an application for leave to proceed against a company subject to administration.
9. ***Wesiak v D&R Constructions (Aust) P/L*** [2016] NSWCA 353 was an appeal from the NCAT Appeal Panel dealing with the nature and operations of the principles of repudiation of contract, as well as the powers of the tribunal on appeal.
10. ***Allianz Australia Insurance Ltd v Dinov*** [2016] NSWDC 342 is a leading case on the extent and applicability of the long stop limitation provisions for building claims in sec 109ZK of the *Environmental Planning & Assessment Act 1979*. That case is currently under appeal.
11. ***Chan v Acres (No 3)*** [2016] NSWSC 1389 was a consequent costs argument to the Chan v Acres' case, the issue involved successful opposition to claims for indemnity costs, as well as issues involving *Sanderson* and *Bullock* type costs orders.
12. ***Gardez Nominees Pty Ltd v NSW Self Insurance Corp'n*** [2016] NSWSC 532 (28 April 2016) in which he appeared for a mortgagee in possession seeking the benefit of the Statutory Warranties under the *Home Building Act* and indemnity under Home Warranty Insurance.

The case, however, turned upon the proprietary nature of unregistered interests in Torrens Title land and the nature of 'title'. It is the first such consideration of these issues.
13. ***Chan v Acres*** [2015] NSWSC 1885 (11 December 2015) in which he appeared for a local council defending a case for a claim in negligence for economic loss arising from allegedly faulty certification of building work.

This is now one of the significant case on this point in NSW, following as it does the question of the extension of duty of care to statutory building certifiers.

14. **Wang v Kaymet Corporation Pty Ltd** [2015] NSWSC 1459 (6 October 2015) in which he successfully defended a group of developers who rescinded off-the-plan sales contracts.

The case is of great significance and has aroused a wide range of media response and our success led to an urgent statutory amendment. This is the first modern case dealing with the topical sunset clause issue in off-the-plan contracts.

15. In late 2015, he appeared for the owners' corporation in the inquest into the fire and death of Connie Zhang, which occurred following a prominent and tragic apartment block fire in Sydney. The issue involved the proper construction and application of the building code to the building. This led to recommendations that are likely to lead to statutory reform.

Further, the Zhang inquest has led to Supreme Court proceedings, in which he is briefed.

16. **De Armas v Peters** [2015] NSWSC 1050, in which he appeared for the plaintiff insurer on an appeal involving the application of extended *res judicata* principles and the nature of subrogated interests in choses in action. This was the first consideration of that particular aspect of those principles at superior court level.

17. In 2014 and 2015, he appeared in the latter of a series of cases involving the capacity of the statutory owners' corporation to bring proceedings for building defects. These included: **The Owners - Strata Plan No 70798 v Bakkante Constructions Pty Ltd** (2014) 88 NSWLR 513, [2014] NSWCA 410 as well as a number of others.

18. He appeared for the respondents in the leading Australian case on tort claims for economic loss in relation to latent defects in buildings: **Brookfield Multiplex v The Owners – Strata Plan No 61288** (2014) 254 CLR 185, [2014] HCA 36 (8 October 2014). This case has re-defined the way that such negligence cases are decided.

19. He appeared for the Building Insurers Guarantee Corporation in **The Owners - Strata Plan No 61162 v Lipman; The Owners - Strata Plan No 61162 v Building Insurers' Guarantee Corporation**, a claim against a statutory insurer for defects in an apartment building.

This decision then led to the significant decision on costs: **The Owners - Strata Plan No. 61162 v Lipman The Owners Strata Plan No 61162 v Building Insurer's Guarantee Corporation** [2014] NSWSC 622 (23 May 2014) providing an overwhelming success for the client.

20. **Wesfarmers Gen Ins Ltd t/a Lumley Insurance – ats – the Owners – Strata Plan No 68489 (Paris Apartments)**. In August 2012, he appeared for the insurer, in the NSWSC Technology & Construction List, No: 2010/261150, a sizable, and long fought, building defect (insurance dispute), which resolved at mediation.

21. Also in August 2012, he appeared, in **Vero Insurance Ltd – ats – The Owners – Strata Plan No 73701** (in the Supreme Court, Technology & Construction

List, No 2010/300045) which involved a very large building defect (insurance) dispute, which resolved at mediation.

22. In May 2012, he appeared in ***The Owners – SP 62883 (Quest Apartments) v Building Insurers Guarantee Corporation*** (NSWSC, Tech & Construction List, No 07/266734) for the insurer.

The matter involved a sizeable claim for building defects upon the statutory indemnity scheme conducted by the NSW Government. The case involved particularly complex and abstract questions of construction of the relevant insurances and the nature and extent of residential parts of a serviced apartment scheme in a building, as well as some Constitutional points.

23. In 2012, he appeared in a substantial commercial arbitration, between (Confidential (a major institutional property owner)) v (Confidential (a building company)).

The matter involved the construction of a defective façade and awning to a feature building in Sydney. The case involved complex technical evidence as to the construction of a structural glass awning including the properties of the glass.

24. In 2011, he was briefed by a government to advise and to develop strategy in respect of a large scale re-insurance dispute it was having with the liquidators of a major now insolvent insurer. The sums involved were substantial, and the issues of a complex technical nature (for reinsurance). This matter settled.

25. ***The Owners – Strata Plan No 75903 v Dix*** (2011) 80 NSWLR 186, [2011] NSWSC 245 (5 April 2011). That case was brought against a principal private certifier (PCA) pursuant to Part 4 of the *Environmental Planning & Assessment Act 1979* and, in the determination of a separate question, was the leading case on the construction of the multi-storey exemption in the *Home Building Regulations*.

This case led to a statutory amendment of the legislation.

26. ***Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971*** (2011) 80 NSWLR 711, [2011] NSWCA 159 (24 June 2011) in which the scope of the powers of strata corporations as provided in by-laws was explored and significantly expanded.

27. In 2011, he appeared in ***The Owners – Strata Plan No 65842 (Eastside Apartments) v VW Stronach P/L and the Building Insurers Guarantee Corporation*** (CTTT (Newcastle), No HB 08/49882). That case involved a complex construction of transitional provisions in the statutory indemnity provisions for insolvent insurers in the *Home Building Act*.

28. In ***Associated Translators and Linguists Pty Limited and Commissioner of Taxation*** (2010) 78 ATR 937, [2010] AATA 260 (14 April 2010), he appeared, for the Commissioner, in a substantial hearing involving a contest a to the Superannuation Guarantee charge.

29. In 2010, in ***The Owners – Strata Plan No 61759 v Vero Insurance Ltd*** (*In the Supreme Court of NSW (Technology & Construction List – No: 55033/07)*). The case was a substantial strata building defects insurance claim, which settled at the mediation.

30. **Allianz v Waterbrook** [2009] NSWCA 224 (10 August 2009) which is important authority on causation and the structuring of the operation of the Statutory Warranties and the Home Warranty Insurance in the *Home Building Act 1989*. This case largely re-directed the development of the Court's approach to subsequent purchaser liability as to this Act.
31. In **The Owners SP 69352 v Vero Insurance Ltd (Home Building)** [2009] NSWCTTT 396 (22 July 2009), he appeared in a leading case as to the true construction of Home Warranty Insurance policies in relation to owners corporations. That case ultimately went on appeal to the Court of Appeal, and represents one of the major authorities on the question.
32. In 2009, in **Owners Strata Plan 62327 v Vero Insurance (Pacific Rivage)**, he appeared for a very lengthy period, in a major strata building defects case. The matter was case managed before the Court after which it settled.
33. He appeared in **Vero Insurance v Tran** [2008] NSWCA 358 (15 December 2008) addressing issues of the construction of settlements made in mediations. He also appeared at first instance in **Vero Insurance v Tran** (2008) 15 ANZ Ins Cas 61-759.
34. He appeared as amicus in the Court of Appeal in **Ilvari Pty Ltd trading as Craftsman Homes Northern Rivers v Moss & Ors** (2009) 74 NSWLR 710, [2009] NSWCA 207 (17 August 2009), before Campbell and Young JJA and Handley AJA. The case dealt with principles of res judicata arising from earlier tribunal proceedings.
35. In **Salih v Vero Insurance Limited & Harb Constructions (Home Building)** [2008] NSWCTTT 873 (5 March 2008), he appeared in the building tribunal against two Senior Counsel opponents (one subsequently a judge). The case involved a complex question of the application of the principles of res judicata and Anshun estoppel in relation to an insurance claim.
36. In 2005 to 2008, he acted for Vero Insurance in **The Owners – Strata Plan No 61694 (the Grandview Apartments)**, at the time, amongst the largest Home Warranty claims ever made in Australia. This case was primarily a building defects case, but involved issues of trusts, director's duties, and conspiracy.
37. **The Owners Strata Plan 56587 v TMG Developments Pty Limited** [2007] NSWSC 1364 (29 November 2007) This is a leading judgement in relation to the definition of beneficiary in Home Warranty insurance policies and the clarification as to the availability of the defence of circularity of action (which was live at the time).
38. He has appeared in a number of taxation matters in the AAT, such as **Cachlios and Commissioner of Taxation** [2006] AATA 676; (2006) 64 ATR 1060; 2006 ATC 2370 (3 August 2006) involving a defence to a challenge as to tax assessments, and **Tenvoc Properties Pty Ltd and Commissioner of Taxation** [2006] AATA 529; (2006) 63 ATR 1108; 2006 ATC 2241 (20 June 2006) which the goods & services tax (GST) margin scheme.
39. In **Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd** [2005] FCA 1102 (15 August 2005). This was an important case involving, inter alia, the question of stays of statutory proceedings by virtue of the *International Arbitration Act 1974 (Cth)*. This case was the precursor to the change in the

law in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 (20 December 2006).

40. From 2002 to 2004, he appeared in an extensive series of cases involving ***Tridon Australia P/L ats - ACD Tridon Inc*** which were conducted in the Supreme Court of NSW (Corporations List), the Federal Court, the Court of Appeal, in reference to Andrew Rogers QC from the Supreme Court and in a commercial arbitration before Rogers QC.

This case involved a substantial shareholder dispute, disputes as to the rights of nominee directors and access to documents, trademarks, the *Convention for the International Sale of Goods* (CISG), corporate structuring and re-structuring in Australia and Canada, and the like.

41. ***Chapman v Taylor & Ors; Vero Insurance Ltd v Taylor & Ors*** (2005) Aust Contract R 90-205, [2004] NSWCA 456 (13 December 2004) was a significant case as to the law of frustration of contract, and the nature of an appeal to the Court per section 67 of the *Consumer Trader & Tenancy Tribunal Act 2001*. He had devised the principal strategy at the first instance trial, which succeeded then and on the appeal.

42. In 2001/2002, he appeared, in ***Jarman v The Owners – Strata Plan 32905*** (In the District Court, Construction List, No 844/98). This was a lengthy strata defects case, involving unusual issues of damages, where the relevant property was sold whilst the proceedings were on foot.

The case involved particular issues distinguishing the ordinary rules of damages, by reference to the particular case. Despite an initial reluctance to the client's argument, the Court's view was turned, successfully, for the client. He then appeared in the Court of Appeal which upheld the District Court's decision.

43. He appeared for Mr Campbell and Arnoya Holdings in their various actions against Metway Leasing Ltd. The disputes related to bankruptcy matters and mortgage finance, as well as involving a constitutional issue regarding section 60 of the *Bankruptcy Act 1966 (Cth)*, these include (but are not limited to) ***Campbell v Metway Leasing Ltd*** [2001] FCA 1311 (13 September 2001) per Katz J, and ***Campbell v Metway Leasing Limited*** [2002] FCAFC 47; [2002] FCA 213 (5 March 2002).

This constitutional question went to the High Court on a special leave application, see for example *Arnoya Holdings Pty Ltd & Ors v Metway Leasing Limited S72/1999* [2000] HCATrans 16 (11 February 2000). The matter was settled after papers were filed in the High Court following the Federal Court determinations in *Campbell* (above).

Other Matters

44. *Beechwood Homes Management Strategy*

Philip's experience and skill in residential building matters and in insurance matters led to him being briefed in late 2008. He was chosen as part of the small task force engaged by the insurer to provide advice and set up the management strategy for the collapse of Beechwood Homes, a very substantial

domestic builder in NSW, and potentially the source of very many claims. He was the only barrister invited to work with the task force. The strategy implemented is now the blueprint for resolution of such collapses, and has been employed since.

45. Also in 2011, he was retained to advise and develop a strategy for legislative reform to address some urgent problems emerging for insurers from the insurance scheme in the *Home Building Act 1989*. Again, he was the only barrister invited to participate in that process, which led to the Insurance Council of Australia recommendations for legislative reform. And whilst the proposals were not adopted in full, many recommendations were. This resulted in certain of the large Home Warranty Insurers being able to rationalise and restructure their operations accordingly.
46. He is regularly briefed to advise, insurers, major developers/builders, owners corporations, as well as the government in relation to disputes, but also in respect of legislative development and reform. This included being retained to advise a government (the terms and identity of which he is required to maintain as confidential) in relation to a large re-insurance dispute involving millions of dollars.
47. He has a substantial pro-bono practice, retained by Salvos Legal (the humanitarian law arm of the Salvation Army). This has included acting in a range of matters such as immigration law, social security law, and social housing matters.

Current Projects/Activities

He is currently drawing the 2nd edition of *Building Disputes & the Home Building Act 1989*, pursuing admission to the bar of England & Wales, and is in the latter stages of the Accelerated route to Fellowship of the Chartered Institute of Arbitrators (CIArb).

Professional Associations:

NSW Bar Association,
Union Internationale des Avocats (**UIA**)
(past Regional Secretary & past secretary to the Australian conference of the UIA),
International Bar Association (**IBA**)
National Environmental Lawyers Association (**NELA**),
Australian Construction Law Discussion Group (**ACL DG**),
Society of Construction Law, Australia (**SoCLA**),
Resolution Institute, formerly Institute of Arbitrators & Mediators Australia (**IAMA**)
Fellow: International Dispute Resolution Academy (**IDRA**),
Chartered Institute of Arbitrators (**CIArb**) (member, but currently on the accelerated fellowship program)
Maritime Law Association of Australia & New Zealand (**MLAANZ**)
Australian Centre for International Commercial Arbitration (Associate)(**ACICA**)
International Chamber of Commerce (Australia) (**ICC**),
Australian Insurance Law Association (**AILA**),
The French Australian Lawyers Society (**FALS**).

Member of the Commercial Litigation Advisory Committee for the NSW College of Law (Masters of Applied Law (Commercial Litigation) Advisory Committee);

Law Council of Australia – Business Law Section (Member of the Construction & Infrastructure Law Committee).

French Australian Chamber of Commerce,
Italian Australian Chamber of Commerce
Alliance Française.