
FIRE SAFETY ENGINEERING SEMINAR

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KREISSON

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Contracts

1. What is a contract?
2. What a contract does
3. Framework
 - a) Rights & responsibilities
 - b) The services – due care and skill
 - c) Manage risk
4. Case studies in fire safety: the Lacrosse Fire & judgement
5. Key contract clauses

Contracts

Including contractual terms which reflect a party's interests

Need for pre-agreed risk strategy

Accepting unduly onerous clauses may lead to losses:

- Revenue
- Reputation in the marketplace
- Confidence of customers
- Management time
- Insurance costs
- eg. contracts- consultant assuming principal's risks... overall access & co-ordination of site

Contracts

- Contract - basis of commercial law
- Definition: agreement/bargain between 2/more parties under which legal rights are created and which are enforceable in court
- Economic tool –ownership of present and future property is transferred or goods and services provided

Features:

- Parties
- Price
- Payment
- Promise

- A code of practice for administration of transaction;
- Allocate the risk inherent in the transaction

Current Issues: ACP – How widespread?

- Fire cladding risks revealed at several prominent Sydney buildings, documents reveal: ABC July 2019 ABC News
- **Several prominent buildings** in Sydney need their cladding replaced due to fire risks, documents released under freedom of information laws have revealed.

Key points:

- The NSW Government required buildings with cladding to be registered on its combustible cladding register in 2018
- ABC's Ultimo headquarters are among those needing cladding to be partially removed
- The documents reveal **11 buildings** in the City of Sydney need their entire cladding replaced while a further **31 buildings** — including Star Casino — require partial replacement.
- [May 2019: ABC revealed NSW Health documents identifying hospital buildings where flammable cladding has posed major fire threats to the public in Sydney and across state.](#)

Sydney apartment owners face \$12.5 million bill to remove flammable cladding

<https://www.news.com.au/finance/real-estate/buying/sydney-apartment-owners-face-125-million-bill-to-remove-flammable-cladding/news-story/3e870c93a9bc87e17b762b6fd248e4d4>

Hundreds of apartment owners could take legal action after being told they may be forced to cough up \$45,000 each.

DECEMBER 3, 2018 1:48PM

Construction industry faces 'screeching halt' over cladding risk

By James Fernyhough

Updated 16 Jan 2019 - first published at 9:43

Combustible cladding hits UK apartment values - and Australia's next

The combustible find compliant p sources warn co

By Michael Bleby

17 Jul 2018 - 11:45 PM

British owners of apartments clad in combustible aluminium panels are struggling to sell their units in the wake of London's Grenfell Tower tragedy, as the financial costs of replacing cladding and fixing buildings are unclear to both owners and potential buyers.

Related Quotes

LLC \$12.27 +0.36 (+3.02%)

Last year, Manchester teacher Danielle Williamson put her two-bedroom apartment up for sale. She started negotiating with a buyer in May but the process hit a rock in January this year when the buyer's solicitor alerted her

If left unresolved, they say the withdrawal of insurers from the market could leave surveyors non-compliant with the law and therefore unable to practise. A lack of surveyors would bring the construction industry to a standstill.

Case Study – the Lacrosse Fire



Lacrosse fire ruling sends shudders through building industry consultants and governments

March 6, 2019 6:05am AEST

<https://theconversation.com/lacrosse-fire-ruling-sends-shudders-through-building-industry-consultants-and-governments-112777>

ARCHITECTUREAU Endorsed by Australian Institute of Architects and Design Institute of Australia

HOME PROJECTS AWARDS NEWS REVIEWS PRACTICE PEOPLE DISCOURSE PRODUCTS CALENDAR MAGAZINES

Judge finds architect proportionately liable for Lacrosse fire damages

NEWS | Linda Cheng | 5 Mar 2019

A "landmark decision" in the Victorian Civil and Administrative Tribunal could have ramifications across the industry.

<https://architectureau.com/articles/judge-finds-architect-proportionately-liable-for-lacrosse-fire-damages/>

ABC NEWS LOCATION: Sydney, NSW Change

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Lacrosse apartment owners awarded \$5.7 million in damages after flammable cladding blaze

By Joseph Dunstan
Updated 1 Mar 2019, 6:34am

<https://www.abc.net.au/news/2019-02-28/lacrosse-apartment-owners-win-5.7-million-cladding-fire-damages/10857060>

Contractors judged liable in shock apartment fire ruling

Kate Jackson | Wednesday, March 6, 2019 | Developments, Industry, Management

Leave a comment

<https://www.accomnews.com.au/2019/03/contractors-judged-liable-in-shock-apartment-fire-ruling/>

Lacrosse payout 'a game-changer'

4 March 2019



A ruling awarding more than \$5.7 million to apartment owners hit by a flammable cladding-fuelled fire has been praised for "holding the [building] industry to account".

<https://www.insuranceneews.com.au/regulatory-government/lacrosse-payout-a-game-changer>

Case Study – the Lacrosse Fire

Builder LU Simon

- D & C contract with developer dated 14 May 2010
- Owners claim builder breached warranties [48]:
 - “good and suitable for the purpose”
 - Would comply with all laws and legal requirements
 - Fit for purpose

Fire Engineer

- Scope of services [75] - [76] included:

Undertake the performance fire engineering analysis and life safety design for the building generally from a quantifiable basis in accordance with the performance provisions of the BCA and the Fire Engineering Design Guidelines.

Architect

- Same consultants agreement as with Surveyor [70]
- Obligations and services [71] to 73]

Building Surveyor

- Fee proposal dated 5 April 2007; Consultant agreement [55] – AS4122-2000
- Agrees to indemnify [59]:

“claims by any person against the Client in respect of... loss of or damage to any other property, arising out of or in consequence of carrying out the Services by the Consultant but the Consultant’s liability to indemnify the Client shall be reduced proportionally”

- Consultant accepts all design risk – clause 17.3 [60]

The Lacrosse Fire

Owners Corporation (incl Lot Owners) Applicant

Total Claim	\$12,765,812.94 [page 9]
Agreed amount	\$4,851,937.19
Balance	\$7,913,875.75
• Cost of reinstatement	\$1,243,634.10
• Additional insurance premium	\$701,270.16
• Compliance costs Note 1	\$5,968,971.49
• Unquantified future costs – status unclear	
Amount to be paid based on decision	\$5,748,233.28
• Future amounts to be paid	pending
• Amount yet to be resolved	• \$6,823,165.65

Builder – LU Simon
First respondent

Wrongs Act 1958

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT//2019/286.html>

Surveyor

- Stasi Galanos and his employer Gardner Group Pty Ltd (“Gardner Group”) 2nd Respondent

Architect

- Elenberg Fraser Pty Ltd (3rd and 4th Respondent)

Fire Engineer

- Tanah Merah Pty Ltd, trading as Thomas Nicolas (5th Respondent)

Occupier

- Gyeyoung Kim - 6th Respondent
- Mr Gubitta - 7th Respondent No part in the proceedings

Superintendent

- Property Development Solutions
- Settlement reached and withdrew from direct involvement shortly before the hearing

Note 1 – includes future costs of replacing non compliant cladding

The Lacrosse Fire

Summary of Result

No	Party	Finding Result	Reasons	Amount liable
1	LU Simon	Breached warranties of suitability of materials, compliance with law of fitness for purpose implied into D&C Contract	<ul style="list-style-type: none"> NOTE - Did not fail to exercise reasonable care in construction of Lacrosse Tower by installing ACPs on east and west facades 	\$5,748,233.00
2	Gardner Group (surveyor)	Failed to exercise due care skill	<ul style="list-style-type: none"> Issued Building Permit for Stage 7 and approved Architects specification for ACP which did not comply with BCA as in force in 2011 Failed to notice and query incomplete description of cladding systems in 5th iteration of Fire engineering Report by Thomas Nicolas 	33%
3	Elenberg Fraser (Architect)	Breached Consultant Agreement by failing to exercise due care and skill	<ul style="list-style-type: none"> Failed to remedy defects in its design (ie ACP Specification and extensive use of ACPs) that caused design to be non compliant with BCA and not fit for purpose Failed as head design consultant to ensure that ACP sample provided by Builder was compliant with Architects design intent 	25%
4	Thomas Nicolas (Fire Services)	Breached its Consultant Agreement by failing to exercise due care and skill:	<ul style="list-style-type: none"> Failed to conduct a full engineering assessment of the Lacrosse Tower in accordance with the requisite assessment level dictated within the IFEG and failing to include the results of that assessment in the Fifth FER; Failed to recognise that the ACPs proposed use in the Lacrosse tower did not comply with the BCA Failed to warn at least LU Simon (and probably also Gardner Group, Elenberg Fraser and PDS) of that fact, whether by disclosing these matters in the Fifth FER or otherwise. 	39%
5	Mr Gubitta	Mr Gubitta owed a duty of care to the Owners	<ul style="list-style-type: none"> Failed to take care in the disposal of his smouldering cigarette and he breached that duty by failing to ensure that his cigarette was fully extinguished before leaving it in the plastic container. 	3%

The Lacrosse Fire

Lessons Learned

The fire engineer argued that despite the terms of his consultancy agreement required him to undertake a 'full engineering assessment', this was not his actual role

At [480]

"The fire engineer) ... opened its case on the basis that "it was never expected that the fire engineer would have the role of going through architectural drawings and identifying possible non-compliances".[\[737\]](#) Rather, the role of the fire engineer was limited to responding to the alternative solutions or "deviations from the DTS provisions"

"..... It wasn't my role, again as I said, to go on never ending searches through documents, looking for non-compliances".

"It may have been ("the fire engineer's) usual practice to limit his assessment to matters identified for his consideration by the building surveyor, but the ...Consultant Agreement demanded more than this.

Under that agreement, (the fire engineer) assumed **an express obligation at least to assess the construction materials for any fire hazards.**

The obligation may not have extended to undertaking "never ending searches...for non-compliances".

But it at least required some proactive investigation and assessment of the principal building materials."

Judgment [481]

"My impression generally of (the Fire Engineer's) approach to the FERs and other documents, was that there were **a number** of instances of the use of template or "**boilerplate**" language (as well as reference to out-of-date guidelines), without much attention being given to what the words actually meant or required.

The fire engineer is, of course, **not alone** in this. It is often the case that diligent and competent professionals **blithely reuse standard documents** that have served them well over the years, focusing only on those parts that need to be tailored to each job. It is only **when something goes wrong** and the lawyers become involved, that any real attention is given to how that boilerplate language informs potential liability."

Judgment at [487]

The Lacrosse Fire

Lessons Learned

(Decision should **not** be taken as a general statement of how and where liability will be determined in other cases)

Builders

- Not necessarily a win for builders
- Builders are on notice
- Builder was still 100% liable
- Review contracting structures
- May be primarily responsible to the owner under statute
- Builder's right to recover for negligence (in tort, contract or under statute) against professionals on whom the builder relied subject to proviso that builder did not have any relevant actual or constructive knowledge of the risk

Consultants

- Understand nature of the contractual obligations
- Invest time in negotiating scope of services, and link it to price
- Seek protection of liability caps
- Should notify issuer that circumstances have arisen which may lead to a claim under its policy
- Consider asset insurance options
- A 'business as usual' approach to risk will not do.

Insurance

- Insurers may impose exclusions, increase premiums
- Professionals need to consider:
 - their duty of disclosure to insurers of incoming policies;
 - notify to trigger cover under expiring PI policies

Key clauses

1

Exclusion/ Exemption

- A term which intends to exclude one of the parties from liability or limit the person's liability to specific conditions, circumstances, or situations.
- aims to exclude liability for breach of contract or negligence
- common in contracts for engagement of consulting professionals ie. engineers & architects
- To be effective: parties should consider allocation of risks under the contract & acceptance or denial of liability.

Key clauses

2

Warranties/ Services

Key Warranties

Should define the standard of care, *eg. “In providing services under this Agreement, the Consultant will endeavour to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practising under similar circumstances.”*

Ensure the other party does not attempt to include a higher standard, which may be interpreted as a warranty eg: “perform to the highest standard of practice”, or guaranteeing to perform services in a “non-negligent manner”,

This exceeds the best professional standards established by any professional licensing body. Consultants should negotiate to remove such language.

Take away:

Standard of care should be ‘reasonable’ & not so onerous as to be unrealistic warranty of performance.

Key clauses

3

Indemnities

A standard indemnity

Clause 15.1 of AS 4000 begins as follows:

"Insofar as this subclause applies to property, it applies to property other than WUC.

The Contractor shall indemnify the Principal against:

a) *loss of or damage to the Principal's property; and*

b) *claims in respect of personal injury or death or loss of, or damage to, any other property, arising out of or as a consequence of the carrying out of WUC, but the indemnity shall be reduced proportionally to the extent that the act or omission of the superintendent, the Principal or its consultants, agents or other contractors (not being employed by the Contractor) may have contributed to the injury, death, loss or damage."*

More aggressive indemnity

"The Contractor must indemnify the Principal against any loss or claim suffered or incurred by the Principal directly or indirectly arising from, or otherwise in connection with:

(a) *the Contractor's activities, including the performance of work;*

(b) *any breach of contract; or*

(c) *the project as a whole."*



check insurance

How to modify

- triggered by a breach of contract or other unlawful act or omission on your part;
- not expose you to indirect or consequential losses,
- not apply to damage to the work itself (on the basis that the contractor's obligation to reinstate the work and pay liquidated damages should be sufficient);
- not apply in connection with any losses suffered as a result of a delay;
- is reduced to reflect the proportionate contribution of persons outside of your control;
- is reduced to the extent the principal fails to take reasonable steps to mitigate its losses

Consider inclusion of Limitation of liability clause

For example [not legal advice] -

1. Notwithstanding any other provision of the Agreement, but subject to this clause, the Consultant's total aggregate liability to the Principal arising out of, or in any way in connection with, the Agreement whether based on contract, tort (including negligence), indemnity, under any warranty, under statute (to the extent permitted by law) or otherwise at law or in equity, is limited to 100% of the original Fee.

Exclusion from limitation

2. The limitation of liability in this clause shall not apply to liability of the Consultant:
 - a) for willful misconduct and fraud;
 - b) for personal injury and death;
 - c) for damage to third party real property;
 - d) for infringement of Intellectual Property rights; and
 - e) out of which the Consultant by law, cannot contract.

Survive termination

3. This clause shall survive termination of the Agreement for any reason.

Key clauses

5

Liquidated Damages

Purpose of Liquidated Damages

- remove the need for the non-breaching party to prove the actual damage suffered
- quantify risk allocation
- encourage contract compliance because they are 'self-enforcing'
- allow the contractor, at the time of tender, to price its exposure
- establish a cap on the liability
- allow the principal to recover irrespective of the amount of actual loss.

Possible Amendments to Liquidated damages clause [note – not legal advice]

“.....The Contractor acknowledges and agrees that the rate of liquidated damages provided for in the Contract includes an amount which the Principal may suffer or incur as a result of late completion of the WUC.

The Contractor’s total aggregate liability for liquidated damages under clause 34.7 is limited to and shall not exceed \$[insert amount].

Liquidated damages for delay shall be the sole and exclusive remedy for the Principal in respect to any failure by the Contractor to perform its obligations by the times set out in the Contract (including achieving Practical Completion by the date for Practical Completion).”

TIPS

1. Court will enforce liquidated damages even if unfair
2. Beware of inserting “Nil” or “N/A”

3. Court will not enforce liquidated damages if:
 - a) “extravagant and unconscionable”
 - b) Not a genuine pre estimate

Key clauses

6

Termination

May arise:

By agreement, variation, accord and satisfaction or waiver

In accordance with the terms of the contract

- By legal frustration
- By substantial breach
- Before terminating consider:
 - Are there any continuing obligations?
 - Does information/documents need to be returned?
 - Do certain goods/assets need to be returned?
 - Are any proprietary rights affected?

Key clauses

6

Termination

Termination for breach of contract

Termination for convenience

Basically you cannot terminate:

- capriciously
- arbitrarily, or
- for extraneous purposes.

Renard Constructions v Minister for Public Works

GC 21 – clause 78

- *“The Principal may terminate the Contract by giving notice with effect from the date stated in the notice, for its convenience and without the need to give reasons”*

Draft of the *Design and Building Practitioners Bill* 2019

- Suite of new reforms to improve quality and compliance of design documentation & strengthen accountability across the design, building and construction sector.
- Part of the commitment made by the NSW Government in February 2019 in Response to the Building Confidence Report, authored by Professor Shergold AC and Ms Weir in February 2018 (**Shergold Weir Report**).

Compliance with BCA

- Requiring that design practitioners who prepare regulated designs issue a compliance declaration to declare that the designs comply with the Building Code of Australia (**BCA**).

Compliance Declaration

- Requiring that building practitioners obtain, rely upon and build in accordance with declared designs, and issue a compliance declaration to declare they have complied with the BCA.

Variations to Regulated Designs

- Requiring that any variations to declared designs are prepared and declared by a design practitioner if they are in a building element or performance solution, or in any other case, documented by the building practitioner.

Registration Scheme (Part 4)

- The draft Bill requires any design, principal design or building practitioner who intends on making a compliance declaration to be registered under a new registration scheme set out under the proposed Bill.

Duty of Care (Part 3)

- Clarifying the common law to ensure that a duty of care is owed for construction work to certain categories of 'owner' including owners' corporations and subsequent titleholders. There can be no contracting out of this duty of care. This means that homeowners will have a right to pursue compensation when they suffer damage because of a building practitioner's negligence.

Insurance

- Mandatory for all design, principal design and building practitioners to have adequate insurance.

Timing

- The draft Bill was open for consultation from 2 to 16 October 2019 and so the feedback is being analysed to see whether further amendments to the draft Bill may be required.
- The NSW Government has indicated that it intends to introduce a final Bill into Parliament by the end of 2019 and then work to develop and consult upon draft regulations in 2020.
- The draft Bill once enacted will not apply to existing work or arrangements but only to new works or arrangements entered into after the commencement of the proposed Act.

CONCLUSION

13 November 2019

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