

Jonathan Clark

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Areas of Practice

I practice primarily in the areas of competition, consumer protection, insurance, director and trustee duties, transportation, administrative and general commercial law. In addition to court-based litigation, I regularly assist regulators in the conduct of their investigations including through the compulsory examination process.

Competition and Consumer Protection Law

ACCC v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd & Anor, 2018 (Bromwich J).

Civil prosecution of misleading and deceptive conduct in relation to the promotion and sale of the Voltaren topical rub pharmaceutical products. Led by K Morgan SC. Judgment on liability and injunctive relief reserved.

ACCC v Equifax Australia Information Services and Solutions Pty Ltd, 2018 (Lee J).

Civil prosecution of misleading representations and unconscionable conduct in the promotion and sale of paid credit reporting services. Led by M Darke SC.

ACCC v PT Garuda Indonesia Ltd, 2018 (Perram J).

Contested penalty hearing in respect of contraventions of s 45 of the *Trade Practices Act*, defences and discretions arising at international law. Judgment reserved. Led by J Halley SC.

ACCC v Air New Zealand [2018] FCA 1166 (Gleeson J).

Penalty hearing in respect of contraventions of s 45 of the *Trade Practices Act*. Reasons to be provided. Led by J Halley SC.

ACCC v Reckitt Benckiser (Australia) Pty Ltd [2016] FCAFC 181 (Jagot, Yates and Bromwich JJ).

Appeal as to the amount of pecuniary penalty imposed in respect of the sale of misleading Nurofen pharmaceutical products. Grounds of appeal concerning consumer loss, state of mind, the course of conduct principle, cooperation with a regulator and whether the penalty was manifestly inadequate. Led by M O'Bryan QC.

ACCC v Online Dealz Pty Ltd [2016] FCA 732 (Markovic J).

Civil prosecution in respect of the supply of unsafe products and of misleading and deceptive conduct. Accessorial liability of individual in respect of corporation's contraventions. Amount of penalty.

ACCC v Reckitt Benckiser (Australia) Pty Ltd (No 7) [2016] FCA 424 (Edelman J).

Contested penalty hearing in respect of contraventions of ss 29 and 33 of the Australian Consumer Law. Led by K Banks-Smith SC.

ACCC v Reckitt Benckiser (Australia) Pty Ltd (No 4) [2015] FCA 1408 (Edelman J).

Civil prosecution of misleading and deceptive conduct in relation to the promotion and sale of the Nurofen specific pain relief pharmaceutical products. Led by K Banks-Smith SC.

ACCC v Derodi Pty Ltd & Anor, Federal Court of Australia, 2015.

Civil prosecution of misleading and deceptive conduct in relation to the promotion and sale of free-range eggs.

Ceased involvement after the parties reached an agreed settlement, including as to penalty – see [2016] FCA 365 (Edelman J).

ACCC v Air New Zealand and Anor [2014] FCA 1157 (Perram J).

Represented the ACCC in this 56-day hearing regarding price fixing, scope of markets and jurisdiction of the *Trade Practices Act*. There were multiple interlocutory hearings on evidence and pleadings including: *ACCC v Air New Zealand (No. 1)* [2012] FCA 1355; *ACCC v PT Garuda Indonesia (No. 2)* [2012] FCA 1429. Led by J Halley SC and E Collins SC.

ACCC v Singapore Airlines; ACCC v Cathay Pacific; ACCC v Emirates; ACCC v Korean Airlines; ACCC v Japan Airlines; ACCC v Malaysian Airlines; ACCC v Thai Airways – involved in proceedings between 2009 and 2012.

Prosecution of price fixing conduct across a wide range of jurisdictions. Proceedings settled prior to or during hearing. Led by J Halley SC and C Moore SC.

I also regularly act for the ACCC in its conduct of investigations of suspected contraventions of the *Competition and Consumer Act* and the Australian Consumer Law (see Regulatory Investigations below).

Insurance and Construction

CGU Insurance Ltd v HDI Global SE, Supreme Court of NSW, 2017-2018.

Action for recoupment and/or contribution; application of exclusion clause in context of rain event; coverage limit for length of unsealed roadworks; dual insurance v difference in conditions cover.

Globe Church Incorporated v Allianz & Anor, Court of Appeal NSW, 2017-2018.

Limitation defence: whether causes of action accrue upon occurrence of damage or denial of liability by insurer.

Sydney Airport Corporation Ltd v Glidepath Ltd, District Court of NSW, 2018.

Fire damage to electrical components of baggage conveyor system; liability in context of global recall of affected component.

Port Waratah Coal Services Ltd v Avopiling (NSW) Pty Ltd & Ors – Supreme Court of NSW, 2014-2017.

Whether insurers were required to indemnify under a construction all risks insurance policy for damage caused by a defective base block during the construction of a dump and reclaim station at the Kooragang Island coal export port. Whether exclusion clauses applied (incl. LEG2 exclusion). Proceeding settled immediately prior to hearing. Led by I Pike SC.

Cape Byron Power I Pty Ltd & Anor v HSB Engineering Insurance Ltd & Anor [2017] NSWSC 1081 (Parker J).

Whether insurers are required to indemnify under a debt servicing standing charges insurance policy in respect of delay caused by insured damage. Led by P Greenwood SC.

The Owner – Strata Plan No 73558 v Australian Consulting Engineers Pty Ltd & Anor – Supreme Court of NSW, 2016.

Liability of consultant engineer in respect of the construction of a residential unit block. Proceeding discontinued.

Biovision 2020 & SITA Australia v CGU Insurance & Ors – Supreme Court of Victoria, 2010 - 2014.

Whether damage to machinery occurred before the inception of the policy. The proceedings also concerned the contractual and tortious liability of the designers and manufacturer of the machinery, and whether the designers and manufacturer were additional insured under the insurance policy. Proceedings settled at the commencement of hearing. Led by F Kunc SC, then P Greenwood SC.

Insurance advisory work

Many opinions for various insurers on issues including: policy interpretation, liability for indemnity, whether damage occurred, when did damage occur, distinction between damage and defect, how many events, operation of exclusion clauses, who is an insured, whether subrogation rights are available, whether statutory policy arises, insured's disclosure obligations, when cause of action accrues for breach of policy, whether insured successfully contracts out of liability, incorporation of terms.

Commercial

Jefferies Group LLC v Tinkler, Supreme Court of NSW proceedings, 2018.

Enforcement of guarantee; cross claim under *Contracts Review Act*, *ASIC Act* and for unconscionable conduct. Matter resolved before hearing. Led by A Leopold SC.

Cui v Cui Family Asset Management Pty Ltd, Supreme Court of NSW proceedings, 2017.

Specific performance of a deed of settlement and release. Matter settled before hearing.

Mastronardo v Commonwealth Bank Ltd – Supreme Court of NSW, 2017.

Breach of contract, incorporated terms, compliance with the Consumer Credit Code, penalty interest and equitable remedies in respect of commercial loan facility agreements. Led by R Weber SC.

Kazacos v Shuangling International Development Pty Ltd [2016] NSWSC 1725 (Bergin CJ in Equity).

Costs application where freezing order discharged following plaintiffs loss of principle proceeding. Led by I Pike SC.

In the matter of Gondon Five Pty Ltd [2016] NSWSC 1401 (Brereton J).

Application for a freezing order and ancillary relief in support of claims for repayment of loan, derivative action under s. 237 of *Corporations Act*, and removal and replacement of a trustee. Costs following rejection of offers. Led by K Andronos SC.

In the matter of Gondon Five Pty Ltd [2016] NSWSC 1584 (Brereton J).

Opposing application for variation of freezing order seeking carve out for legal expenses.

Kazacos v Shuangling International Development Pty Ltd [2015] NSWSC 835 (Darke J).

Opposing application for a freezing order against and non-party to the principle proceeding.

TMA Australia v Indect Electronics & Distribution GmbH [2013] NSWSC 1375 (Robb J).

Application for mandatory interlocutory injunction (for ongoing supply and support to a business); implied contractual terms; conventional estoppel; unconscionable conduct. Led by M Einfeld QC.

CGU Insurance v Biovision 2020 [2010] VSC 589 (Judd J).

Appeal against finding of settlement negotiations privilege over documents. Led by F Kunc SC.

Administrative Law

Duncan v Ipp & Ors [2013] HCATrans 157 (French CJ, Hayne and Bell JJ).

Opposing special leave application arising from an allegation of apprehended bias against the Commissioner of the Independent Commission Against Corruption. Led by B Walker SC.

LT v Commission for Children and Young People, ADT unreported 2012 (Higgins JM).

Opposing application for the removal of a prohibition against undertaking child related employment.

El-Kassir v Commissioner of Police, NSW, ADT unreported 2011 (Hennesy JM).

Obtaining leave to pursue a discrimination claim following its dismissal by the Anti-Discrimination Board.

Potier v Legal Aid Commission [2011] NSWSC 1066 (Johnson J).

Opposing application for leave to institute a judicial review proceeding.

Tran v The Commonwealth [2010] FCAFC 80 (Lander, Rares and Besakno JJ).

Construction of provisions of the *Migration Act*, *Customs Act* and *Criminal Code*; whether the destruction of a vessel pursuant to a statutory power is an acquisition of property under s. 51(xxxi) of the *Constitution*. Led by G Kennett SC.

Commissioner of Police, NSW v AVS Group of Companies [2009] NSWSC 1408 (Rothman J).

Appeal concerning whether the ADT had the power to consider confidential criminal intelligence material under the *Security Industry Act* during an application for a stay of the revocation of a security licence under the *Administrative Decisions Tribunal Act*.

Constantin v Commissioner of Police, NSW, ADT unreported 2009.

Opposing application for review of a security licence revocation.

AVS Group of Companies v Commissioner of Police, NSW [2009] ADTAP 48.

Opposing appeal against the refusal of a stay of a security licence revocation.

Regulatory Investigations

Briefed by the ACCC to assist in its investigations of suspected contraventions of the *Competition and Consumer Act* and the Australian Consumer Law, principally by the conduct of compulsory examinations, including:

- Investigation of a large manufacturer into suspected cartel conduct with its distributors, 2017-2018;
- Investigation of a rehabilitative aid supplier into suspected cartel conduct, 2017;
- Investigation of a vocational education training provider into suspected unconscionable conduct, 2017;
- Investigation of a large manufacturer into suspected contraventions of ss 46 and 47 of the Act.

Briefed by the Australian Prudential Regulation Authority (APRA) to assist in its investigation of Trio Capital Ltd (in Liquidation), 2010 – 2013.

Following losses of approximately \$100m from investments by superannuation entities under the trusteeship of Trio Capital Ltd, I assisted APRA in its investigation, its compulsory examinations and in ultimately achieving enforceable undertakings against 13 of Trio's directors over the period 2003 to 2009 (in lieu of court ordered disqualification). With R Dick SC.

See http://www.apra.gov.au/MediaReleases/Pages/16_13.aspx

Included preparing written advices on the following issues: duties of a superannuation trustee, scope of an investigation under the *Superannuation Industry (Supervision) Act*, access and use of material obtained under the *Telecommunications (Interception and Access) Act*, and prospects of success in disqualification proceedings against directors of a superannuation trustee.

Admissions

Solicitor, Supreme Court of ACT and Supreme Court of NSW	2000, 2001
Barrister, NSW	2009

Education

Bachelor of Arts (Political Science), University of New South Wales	1995 - 1997
Vice Chancellor's International Exchange Scholarship, University of British Columbia	1998
Bachelor of Laws (First Class Honours equivalent), University of New South Wales	1995 - 1999
Legal Workshop, Australian National University	2000

Professional Experience prior to the Bar

Special Counsel Litigation Team, Australian Government Solicitor	2008 - 2009
Practising administrative law, public interest immunity, legal professional privilege, statutory interpretation, statutory negligence, judicial review of decisions of Australian Customs, and Customs prosecutions.	
Associate to the Hon. Justice Roger Gyles AO, Federal Court of Australia	2007 - 2008
Legal Consultant, United Nations Children's Fund, Cambodia	2006
Writing a judicial training manual and a court handbook on child rights law and juvenile justice in consultation with a Cambodian judge and prosecutor.	
Legal Advisor, Royal Academy for Judicial Professions, Cambodia	2005 - 2006
Assisting this Cambodian government institution in its training to student and practicing judges, prosecutors and court clerks. Coordinating its engagement with donors and other relevant Cambodian and international organisations.	

Solicitor, Welfare Rights and Legal Centre, Canberra

2002 – 2004

Practising tenancy law, administrative law relating to public housing and social security, and disability discrimination law. Conducting law reform and community legal education. Regularly appeared in specialist tribunals and appeared in several Supreme Court of ACT appeals (e.g. [2003] ACTSC 21; [2003] ACTSC 40 and [2003] ACTSC 44).

Solicitor, Minter Ellison Lawyers, Sydney

2001

Practising commercial litigation, including Qantas' (and other airlines') claims against Sydney Airport Corporation Ltd.

Publications

Child Rights Law: Juvenile Justice and Child Victims of Crime – Training Manual for Judges and Prosecutors, UNICEF, Cambodia, 2006.

Child Rights Law: Juvenile Justice and Child Victims of Crime – Bench Book for Judges and Prosecutors, UNICEF, Cambodia, 2006.

'The Advanced Trial Advocacy Course', NSW *Bar News* [2015] (Autumn), 43.

Reporter, New South Wales Law Reports, 2015 to present.

Courses

Advanced Trial Advocacy Course, Australian Bar Association 2015

Languages

French: Diplôme d'études en Langue Française (Diploma in French Language) at Intermediate Level 2014

Khmer and Indonesian: basic conversational

Interests

Trail running, bushwalking, ocean swimming, soccer.