

# Jonathan Clark

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## Areas of Practice

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I accept briefs in all areas of law. My practice at the Bar has been primarily in the areas of competition, consumer protection, insurance, administrative and general commercial law. I have appeared in a number of significant appellate cases. I have been and continue to be involved in the conduct of substantial regulatory investigations and have a particular interest in commissions of inquiry.

## Appellate

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*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.

*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.

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

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

*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*.

## Competition and Consumer Protection

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

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

*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. Unled.

*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*, 2015.

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 across a wide range of jurisdictions. Proceedings settled prior to, or at commencement of, hearing. Led by J Halley SC and C Moore SC.

I have also been briefed by the Australian Competition and Consumer Commission (ACCC) in a substantial investigation of suspected contraventions of s. 47 (exclusive dealings) of the *Competition and Consumer Act*, 2015-2016.

## **Insurance and Construction**

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*Port Waratah Coal Services Ltd v Avopiling (NSW) Pty Ltd & Ors* - proceedings on foot between 2014 and 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). Proceedings settled just prior to hearing. Led by I Pike SC.

*Cape Byron Power I Pty Ltd & Anor v HSB Engineering Insurance Ltd & Anor* – proceedings on foot since 2015.

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* – proceedings on foot since 2013.

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

*Biovision 2020 & SITA Australia v CGU Insurance & Ors* – proceedings on foot between 2010 and 2014.

Whether insurers were required to indemnify under an industrial special risks insurance policy for damage to machinery at a waste processing facility in Mindarie, Western Australia. Whether damage 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**

Opinions for various insurers on issues including: policy interpretation, liability for indemnity, what is damage, 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, and insured's disclosure obligations.

## **Commercial**

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

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

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

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

*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. Unled.

*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.

*Jassbell & Anor v Honey & Anor*, 2009.

Obtained injunctive relief following the lock out from a business. Proceeding settled at final hearing. Led by A Coleman SC.

## **Administrative Law and Discrimination**

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*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. Unled.

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

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

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

Opposing application for leave to institute a judicial review proceeding. Unled.

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

Opposing application for review of a security licence revocation. Unled.

*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. Unled

## **Regulatory Investigations**

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Australian Prudential Regulation Authority's (APRA) investigation into 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](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.

Briefed by the Australian Competition and Consumer Commission (ACCC) in its investigation of suspected contraventions of s. 47 (exclusive dealings) of the *Competition and Consumer Act* including to compulsorily examine witnesses, 2015 to 2016.

## Admissions

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

## Education

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

## Professional Experience prior to being a Barrister

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<b>Special Counsel Litigation Team, Australian Government Solicitor</b>	2008 - 2009
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Practising administrative law, public interest immunity, legal professional privilege, statutory interpretation, statutory negligence, judicial review of decisions of Australian Customs, and Customs prosecutions.

<b>Associate to the Hon. Justice Roger Gyles AO, Federal Court of Australia</b>	2007 - 2008
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<b>Legal Consultant, United Nations Children's Fund, Cambodia</b>	2006
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Writing a judicial training manual and a court handbook on child rights law and juvenile justice in consultation with a Cambodian judge and prosecutor.

<b>Legal Advisor, Royal Academy for Judicial Professions, Cambodia</b>	2005 - 2006
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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.

<b>Solicitor, Welfare Rights and Legal Centre, Canberra</b>	2002 – 2004
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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 appeals (e.g. [2003] ACTSC 21; [2003] ACTSC 40 and [2003] ACTSC 44).

<b>Solicitor, Minter Ellison Lawyers, Sydney</b>	2001
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Practising commercial litigation, including Qantas' (and other airlines') claims against the Sydney Airport Corporation.

## Publications

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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

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Advanced Trial Advocacy Course, Australian Bar Association	2015
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## Languages

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French: Diplôme d'études en Langue Française (Diploma in French Language) at Intermediate Level	2014
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Khmer and Indonesian: basic conversational

## Interests

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Trail running, bush walking, swimming, soccer.