

# JONATHAN CLARK

BARRISTER

12 Wentworth Selborne Chambers

180 Phillip Street Sydney NSW 2000

T: (02) 8029 6222 • E: jonathan.clark@12thfloor.com.au

## Admissions

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Legal Practitioner, Supreme Court of ACT/NSW – 2000/2001

Barrister, NSW - 2009

## Education

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Bachelor of Arts (Political Science), University of New South Wales

Bachelor of Laws (Dean's Certificate), University of New South Wales

## Practice at the Bar

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Jonathan practices predominantly in the fields of competition and consumer law, insurance law, and commercial law.

He has worked on and appeared in many cartel matters (including investigations, civil penalty proceedings and criminal prosecutions) as well as cases concerning misuse of market power and/or exclusive dealing. He has significant expertise in matters involving allegations of misleading or deceptive representations/conduct, unconscionable conduct, unfair contract terms, consumer guarantees, product safety, and the Franchising Code of Conduct.

He has appeared in and advised on a wide range of insurance and commercial disputes. He also has significant experience in administrative law, privileges (both common law and statutory), superannuation law (including trustee duties), and transportation contracts law.

Jonathan has extensive experience in the conduct of regulatory investigations (particularly by the ACCC, ASIC and APRA) including preparing or responding to notices, conducting compulsory examinations and the exercise of regulatory powers including search warrants. He is also briefed by the CDPP to advise on prosecutions arising out of such investigations.

## Competition and Consumer Law

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*ACCC v Qteq Pty Ltd*, 2022-2024 (Bromwich J)

Attempts to make understandings containing supply restriction and bid rigging provisions. Judgment reserved. Led by N DeYoung KC with S Andrews and A Poukchanski.

*ACCC v Ultra Tune Australia Pty Ltd*, [2024] FCA 156 (Bromwich J)

Civil contempt prosecution for breach of mandatory injunctions relating to obligations under the Franchising Code and a compliance program. Fine of \$1.5 million imposed. Led by N Sharp SC.

*ACCC v RSA Express Pty Ltd*, 2023-2024 (Cheeseman J)

Alleged false or misleading representations and conduct arising from online training courses. Led by D Staehli SC.

*ACCC v BlueScope Steel Ltd* (No 5) [2022] FCA 1475; (No 6) [2023] FCA 1029 (O'Bryan J)

Findings that respondents attempted to induce understandings containing price fixing provisions in the steel industry. Penalty of \$57.5 million imposed. Led by M Hodge KC with S Chordia and S Andrews.

*ACCC v Retail Food Group Ltd & Ors*, 2022

Liability for misleading representations, (individual and systemic) unconscionable conduct, and breaches of the Franchising Code. Matter resolved on the basis that respondent provide an enforceable undertaking and make payments to franchisees.

*ASIC v Squirrel Superannuation Services Pty Ltd* [2022] FCA 702 (Burley J)

Misleading and deceptive conduct involving publication of brochure advertising financial services. Led by N Beaumont SC.

*ACCC v PT Garuda Indonesia Ltd* [2019] FCA 786 (Perram J)

Contested penalty hearing for contraventions of ss 45/45A of the *Trade Practices Act* (price fixing), extent of contraventions given markets found, defences and discretions arising at international law. Led by J Halley SC with H Younan.

*ACCC v GlaxoSmithKline Healthcare Australia Pty Ltd & Anor* [2019] FCA 676 (Bromwich J)

Misleading or deceptive conduct in relation to the promotion and sale of Voltaren topical rub pharmaceuticals. Led by K Morgan SC.

*ACCC v Equifax Australia Information Services and Solutions Pty Ltd* [2018] FCA 1637 (Lee J)

Liability and penalty for misleading representations and unconscionable conduct in the promotion and sale of paid credit reporting services, injunctions and consumer redress scheme. Led by M Darke SC.

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

Penalty for contraventions of ss 45/45A of the *Trade Practices Act* (price fixing). Led by J Halley SC.

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

Appeal as to the penalty imposed for misleading or deceptive conduct in relation to the promotion and sale of Nurofen ‘specific pain’ medications. Appeal grounds concerned: calculating consumer loss, contravenor’s state of mind, course of conduct principle, cooperation with regulator, and whether penalty was manifestly inadequate. Led by M O’Byrne QC.

*ACCC v Online Dealz* [2016] FCA 732 (Markovic J)

Liability and penalty for the supply of unsafe products and misleading or deceptive conduct. Accessorial liability of individual in respect of corporation’s contraventions. Unled.

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

Contested penalty hearing at first instance. Led by K Banks-Smith SC.

*ACCC v Derodi & Anor* [2016] FCA 365 (Edelman J)

Misleading and deceptive conduct in relation to the promotion and sale of free-range eggs.

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

Misleading or deceptive conduct in relation to the promotion and sale of the Nurofen ‘specific pain’ medications. Led by K Banks-Smith SC.

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

Appeared for 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 C Moore.

*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* – Federal Court, 2009-2012

Prosecution of price fixing conduct in respect of air cargo. Settlements prior to or during hearing.

## Regulatory Investigations

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Briefed by the ACCC and ASIC to assist with the following investigations of suspected contraventions of, respectively, the *Competition and Consumer Act* and the *ASIC Act*, including by the conduct of compulsory examinations:

- Short term financing, 2023-2024
- Furniture delivery times, 2023-2024
- Oil and gas services industry, cartel conduct, 2022
- Digital payment systems, misuse of market power, 2022
- Telecommunications, merger, 2022
- Online platform for services, unfair contract terms, misleading conduct, 2022
- Pharmaceutical industry, cartel conduct, 2021
- Financial services, cartel conduct, concerted practices, 2021
- Pharmaceutical industry, cartel conduct, 2020
- Hotel industry, concerted practices, 2019
- Steel industry, cartel conduct, 2017-2018
- Mobility assistance industry, cartel conduct, 2017
- Vocational education provider, unconscionable conduct, 2017
- Steel industry, alleged misuse of market power and exclusive dealing, 2015-2016

Briefed by the APRA to assist with investigation of Trio Capital Ltd (in Liquidation) concerning breaches of superannuation trustee duties, conducting examinations of all of Trio's directors and responsible officers, 2010 – 2013. Led by R Dick SC.

## Insurance

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*Parkview Constructions Pty Ltd v Australian Prestressing Services Pty Ltd & Ors*, Supreme Court of NSW, 2023  
Liability for defective concrete slab. Led by J Steele SC.

*Globe Church v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470 (Bathurst CJ, Beazley P, Ward, Meagher & Leeming JJA)  
Limitation period: cause of action accrues upon occurrence of damage or denial of liability by insurer. Led by G Sirtes SC.

*CGU Insurance Ltd v HDI Global SE*, Supreme Court of NSW, 2017-2018  
Action for recoupment and/or contribution; application of exclusion clause and exception re rain event; coverage limit for length of unsealed roadworks; dual insurance v difference in conditions cover. Led by I Pike SC.

*Sydney Airport Corporation Ltd v Glidepath Ltd*, District Court of NSW, 2018  
Fire damage to baggage conveyor system; liability of insured following global recall of affected component. Proceedings settled.

*Cape Byron Power I Pty Ltd & Anor v HSB Engineering Insurance Ltd & Anor* [2017] NSWSC 1081  
Liability to indemnify under a debt servicing standing charges insurance policy in respect of delay caused by insured damage. Led by P Greenwood SC.

*Port Waratah Coal Services Ltd v Avopiling (NSW) Pty Ltd & Ors* – Supreme Court of NSW, 2014 - 2017  
Liability 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. Led by I Pike SC.

*The Owner – Strata Plan No 73558 v Australian Consulting Engineers Pty Ltd & Anor* – Supreme Court of NSW, 2016-17  
Liability of consultant engineer in respect of the construction of a residential unit block. Proceedings settled.

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

Whether insurers were required to indemnify under an industrial special risks insurance policy for damage to machinery at a waste processing facility. Whether damage occurred before the inception of the policy. Proceedings settled during 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, whether and/or when damage occurred, distinction between damage and defect, how many insured events, operation of exclusion clauses, who is an insured, whether subrogation rights are available, whether statutory policy arises, and insured's disclosure obligations.

## **General Commercial**

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*Jeffries Group LLC v Tinkler*, Supreme Court of NSW, 2018

Enforcement of a guarantee; cross claim under *Contracts Review Act*, *ASIC Act* and for unconscionable conduct. Proceedings settled. Led by A Leopold SC.

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

Specific performance of a deed of settlement and release. Proceedings settled.

*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 Eq)

Costs application where freezing order discharged following plaintiff's 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. 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)

Application for a freezing order against a non-party to the principle proceeding.

*TMA Australia Pty Ltd 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 Ltd v Biovision 2020 Pty Ltd* [2010] VSC 589 (Judd J)

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

## **Administrative and Public Law**

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

Opposing special leave application arising from allegation of apprehended bias against the Commissioner of ICAC. Led by B Walker SC.

*LT v Commission for Children and Young People*, ADT unreported 2012

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

*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 & Besanko JJ)  
Construction of provisions of the *Migrations 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)  
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*.

## Other Professional Experience

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**Principal Lawyer, Australian Competition and Consumer Commission** April 2019 – April 2021

Advising and assisting the ACCC's various enforcement divisions in the conduct of investigations and litigation of suspected/alleged contraventions of the *Competition and Consumer Act*, including prosecutions by the CDPP. Conducting compulsory examinations. Training staff about litigation process, evidence law, cross examination and relevant caselaw. Preparing guidance on relevant criminal investigative processes.

**Special Counsel Litigation Team, Australian Government Solicitor** 2008 - 2009

Practicing administrative law, public interest immunity, legal professional privilege, statutory interpretation, statutory negligence, judicial review, competition law, and Customs prosecutions. Principal clients were law enforcement agencies: Australian Federal Police and Customs (now Border Force).

**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 of student and practicing judges, prosecutors and court clerks. Coordinating its engagement with donors, other government institutions, and international organisations.

**Solicitor, Welfare Rights and Legal Centre, Canberra** 2002 – 2003, 2004

Practicing 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 unled in Supreme Court appeals ([2003] ACTSC 21; [2003] ACTSC 40; and [2003] ACTSC 44).

**Solicitor, Minter Ellison Lawyers, Sydney** 2001

Commercial litigation.

## 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.

Reporter, New South Wales Law Reports, 2015 - 2020.