

## Toby J Mullen, Barrister

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### EDUCATION

- Masters of Commercial Law (First Class Hons ave), Melbourne University (2014).
- Bachelors of Laws (Hons) and Commerce, Melbourne University (2004).

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### PROFESSIONAL EXPERIENCE

#### **Barrister, Victorian Bar (2010 to Present)**

Broad civil/commercial practice, with particular experience in:

- commercial disputes, including contractual, equitable, building and construction, trade practices, banking, partnership, sale of land and corporations; and
- defamation and related actions.

Regular appearances (led and unled) in the Victorian Supreme and County Courts. Also appears in the Court of Appeal, Federal Court, NSWSC, VCAT, and arbitrations and expert determinations.

Excellent understanding of all aspects of civil procedure, including the various rules of Court and the *Civil Procedure Act 2010*.

#### **Examples of commercial matters:**

- *Oppression proceedings in the VSC (current)* – arising out of claims for alleged historical breaches of directors' duties (including fraud) for \$40m+ (with M Osborne QC).
- *Unconscionable conduct claims in the Federal Court (current)* – various claims against big four bank by former contractor, arising out of handling of loan fraud allegations (unled).
- *Sale of land (2018)* – defended claim for specific performance of HOA for sale of land for \$80m, involved contractual and equitable issues (unled, and later with S Horgan QC).
- *Oakland York Pty Ltd v SG Precision Coatings Pty Ltd & Anor* [\[2017\] VCC 865](#) – acting for lender seeking possession; misleading or deceptive / unconscionable conduct claims (unled).
- *Major construction arbitration (2015-17)* – latent condition, delay and variations claim against state roads corporation before Sir Vivian Ramsay QC. Complex issues of causation, global claims and expert evidence. Award of \$25m (with J Gleeson QC and B Mason).
- *Brunswick Zhang Pty Ltd v Australia Day* [\[2015\] VSC 782](#) – successful application for freezing order (\$1.6m) involving significant and unusual claim for damages arising from breaches of HOA and Contract of Sale of real estate by developer against vendor (unled).
- *Naumovski & Ors v Ugrinovski* – various VSC proceedings concerning alleged breaches of fiduciary and duties / oppression in the VSC (with N Lucarelli QC and J Peters QC).
- *Defferos v Scott* [\[2014\] VSCA 154](#) – Appeal concerning payment for work completed as a costs consultant; alleged breaches of the *Legal Profession Act 2004* (with M R Pearce SC).
- *Biosciences Research Centre* – Dispute between contractor and the State Government arising out of conduct during D&C phase of \$230m PPP project (variously with J Gleeson QC, D Levin QC, and H Foxcroft QC, including *Grocon Constructors (Vic) Pty Ltd v Biosciences Research Centre Pty Ltd* [\[2014\] VSC 204](#) and expert determination before A Myers QC).
- *Glenvill Projects Pty Ltd & Ors v North Melbourne Pty Ltd & Ors* [\[2013\] VSC 717](#) and related IAMA Expert Determination between developer and builder (unled).

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- *Intrapac Pty Ltd v St James Investments Pty Ltd & Ors* – Anton Pillar order in Supreme Court and claims concerning breaches by current/former employee of fiduciary, statutory and contractual duties, and non-compete clause (with L Glick SC).
- *Black v Rafa Pastoral Pty Ltd & Ors* [\[2013\] VSC 317](#) – Application to set aside judgment and appeal. Involved the slip rule and non-compliance with self-executing orders (unled).
- *Jemena Asset Management Pty Ltd v Tas Gas Pty Ltd* – \$30m arbitration before the Hon. Gillard QC and related Court proceedings arising out of construction of the Tasmanian gas network (with D Levin QC).
- Various VCAT matters (esp domestic building, civil claims and retail leases), including:
  - *Di Dio Nominees Pty Ltd v JVR Enterprises (Vic) Pty Ltd (Building and Property)* [\[2018\] VCAT 772](#) – successful application to set aside rental determination under *Retail Leases Act 2003*.
  - *Lopez v Gem Plumbing & Drainage Pty Ltd & Anor (Civil Claims)* [\[2018\] VCAT 753](#) – acted for wholesaler in misleading and deceptive conduct claims by consumer.
  - *Roach v Nava Homes Pty Ltd (Building and Property)* [\[2016\] VCAT 1861](#) – joinder, pleading and proportionate liability issues in domestic building list.
  - Acting for large automotive group in various consumer claims concerning luxury cars.

Various other commercial matters, including corporations (eg. applications to set aside statutory demands, winding up, oppression and s 596 examinations), and other claims involving breach of contract, contraventions of the ACL (esp. misleading or deceptive and unconscionable conduct), equitable claims (eg. confidential information, specific performance), directors' duties, trusts, building and construction (large infrastructure and some domestic building), property transactions (eg. caveats, sale of land), insurance, sale of business, and partnership/shareholder disputes.

### Examples of defamation and related matters:

- *Mirabella v Price & Anor* – Acted for former federal politician in successful defamation claim against *The Benalla Ensign* over “push” allegation made during Federal election campaign, republished Australia-wide. Damages award of \$175,000 and indemnity costs (see eg. *Mirabella v Price & Anor* [\[2018\] VCC 650](#), unled and with G Schoff QC).
- *Fenn & Anor v ABC (current)* – Supreme Court proceedings over report on 7.30 program. Various pleading fights, including successful appeal eg. *Fenn & Anor v ABC* [\[2018\] VSCA 166](#); [\[2017\] VSC 486](#); [\[2018\] VSC 60](#) (with G Schoff QC, and unled application).
- *Charan v Nationwide News* – Supreme Court proceedings against *The Australian* (5 week trial and extensive interlocutory applications. See eg. *Charan v Nationwide News* [\[2017\] VSC 66](#); [\[2017\] VSC 138](#); [\[2018\] VSC 3](#) [\[2018\] VSC 89](#) with G Schoff QC).
- *ImageBuild Group Pty Ltd v Cidec Pty Ltd & Ors* [\[2017\] VCC 615](#) – successfully defended application for injunction by builder based on injurious falsehood and defamation over allegations made on the builder's former website (unled).
- Acted for vehicle manufacturer in County Court proceedings for injurious falsehood and defamation re “*Lemon Caravans in Australia*” Facebook Page (unled).
- Supreme Court proceedings over Facebook publications concerning response to child sexual abuse allegations (see eg [article](#), variously unled and with M Collins QC and G Schoff QC).
- *Sharma v Parbhakar*, Supreme Court proceedings, including various successful interlocutory applications (see eg. indemnity costs judgment [\[2015\] VSC 632](#)) (unled).
- *Eden v Wreford*, acting for local councilor against State MP, over allegations published in *The News (Bayside)*. Settlement involving [apology](#) (with J Burnside QC, and unled).
- *Hardie v The Herald & Weekly Times & Anor* [\[2014\] VSC 232](#) – application for HWT (unled).

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- *Snowden v The Herald & Weekly Times & Anor* – Supreme Court defamation claims over Herald Sun articles re the running of aged care homes (with M Collin QC, acting for HWT).
- *Papas v Dnister Ukranian Credit Cooperative & Ors* – Federal and Supreme Court defamation claim by former CEO against employer and board following termination. Settled (unled).
- *Franchise Central (Australia) Pty Ltd & Ors v Fairfax Media Publications Pty Ltd & Anor* [\[2011\] VSC 379](#) - Supreme Court defamation claim over BRW articles (settled, with S Wilson QC).
- *Han v Australian Kung Fu (Wu Shu) Federation Inc* [\[2011\] VSC 498](#) – Strike out/summary judgment applications, and application to extend limitation period (with A Nolan SC).

Various other advice and appearances on behalf of plaintiffs and defendants in defamation and other related matters (eg. privacy, breach of confidence, injurious falsehood, M&D conduct).

### **Clayton Utz, Sydney, Senior Lawyer, Litigation (2008 to 2010)**

Worked for three partners, in a broad commercial litigation and defamation practice group.

### **Victorian Court of Appeal, Associate to the Hon. Justice Neave AO (2007 to 2008)**

Wide variety of civil and criminal matters, including major commercial appeals. Responsibilities included judgment-writing support, legal research, preparation for and attending Court.

### **Clayton Utz, Melbourne, Lawyer and Articled Clerk, Litigation (2005 to 2007)**

Wide variety of commercial disputes, including various trials. Prior to that, completed three rotations as an Articled Clerk in Corporate/M&A, Litigation & Dispute Resolution and IP groups.

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## **PUBLICATIONS**

Various contributions, papers, articles and presentations including:

- *What's my evidence? A practical guide to affidavits*, CLE presentation to major commercial law firms with Phoebe Knowles, 2016 and 2017.
- *Civil Procedure in 2014: A practical look at how Courts have applied the Civil Procedure Act 2010*, [Paper](#) and [Greens List Breakfast](#), Melbourne, 2014.
- Updating Author, Negligence Chapter, *The Laws of Australia*, Thomson Reuters, 2013.
- [Witness Statements – Tips, Traps and Pitfalls](#), Greens List Breakfast, Melbourne, 2012.
- *An introduction to the Australian Consumer Law, including the new unfair contract terms provisions*, paper presented at the Law Institute of Victoria, Melbourne, 2011.
- *Sex, lies and videotape: breach of confidence claims and awards of damages*, 19 December 2008, Clayton Utz Litigation and Dispute Resolution Insights and Mondaq.