

Daniel Clough

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Profile

Daniel is an experienced commercial litigator. He regularly appears in the Supreme Court of Victoria, Federal Court, County Court of Victoria, the Courts of Appeal, and the Victorian Civil and Administrative Tribunal. He has a diverse private and public law practice, acting for a wide range of clients. He works collaboratively with solicitors, receiving briefs from the largest and smallest of law firms in Australia and New Zealand and direct briefs from in-house counsel.

He is a nationally accredited mediator and has extensive experience in settling complex cases. Daniel also has experience in a wide variety of complex interlocutory matters, assisting clients at all stages of the litigation process.

His particular areas of expertise are in competition and consumer law, commercial contracts, property, restraints of trade, directors' duties and partnerships. Daniel is ranked in *Australia's Best Lawyers* for Competition Law (2018 to 2022) and Commercial Law (2020 to 2022).

He also actively practises in a wide range of other commercial matters, including corporations, insolvency, telecommunications, professional negligence and corporate governance, administrative law and local government.

Prior to signing the Bar Roll in 2004, Daniel was a Senior Associate in the Competition Group of Allens Linklaters in Melbourne and a director in the Telecommunications Group of the Australian Competition and Consumer Commission. He was Associate to the former Chief Justice of the High Court of Australia, Sir Gerard Brennan.

Daniel is the author of *Competition Law - The Laws of Australia* (2014 Thomson Reuters). He is currently author and editor of Competition Law (Laws of Australia) and was previously author and editor of Restraints of Trade (Laws of Australia). He has published several refereed articles in the areas of competition law, international trade law, law and economics, consumer protection and unconscionability.

He has Honours in Economics at Monash University, Master of Laws with first class honours at the University of Melbourne, and Master of Laws (Kent Scholar) at Columbia University Law School, New York. He was an Assistant Lecturer in Economics at Monash University, co-lectured Economics for Competition Lawyers in the LLM program at the University of Melbourne and lectured Legal Theory in the JD program.

Daniel is the Chair of the Competition and Consumer Law Section of the Commercial Bar Association of Victoria, a member of the Competition and Consumer Law Committee of the Business Law Section of the Law Council of Australia, and a member of the Ethics Committee of the Peter MacCallum Cancer Centre.

Qualifications

BEc(Hons) LLB(Mon) LLM(Hons)(Melb) LLM(Kent Scholar)(Columbia) (top 1-3%).

A selection of major concluded matters

Competition law and trade practices

- *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 (with N O'Bryan SC). Statutory guarantees and misleading or deceptive conduct and unconscionable conduct in relation to entitlement to guarantees and warranties.
- *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd (No 2)* [2021] FCA 453 (with D Star QC). Penalty hearing.
- *Australian Competition and Consumer Commission v Oakmoore Pty Ltd* [2018] FCA 1169. Acting for a defendant in cartel investigation and subsequent litigation and appearing at the penalty hearing.
- *Australian Competition and Consumer Commission v Visy Industry Holdings Pty Ltd (No 3)* [2007] FCA 1617 (with Burnside QC). Acting for a senior executive in a major cartel proceeding.
- *Cargill Australia Limited v Viterro Malt Pty Ltd* (VSC). Misleading or deceptive conduct in relation to a sale of business. Assisting in preparing witness statements, particulars, evidence. Advising on legal professional privilege.
- *Clark Rubber Franchising Pty Ltd v Microsoft Pty Ltd* (VSC). Alleged misleading or deceptive conduct in relation to the supply of an information technology system. Settled at mediation.
- *Re Telstra Corporation Limited* [2006] ACompT 4 (with M Sloss QC). Telecommunications access dispute.
- *In the matter of 7-Eleven Stores Pty Ltd*. Advising on the possible application of the Australian Consumer Law in relation to the extra cover warranty for Parcelmate.
- *In the matter of the Australian Competition and Consumer Commission and Geelong Port*. Conducting s155 interviews for the Australian Competition and Consumer Commission in a matter concerning allegations of misuse of market power and exclusive dealing.
- *In the matter of the Australian Competition and Consumer Commission and a proposed acquisition in the petrol industry*. Conducting s155 interviews for the Australian Competition and Consumer Commission.
- *In the matter of BTI Pty Ltd and Australia Pacific Airports Pty Ltd*: Advising and drawing pleadings concerning alleged misuse of market power by a major airport.
- *In the matter of Corrs Chambers Westgarth*. Conducting a nationwide series of lectures on the law of misleading and deceptive conduct for Corrs Chambers Westgarth.
- *In the matter of Cyrosite Limited and Cell Care Australia Pty Ltd*. Advising on competition law aspects of a proposed acquisition.
- *In the matter of the Department of Treasury and Finance and proposed Implementation Guidelines for the Building and Construction Industry*. Advising the State government on the competition law

implications arising from implementation of draft guidelines for the building and construction industry.

- *In the matter of Downer EDI Engineering Power Pty Ltd.* Advising on competition law aspects of a proposed joint venture.
- *In the matter of an alleged global DRAM cartel.* Advising a major law firm on the prospects of a class action concerning the effect in Australia of a global cartel.
- *In the matter of Extol Australasia Pty Ltd.* Acting for an Australian manufacturer in submissions to the Australian Competition and Consumer Commission concerning alleged misuse of market and power and exclusive dealing.
- *In the matter of Fair Contract Terms and the Education and Training Reform Regulations 2012.* Advising the Victorian Registration and Qualifications Authority on draft regulations, including fair contract terms proposed to be included in contracts between registered training organisations and students.
- *In the matter of Intralot Australia Pty Ltd.* Advising on market definition and market conduct, including submissions to the Australian Competition and Consumer Commission.
- *In the matter of Metcash Trading Limited and the Australian Competition and Consumer Commission.* Acting for a senior executive in an ACCC investigation.
- *In the matter of the Motor Traders Association of Australia.* Advising on concerted practices, including submissions to the Australian Competition and Consumer Commission.
- *In the matter of Olex Australia Pty Ltd.* Acting for a senior executive in an ACCC investigation.
- *In the matter of Sky Bus and Melbourne Airport.* Advising on misuse of market power.
- *In the matter of the Victorian Automobile Chamber of Commerce.* Advising on a proposed collective trading agreement, including submissions to the Australian Competition and Consumer Commission.
- *Pallet & Bin Corp Pty Ltd v Dramicom Pty Ltd.* Advising on a contract dispute and alleged cartel.
- *Telstra Corporation Limited v Orchid Flower Pty Ltd.* Misuse of market power (price squeeze) in the telecommunications industry (Federal Court).
- *Wicks v Wodonga Car World Pty Ltd (VCC).* Claim for refund of purchase price of a motor home for alleged breaches of statutory guarantees and misleading or deceptive conduct. Settled at mediation.

Contract and restitution

- *Alphater Consulting Engineers Pty Ltd v Rozman* [2016] VSCA 111 (with K Lyons QC). Breach of contract and repudiation.
- *B J Bearings Pty Ltd v Whitehead* (VSC). Alleged breach of restraint of trade and conspiracy by unlawful means. Settled at mediation.
- *Biggin & Scott (South-Eastern) Pty Ltd v Biggin & Scott Corporate Pty Ltd* (VSC). Alleged breach of a Master Licence Agreement. Settled at mediation.
- *Calcorp Australia Pty Ltd v 271 Collins Pty Ltd* [2010] VSCA 259. Doctrine of penalties.

- *Chubbies Pty Ltd v Dominos Pizza Australia* (VSC). Alleged breach of franchise contract and sale of business agreement, and misleading or deceptive conduct. Settled at mediation.
- *Fensford Pty Ltd v Nour Pty Ltd* [2006] VSCA 118. Construction of employment contract.
- *Golden Sands Pty Ltd v Excel Quarries Pty Ltd* [2008] VSC 276 (with K McMillan SC). Breach of warranties, implied terms. Misleading or deceptive conduct, negligent misstatement.
- *Go West Tours (Vic) Pty Ltd v Josevski* (VCC). Alleged misleading or deceptive conduct in sale of business. Settled at mediation.
- *Husain v O & S Holdings (Vic) Pty Ltd* [2005] VSCA 269 (with P Riordan SC). Offer and acceptance, implied terms, uncertainty and intention to enter legal relations.
- *Kyriakou Orchards Pty Ltd v K & S Coolstores Pty Ltd* [2018] VCC 28. Breach of promise. Expert evidence of causation and damage.
- *Major Engineering Pty Ltd v Timelink Pacific Pty Ltd* [2007] VSCA 228 (with R Merkel QC). Breach of contract, implied terms and expert evidence.
- *Major Engineering Pty Ltd v Timelink Pacific Pty Ltd* [2009] VSCA 83 (with B Caine SC). Breach of contract, causation and expert evidence.
- *Muto v Greater Shepparton City Council* [2017] VCC 811. Alleged contract to fund legal costs. Intention to enter legal relations, consideration, construction.
- *Oakton Services Pty Ltd v Toll Holdings Limited* (VSC). Alleged breach of Master Services Agreement and associated contracts concerning installation services, compliance with specifications, alleged defects and alleged damages in relation to an information technology system. Alleged repudiation and acceptance of repudiation. Settled at mediation.
- *Paradise Alley Pty Ltd v Choco Churro Pty Ltd* (VCC). Rectification of licence agreement. Alleged misleading or deceptive conduct in relation to a franchise agreement. Restitution of funds. Judgment in default of defence.
- *Sebring Pty Ltd v CLA Trading Pty Ltd (trading as Europcar)* (VSC). Franchise dispute. Construction of franchise agreement. Settled at mediation.
- *Tri-Tech Refrigeration Contracting & Engineering Pty Ltd v Radenski* [2012] VSC 354 (with D Williams SC). Contract dispute and misleading or deceptive conduct in relation to the supply and installation of industrial refrigeration system.
- *Vadarlis v King* [2010] VSC 80 (with A Nolan SC). Contract and solicitor's retainer.

Corporate governance, directors', members' and partnership disputes

- *Australasian Centre for Corporate Responsibility v Commonwealth Bank of Australia* [2015] FCA 785; [2016] FCAFC 80 (with C Kenny QC). Power of shareholders in general meeting to pass resolutions.
- *Australian Securities and Investments Commission v Smith; Australian Securities and Investments Commission v Adamson*. Acting for directors under investigation by ASIC.
- *Copeland Electrical Services & Staff Pty Ltd v Ascenzo*. Oppression of minority shareholder and directors' dispute (Supreme Court).
- *Footy v Horewood* [2007] VSCA 130 (with S Wilson QC). Oppression of a minority shareholder and expert valuation.

- *In the matter of an arbitration between L&M Coal Holdings Limited and Bathurst Resources Limited*. Advising in relation to Australian law concerning the interpretation of a change of control clause in a major international arbitration.
- *Iririki Island Holdings Ltd v Estate of Andrew Spinks*: Directors' dispute and restitution (Supreme Court).
- *Pullar v Frolgoud Pty Ltd* (VSC). Partnership dispute between real estate agents. Settled at mediation.
- *Re Venture Capital Group Pty Ltd* [2012] VSC 654; *Re Venture Capital Group Pty Ltd (No 2)* [2015] VSC 319; *Re Venture Capital Group Pty Ltd (No 3)* [2018] VSC 513. Directors' dispute, dispute resolution agreement, expert valuation.
- *Sergy Boy MQ Pty Ltd v Beteramia* (VSC). Partnership dispute concerning partnership agreement and ownership of partnership assets. Claims for account, injunctions and constructive trusts over partnership assets. Settled at mediation.
- *STY (Afforestation) Pty Ltd v Atkinson* [2005] VCC 360 (with D Collins QC). Equity, taxation and the doctrine of election in a managed investment scheme.
- *United Lift Services Pty Ltd v Hermus* (VSC). Oppression of minority shareholder. Derivative action. Directors' duties. Settled at mediation.
- *United Lift Services Pty Ltd v Motion Elevators* (VSC). Alleged breach of settlement deed, restraint of trade and misuse of client list. Settled at mediation.

Constitutional law, administrative law and statutory interpretation

- *Chakraborty v Jeynes* [2009] VCAT 1863. Racial discrimination.
- *DJS16 v Minister for Immigration and Border Protection* [2019] FCA 254 (with J Burnside QC). Appeal from decision to refuse protection visa.
- *Hapisun Pty Ltd v Rikys & Moylan Pty Ltd* [2013] VSC 730. Review of VCAT decision to refuse order for security for costs. Appropriate procedure.
- *In the matter of the Department of Treasury and Finance of Victoria*: Advising the State of Victoria on the competition law aspects of a proposed policy.
- *In the matter of the Education and Training Reform Regulations*: Advising the State of Victoria on the drafting of proposed regulations.
- *In the matter of Dr Schnapp and the Medical Practitioners Board of Victoria*. Advising regarding causes of action against the Board for alleged failure to conduct a proper investigation.
- *In the matter of the Victorian WorkCover Authority*. Advising the Victorian WorkCover Authority in relation to the review of premiums under the *Accident Compensation (WorkCover Insurance) Act 1993*.
- *Intralot Australia Pty Ltd v State of Victoria* [2015] VSC 407; *State of Victoria v Intralot Australia Pty Ltd* [2015] VSCA 358 (with N O'Bryan SC). Secrecy provisions of the *Gambling Regulation Act 2003*. Powers of the Supreme Court.
- *Janover v Muto* [2015] VCC 1530. *Local Government Act 1989*. Finding of gross and serious misconduct as councillor. Alleged entitlement to indemnification for legal costs.

- *Muto v Shepparton City Council* [2017] VSC 210; [2018] VSCA 73. *Local Government Act 1989*. Jurisdiction of VCAT.
- *Rubani v Director of Police (Nauru)* (HCA) (with G Griffith QC). Human rights.
- *Iplex ITG Pty Ltd v State of Victoria* [2010] VSC 480; [2011] VSCA 134; [2012] VSCA 201; [2014] VSCA 315. Alleged breach by the State of Victoria of the duties of good faith in a public tender (Supreme Court trial, appeals and application for special leave to the High Court).
- *Re Claydon; State Trustees Limited* (VSC). Treatment of settlement funds held in administration.
- *Telstra Corporation Limited v The Commonwealth* [2008] HCA 7 (with M Sloss QC). Constitutional law case stated in the High Court, concerning the telecommunications access regime as it applies to Telstra's copper network.
- *Waddell v Intralot Australia Pty Ltd* [2010] VCC 9 (with D Derham QC). *Gambling Regulation Act 2003*. Construction of lottery ticket playing rules.
- *Wallin v Architects Registration Board* [2017] VCAT 442. Review of Board's decision not to hold an inquiry into an architect's professional conduct. Acting for respondent architect in subsequent proceeding before the Board.
- *Wiggins v Department of Defence (Navy)* [2006] FMCA 800. Sex and disability discrimination.
- *In the matter of the Victorian Workcover Authority*: Advising a major public authority on statutory interpretation.
- *MacDonald v Secretary, DFHCSIA*: Interpretation of social security legislation (Federal Court).

Insolvency

- *In the matter of Environinvest Ltd* (VSC). Winding up of a managed investment scheme.
- *Glodale Pty Ltd v Investec (Australia) Pty Ltd*: Mortgagee's and receiver's duties in the sale of real estate (Supreme Court trial, appeal and special leave application to the High Court).
- *Boz One Pty Ltd v McLellan* [2014] VSC 208; [2015] VSCA 68. Receivers' duties in exercising power of sale.
- *Dattilo Holdings Pty Ltd v Bankwest Limited*: Receivers' duties (Supreme Court).
- *Investec Bank (Australia) Limited v Glodale Pty Ltd* [2009] VSCA 97. Mortgagees' and receivers' duties to take reasonable care to ensure property sold at market value.
- *Mijac Investments Pty Ltd v Graham* [2010] FCA 87 (with M Heaton QC). Duties of mortgagee in possession.
- *Khallouf v Cripps*: Contract dispute with receiver (Supreme Court).
- *Re Tomi-Sasha Holdings Pty Ltd (rec and mgr appt)(adm apptd)* [2020] VSC 595; *Re Tomi Sasha Holdings Pty Ltd (rec and mgr appt) (No 3)* [2021] VSC 17; *(No 4)* (unrep), *(No 5)* [2021] VSC 307, *(No 7)* (unrep). Validity of appointment of receiver. Trustee company. Trustee's indemnity. Fiduciary duties. *Barnes v Addy*. Effect of non-registration of security interests on the PPSR. Misleading or deceptive conduct. Pleadings. Compliance with undertakings to the Court.

- *Timbercorp Finance Pty Ltd v Collins* [2015] VSC 461. “Opt out” provisions in group proceedings. *Anshun* estoppel.

Procedure

- *Aucare Dairy (Aust) Pty Ltd v Huang* [2017] FCA 746. Legal professional privilege.
- *B J Bearings Pty Ltd v Whitehead* [2016] VSC 44. Preliminary discovery.
- *Copeland Electrical Services & Staff Pty Ltd v Ascenzo* [2011] VSC 323. Security for costs.
- *Lamers v Lamers* [2017] VSC 165; *Lamers v Lamers (No 2)* [2017] VSC 760. Legal professional privilege.
- *Lamers v Lamers (No 3)* [2019] VSC 63; *Lamers v Lamers (No 4)* [2019] VSC 510. Joinder of defendant and amendment of pleadings.
- *Mecrus Pty Ltd v Industrial Energy Pty Ltd* [2015] FCA 103. Security for costs.
- *Papadopoulos v Meletis* [2020] VSC 505. Summary judgment and overarching obligations.

Professional negligence and torts

- *Davis v Cogblan Partners Pty Ltd* (VSC). Professional negligence in provision of accountancy services. Settled at mediation.
- *Giroto v Phillips Fox* [2011] VSC 293 (with R Kendall QC). Professional negligence in absence of retainer. Appeared unled on appeal, which settled favourably prior to judgment.
- *Griffies v James & Son Pty Ltd* (VCC). Alleged negligent supply of defective cattle feed. Settled at mediation.
- *Joel Australia Pty Ltd v Camcoon Pty Ltd* (VSC). Nuisance. Settled at mediation.
- *Lamatta Pty Ltd v Alkemade* (VSC). Professional negligence in provision of accountancy services. Settled at mediation.
- *Riverside Food Products Pty Ltd v TXU Electricity Ltd* [2006] VSC 37 (with J Wilson). Negligence, causation and expert evidence.
- *Tadsam Pty Ltd v Stannards Accountants & Advisors Pty Ltd* (VSC). Professional negligence in provision of accountancy services. Settled at mediation.
- *Unique Nominees (Aust) Pty Ltd v Kingston City Council* (VSC). Acting for a group of owners of contiguous commercial properties alleging nuisance and negligence by a public authority. Settled at mediation.

Property and equity

- *Barnes v 10 Fawcner Road Pty Ltd* [2019] VCC 1769. Contract for sale of land. Alterations by agent. Estoppel.
- *Brondolino v Surf Coast Smash Masters Pty Ltd* [2019] VSC 505. *Retail Leases Act 2003*. Covenants prohibiting sharing of occupation.
- *Chatham v Coral Park Pre-Training & Breaking Pty Ltd (No 2)* [2021] VSC 44. Costs. Acting in appeal concerning findings as to a sale of property as a “going concern” for GST purposes. Appeal settled at mediation.
- *Glenis v Ikosedikas* [2018] VSC 278. Removal of caveat.

- *Harris v Harris* [2020] VSC 256; [2021] VSCA 138. Proprietary estoppel. Promise to bequest farming property.
- *Nagle v Registrar of the Victorian Water Register* (VSC). Review of decision of the Water Registrar to refuse to rectify the Water Register. Historical chain of ownership of take and use water rights and subsequently issued water shares. Whether water rights run with associated land. Settled at mediation.
- *Owners Corporation No.1 PS536864Y* (VCAT). Applications under the *Subdivision Act 1988* for orders to amend plan of subdivision. Settled at mediation.
- *Papadopoulos v Meletis* [2020] VSC 505. Caveat. Charge over property to secure settlement agreement. Alleged breach of settlement agreement. Indemnity for building insurance.

Taxation

- *Rigoli and Commissioner of Taxation* [2012] AATA 757. Review of objection decisions by Commissioner of Taxation concerning taxable income and undocumented depreciation deductions.
- *Rigoli v Commissioner of Taxation* [2014] FCAFC 29 (with M Bearman). Appeal from the AAT concerning onus of proving taxable income.
- *Rigoli and Commissioner of Taxation* [2015] AATA 169. Remittal of determination of taxable income. Default assessments. Evidence of taxable income. Onus of proof.
- *Rigoli v Federal Commissioner of Taxation* [2015] FCA 803 (with P Hanks QC). Appeal from the AAT concerning evidence of taxable income and onus of proof.
- *Rigoli v Federal Commissioner of Taxation* [2016] FCAFC 38 (with P Tehan QC). Evidence of taxable income and onus of proof.

Telecommunications and media

- *In the matter of Powerlink Queensland*. Advising on the construction and application of the *Telecommunications Act 1997*.
- *In the matter of the Telecommunications Industry Ombudsman*. Advising the Telecommunications Industry Ombudsman on determinations in complex complaints, including drafting preliminary views.
- *New South Wales Bar Association v Nationwide News Pty Ltd*. Advising on contempt of court by a major media organisation.
- *Pipe Networks Pty Ltd v Commonwealth Superannuation Corporation* [2011] FCA 1288. Declaration of authority to perform telecommunications installation. Application of Schedules 1 and 2 of the *Telecommunications Act 1997*.
- *Pipe Networks Pty Ltd v Commonwealth Superannuation Corporation* [2013] FCA 608 (with D Shavin QC): Statutory interpretation of the Telecommunications access regime in relation to installation of cabling and equipment.

Publications

Books

- D Clough, *Competition Law – The Laws of Australia* (2012, Thomson) (second edition pending).

Chapters and articles

- *Competition Law and Restrictive Trade Practices* (Update author and Title Editor), *Laws of Australia* (Thomson).
- *Restraints of Trade* (Update author and Title Editor), *Laws of Australia* (Thomson).
- “Regulatory Expropriation and Competition under NAFTA” (2005) 6 *The Journal of World Investment & Trade* 553.
- “Coexistence of Fairness and Competition under the Trade Practices Act” (2005) 33 *Australian Business Law Review* 99.
- “Search Engines – Uncloaking the Results” (2005) 7(10) *Internet Law Bulletin* 133.
- “Law and Economics of Vertical Restraints in Australia” (2001) 25 *Melbourne University Law Review* 551.
- “Misuse of Market Power: ‘Would’ or ‘Could’ in a Competitive Market?” (2001) 29 *Australian Business Law Review* 311.
- “Access in Telecommunications: Competition and Content in Pay TV” (2001) 75 *Law Institute Journal* 75.
- “Economic Duplication and Access to Essential Facilities in Australia” (2000) 28 *Australian Business Law Review* 325
- "Trends in the Law of Unconscionability" (1999) 18 *Australian Bar Review* 34.
- “Misleading or Deceptive Silence: Section 52, Confidentiality and the General Law” (1994) 2 *Trade Practices Law Journal* 76.
- "Arbest Pty Ltd v State Bank of New South Wales Ltd" (1996) 4 *Trade Practices Law Journal* 93.
- “Misleading or Deceptive Conduct Involving Silence: Is the Common Law Obsolete?: Demagogue v Ramensky” (1994) 5 *International Company and Commercial Law Review* 27.
- “Directors’ and Managers’ Liability under Australian Environment Protection Legislation” [1990] 8 *Oil & Gas Law and Taxation Review* 259.