

Curriculum Vitae

Mark Thomas McCulloch SC

Name: Mark Thomas McCulloch
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Professional Qualifications:

1984 Diploma of Law (Barristers Admission Board)
1990 Master of Laws (University of Sydney)
2022 NMAS Accredited Mediator (Australian
Mediation Association)
NSW Bar ADR Mediator

Professional Experience:

Areas of Practice:

- Appellate Advocacy
- Commercial disputes
- Common Law claims (statutory authorities)
- Construction and building disputes
- Insurance and reinsurance (policy interpretation; construction, underwriting disputes)
- Product Liability
- Medical negligence claims
- Professional Negligence (doctors, solicitors, accountants, estate agents, valuers, engineers, surveyors)
- Trade Practice disputes
- Valuation of Land disputes

31 September 2004	Appointed Senior Counsel
3 August 1990 to present	Barrister/Mediator
1 July 1986 - 30 June 1990	Senior Associate, Ebsworth and Ebsworth (now HWL Ebsworth)
5 July 1985	Admitted as a solicitor of the Supreme Court of New South Wales

Mark McCulloch SC - Biography

Mark has been at the Bar since 1990. He was appointed Senior Counsel in 2004. His practice is broad and includes areas such as valuers' liability claims, commercial litigation, insurance, public and products liability, trade practice, construction and building disputes, valuation of land disputes and medical negligence claims, with specific experience in catastrophic injury claims.

Mark has conducted numerous successful defences of statutory authorities in a variety of areas. These include cases which went on appeal, including to the High Court of Australia. Many of these decisions were landmark decisions concerning the role of statutory authorities, including whether they owed a duty of care springing from the statutory powers vested in them. Reported decisions include *Ghantous v Hawkesbury Shire Council* [2001] HCA 29; 206 CLR 512; *Great Lakes Shire Council v Dederer* [2006] NSWCA 101; *Mulligan v Coffs Harbour City Council* (heard with *Vairy v Wyong Shire Council*) [2005] HCA 62; 223 CLR 422; *Fitzgibbon v Waterways Authority* [2005] HCA 57, to name but a few.

Mark was briefed by the ACT government in relation to the 2003 bushfires. He led the defence team in the case, including the collection of lay and expert evidence obtained both in Australia and the U.S. Due to a scheduling clash, he did not appear at trial, but the defence mounted (based on the evidence marshalled by Mark) succeeded.

As a result of this success, Mark was briefed in the Mount Victoria bushfire class action for the party responsible for tree audits.

Mark has appeared in class actions (under instructions from Minter Ellison) on behalf of US drug manufacturers, and has also appeared for the NSW Police Force under instructions from the State Crown Solicitor.

Mark's practice spans across all Australian states and territories. Most recently Mark has been engaged as lead counsel in a claim brought against a General Electric, who are based in the US. The claim has been commenced in Western Australia and Mark is presently briefed by one of Perth's leading insurance firms, who are themselves under instruction from GE's US based legal team.

Mark has appeared in several leading cases concerning the proper approach in valuation of land disputes concerning rural and pastoral holdings. He appeared for the valuer in the seminal case of *Adwell Holding v Smith* [2003] NSWCA 103, which enshrined the "10 to 15% rule" of variance in valuation.

Mark has conducted numerous lengthy trials involving the use of joint expert evidence since 2006, when joint expert evidence was used for the first time in *Tabet v Mansour & Anor* [2007] NSWSC 36. In this case he appeared for Dr Mansour and Dr Gett, who were successful on all issues, save for one issue related to causation. This was ultimately corrected in the High Court on appeal, with the judgment containing express reference to Mark's re-examination of Dr Gett (see judgment of Gummow J in *Tabet v Gett* [2010] HCA 12; 240 CLR 537 at [43]).

Mediation Practice:

In 2022 Mark obtained his accreditation as a mediator from the Australian Mediation Association. This accreditation is recognised nation-wide.

Mark is also recognised by the NSW Bar Association as a mediator and appears on the Supreme Court of New South Wales and District Court of New South Wales panel lists of accredited mediators.

Mark has presided as mediator in over 20 mediations in the past six months and remains in high demand.

A selection of cases in which Mark has appeared:

- *Adwell Holdings Pty Ltd v Smith* [2003] NSWCA 103 (02 May 2003) (Mason P, Meagher JA and Buddin J) – leading case on valuation principles and the so called 10-15% margin for error
- *Lasermax Engineering Pty Limited v QBE Insurance (Australia) Limited* [2005] NSWCA 66 (16 March 2005) (Ipp, Tobias and McColl JJA) (2005) 13 ANZ Ins Cas ¶¶61–643 – policy construction; “direct cause” “proximate cause” in relation to electricity supply to machinery
- *Ingham v ACN 000 333 844 Ltd (In Liq) (formerly known as Australian Casualty and Life Ltd)* [2006] NSWCA 63 (03 April 2006) (Handley, Giles and Santow JJA) – life insurance case; construction of policy
- *MBF Life Limited v Rowena Marchant* [2006] NSWCA 363 (15 December 2006) (Handley JA; Beazley JA; Santow JA) – disability policy; interpretation of insuring clause and exclusion
- *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 (13 April 2011) (Besanko, Perram and Katzmann JJ) (2011) 16 ANZ Ins Cas ¶¶61–885 – important case on section 26 and 27 of the Insurance Contracts Act
- *Zhang v ROC Services (NSW) Pty Ltd* [2016] NSWCA 370 (22 December 2016) (Macfarlan and Leeming JJA, Sackville AJA) 93 NSWLR 561 – person rendered quadriplegic by mechanical failure of welding of ramps; policy interpretation; exclusion; leading case in proper interpretation of policies
- *Marketform Managing Agency Ltd for and on behalf of the Underwriting Members of Syndicate 2468 for the 2009 Year of Account v Ashcroft Supa IGA Orange Pty Ltd* [2020] NSWCA 36 (10 March 2020) (Ward CJ In Eq, Leeming and Payne JJA) – appeal dismissed; construction of exclusion in insurance policy
- *QBE Insurance v SLE Worldwide* [2005] NSWSC 776 (29 July 2005) (White J) – contribution between insurers

- *Jerry Schwartz v Albert Hadid Albert Hadid v Jerry Schwartz* [2011] NSWSC 1041 (06 September 2011) (McDougall J) – construction of commercial agreement
- *Sapphire (SA) Pty Ltd (trading as River City Grain) v Barry Smith Grains Pty Ltd (in liq)* [2011] NSWSC 1451 (28 November 2011) (Ward J) – commercial cause re grain contracts and terms
- *Cahill v Kenna (No 2)* [2015] NSWSC 200 (17 March 2015) (McDougall J) – leading case on admissibility of expert valuation evidence
- *The Owners - Strata Plan 74602 v Eastmark Holdings Pty Ltd; Eastmark Holdings Pty Ltd v The Owners - Strata Plan 74602* [2015] NSWSC 1981 (24 December 2015) (Stevenson J) – building dispute involving strata managers and obligations in relation to fire services
- *Downer EDI Rail Pty Ltd v John Holland Pty Ltd; John Holland Pty Ltd v QBE Insurance (Australia) Ltd (No 5); Kellogg Brown and Root Pty Ltd v John Holland Pty Ltd (No 4)* [2018] NSWSC 326 (20 March 2018) (Stevenson J) complex and lengthy building and construction claim ; whether property damage sustained so as to trigger QBE policy; proceedings dismissed after lengthy trial
- *Bassal v Savills (NSW) Pty Limited* [2019] NSWSC 696 (24 July 2019) (N Adams J) – A six week trial involving complex issues of valuation of shopping centres; proceedings dismissed
- *McMurray v AIG Insurance Australia Ltd [No 4]* [2020] WASC 210 (03 June 2020) (Smith J) – lengthy and complex trial concerning fire in luxury premiss and cause of fire; subject to appeal
- *Darshn v Avant Insurance Limited* [2021] FCA 706 (25 June 2021) (Moshinsky J) – interpretation of medical insurance policy and sections 13 and 40(3) of Insurance Contracts Act; appeal to Full Court dismissed. An application for special leave to appeal to the High Court was heard on 18 November 2022.

Further information on other cases Mark has appeared in may be obtained upon request.