

## CHAIR



### **Bob Hollyman, Shortland Chambers, Auckland**

Bob practises as a barrister primarily in commercial litigation. He was admitted in 1995 and has been a member of Shortland Chambers since 2006. Bob is the author of *Falsehood and Breach of Contract in New Zealand* (2017) and has taught *Advanced Tort* at Auckland University.

## SPEAKERS



### **Mary-Anne, General Counsel, Commerce Commission, Wellington**

Mary-Anne has been General Counsel, Competition and Consumer at the Commerce Commission since 2010. She has worked in the Commission's enforcement and merger areas since 2005, having come to the Commission from private practice as a commercial and criminal litigator. Mary-Anne has a Master of Laws (Hons) from Canterbury University in the subject of directors' torts, and has published articles primarily on negligence and company law topics.



### **Mike Colson, Stout Street Chambers, Wellington**

Mike was a litigation partner at Bell Gully for 16 years before moving to the bar in June 2017. He specialises in commercial and insolvency litigation. Mike has acted for the liquidators of Ross Asset Management Limited (New Zealand's largest ponzi).



### **John Horner, Quigg Partners, Wellington**

John is a transactional lawyer practising in mergers and acquisitions and competition law. He has a particular interest in takeovers and joint ventures and gets irritated if an assignment is confused for a novation.



### **Iva Rosic, Gilbert/Walker, Auckland**

Iva is a partner at Gilbert/Walker. She advises and represents clients in a broad range of commercial disputes and investigations brought by the Financial Markets Authority (FMA), Commerce Commission and other regulatory agencies.

## SPEAKERS



### **Adam Ross QC, Shortland Chambers, Auckland**

Adam practises in civil, corporate and commercial law (including insurance) and regulatory crime (securities, corporate, trade practices, environmental). He commenced practice in 1989 and joined Chapman Tripp's litigation department as a partner in 1996, where Adam worked for the next 18 years on disputes great and small, and on corporate/commercial advisory matters. He commenced practice as a barrister sole at Shortland Chambers in March 2015 and took silk in 2017.



### **Hilary Souter, Chief Executive, Advertising Standards Authority (ASA), Wellington**

Hilary has spent over 20 years working in the wider media industry on advertising standards and compliance with codes and legislation. The ASA is a leader in industry regulation and provides robust standards to support responsible advertising.



### **Jane Standage, MinterEllisonRuddWatts, Auckland**

Jane is a litigation partner at MinterEllisonRuddWatts. She has a wide ranging commercial litigation practice with an emphasis on financial and regulatory litigation, complex contractual disputes and consumer law. Jane has practiced in New Zealand and in the United Kingdom. She completed a Master of Laws at New York University on Fulbright and Hauser Global Law scholarships.



### **Stuart Wallace, Head of Commissioner, Commerce Commission, Wellington**

Stuart joined the Commission in 1987, shortly after the Fair Trading Act (FTA) was passed. He can speak with authority as he has had oversight of numerous investigations and built up a wealth of knowledge about how the courts have interpreted the FTA over the years.

# CONTENTS

## In session order

### Untangling the web of the misleading conduct and deception: choosing the right cause of action and pleading it

Untangling the web for practitioners ..... 1

*Adam Ross QC and Jane Standage*

### Documenting the deal

Documenting the deal ..... 39

*John Horner*

### Misleading conduct: building a complaint into a case

Misleading conduct – building a complaint into a case ..... 59

*Mary-Anne Borrowdale*

### Truth in advertising

Truth in advertising ..... 77

*Hilary Souter and Stuart Wallace*

### Remedies: Tracing and Constructive trusts

Remedies: constructive trusts and tracing ..... 109

*Mike Colson*

### Enforcement and limits of the regulators' powers

Enforcement and limits of the regulators' powers ..... 131

*Iva Rosic*

### Future Developments

Future developments: more ways to deal with snake oil merchants ..... 151

*Bob Hollyman QC*

# CONTENTS

## Alphabetical by author/presenter

<b>Author</b>		<b>Title</b>	<b>Page</b>
<b>Borrowdale</b>	Mary-Anne	Misleading conduct: building a complaint into a case	59
<b>Colson</b>	Mike	Remedies: tracing and constructive trusts	109
<b>Hollyman QC</b>	Bob	Future developments	151
<b>Horner</b>	John	Documenting the deal	39
<b>Rosic</b>	Iva	Enforcement and limits of the regulators' powers	131
<b>Ross QC</b>	Adam	Untangling the web of the misleading conduct and deception: Choosing the right cause of action and pleading it <i>Joint session with Jane Standage</i>	1
<b>Souter</b>	Hilary	Truth in advertising <i>Joint session with Stuart Wallace</i>	77
<b>Standage</b>	Jane	Untangling the web of the misleading conduct and deception: Choosing the right cause of action and pleading it <i>Joint session with Adam Ross QC</i>	1
<b>Wallace</b>	Stuart	Truth in advertising <i>Joint session with Hilary Souter</i>	77

# CONTENTS

<b>UNTANGLING THE WEB FOR PRACTITIONERS</b> .....	<b>1</b>
1. INTRODUCTION .....	3
2. IT’S ALL ABOUT THE HE SAID, SHE SAID [OR THE HE DID SHE DID] .....	3
3. CONTEXT IS EVERYTHING.....	9
4. REASONABLE RELIANCE – A CRITICAL ASPECT .....	14
5. EXCLUSION OF LIABILITY CLAUSES .....	16
6. KNOWLEDGE .....	21
7. PITFALLS FOR PRACTITIONERS – AVOIDING BREACH OF S 9 OF THE FAIR TRADING ACT 1986 .....	29
8. APPENDIX 1 - MAJOR ISSUES IN SELECTING A CAUSE OF ACTION – A SUMMARY .....	34
<b>DOCUMENTING THE DEAL</b> .....	<b>39</b>
PRELIMINARY AGREEMENTS .....	41
TERMINATION RIGHTS IN M&A – BREAK FEES .....	45
EARN-OUT PROVISIONS .....	47
ASSIGNMENT .....	49
CONCLUSION.....	57
<b>MISLEADING CONDUCT – BUILDING A COMPLAINT INTO A CASE</b> .....	<b>59</b>
INTRODUCTION .....	61
MAKING A COMPLAINT TO THE COMMERCE COMMISSION .....	61
FRAMING AN FTA PLEADING .....	69
<b>TRUTH IN ADVERTISING</b> .....	<b>77</b>
APPENDIX ONE – GUIDANCE NOTE ON IDENTIFICATION OF ADVERTISEMENTS.....	93
APPENDIX TWO – ADVERTISING STANDARDS CODE .....	98
<b>REMEDIES: CONSTRUCTIVE TRUSTS AND TRACING</b> .....	<b>109</b>
INTRODUCTION .....	111
REMINDER ON THE DISTINCTION BETWEEN REMEDIAL CONSTRUCTIVE TRUSTS, INSTITUTIONAL CONSTRUCTIVE TRUST AND TRACING .....	112
REVIEW OF THE CURRENT STATE OF NEW ZEALAND LAW IN RELATION TO THE EXISTENCE AND USE OF CONSTRUCTIVE TRUSTS INCLUDING MORE RECENT APPLICATIONS OF THE REMEDIAL CONSTRUCTIVE TRUSTS.....	116
UNITED KINGDOM POSITION: CONSTRUCTIVE TRUSTS AND BACKWARD TRACING.....	122
INSTITUTIONAL CONSTRUCTIVE TRUSTS AND TRACING IN NEW ZEALAND: MISAPPLICATION OF COMPANY FUNDS TO REPAY MORTGAGE DEBT .....	126
CONCLUSION AND COMMENTS .....	128
<b>ENFORCEMENT AND THE LIMITS OF REGULATORS’ POWERS</b> .....	<b>131</b>
INTRODUCTION .....	133
WHAT INFORMATION-GATHERING POWERS ARE AVAILABLE TO REGULATORS? .....	133
WHEN CAN THESE POWERS BE EXERCISED?.....	136
WHAT INFORMATION CAN BE REQUESTED? .....	138
PRIVILEGE AND REGULATORY INVESTIGATIONS.....	139
DISCLOSURE OF INFORMATION OBTAINED BY REGULATORS – WHAT ARE THE LIMITS? .....	141
POWER TO INTERVIEW AND THE RIGHT TO COUNSEL .....	146
REMEDIES .....	148
CONCLUSION.....	149
<b>FUTURE DEVELOPMENTS: MORE WAYS TO DEAL WITH SNAKE OIL MERCHANTS</b> .....	<b>151</b>
INTRODUCTION: SNAKE OIL.....	153
STATUTORY UNCONSCIONABILITY – “UNCONSCIONABLE CONDUCT” .....	154
THE AUSTRALIAN ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING, SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY (THE HAYNES REPORT) .....	158
APPENDIX ONE – SCHEDULE 2, PART 2-2 OF THE AUSTRALIAN COMPETITION AND CONSUMER ACT 2010 .....	161