

# David Birch

David has a BA and LLB from the University of Sydney, including being awarded a University Medal in Philosophy. He also has an LLM from the University of Cambridge and was awarded the Chancellor's Medal for English Law. David was awarded the Christopher Gee QC Memorial Prize for Advocacy and Evidence for the May 2016 Bar Practice Course.

David principally practises in commercial and public law. David has appeared led in the High Court, and has appeared led and unled in various federal and New South Wales courts and tribunals.

David is a contributor to Robson's Annotated Corporations Law.

Prior to coming to the Bar, David practised as a solicitor in the Commercial Litigation group at Clayton Utz for 4 years and was the tipstaff for Justice J C Campbell in the NSW Court of Appeal.

David has also been a casual tutor at the University of Sydney in public law, constitutional law and equity.

## **Admission to the Bar:**

May 2016, Christopher Gee QC Memorial Prize for Advocacy and Evidence

## **Academic qualifications:**

### **LLM (Class I) (Cantab)**

Chancellor's Medal in English Law

2<sup>nd</sup> in LLM graduating year

Justice Peter Hely Scholarship (USyd)

Henry Arthur Holland Studentship in Law; Lizette Bentwich Prize; Senior Scholarship (Trinity College)

### **BA (Hons I) / LLB (Hons I) (USyd)**

University Medal (philosophy)

Equal 3<sup>rd</sup> in LLB graduating year; equal first in philosophy

honours class and John Anderson Prize for Best Thesis

12 prizes including Nancy Gordon Smith Memorial Prize;

John Geddes Prize for Equity; Aaron Levine Prize for

Proficiency in Criminal Law; E.D. Roper Memorial Prize No 2 for Equity and Corporate Law; Dean's List of Excellence

## **Previous cases resulting in judgments**

### **HCA**

*Thorne v Kennedy* [2017] HCA 49;  
350 ALR 1

Grounds for setting aside financial agreement under *Family Law Act* on basis of unconscionability, undue influence or duress – led by R Lethbridge SC and G Eldershaw

## NSWCA

|   |   |
|---|---|
| <i>Gaynor v Attorney General of New South Wales</i> [2020] NSWCA 48   | Constitutional validity of Part 3A of Civil and Administrative Tribunal Act 2013 (NSW) – led by S Robertson   |
| <i>GR v Secretary, Department of Family and Community Services and Justice</i> [2019] NSWCA 177                             | Appeal against summary dismissal of <i>parens patriae</i> application – unled   |
| <i>Weber v Greater Hume Shire Council</i> [2019] NSWCA 74; ( <i>No 2</i> ) [2019] NSWCA 108                                 | Class action in relation to bushfire from local council operated tip – led by P Braham SC (application for special leave dismissed: [2019] HCASL 303) |
| <i>Kostov v State of New South Wales</i> [2019] NSWCA 17; ( <i>No 2</i> ) [2019] NSWCA 66; ( <i>No 3</i> ) [2019] NSWCA 189 | Appeal concerning vexatious proceedings order – unled   |
| <i>Racing NSW v Lewin</i> [2018] NSWCA 93   | Validity of Racing Appeals Tribunal Regulation 2015 – led by J Gleeson SC   |
| <i>Hunter's Hill Council v Minister for Local Government</i> [2017] NSWCA 188; 346 ALR 31                                   | Judicial review of proposal for amalgamation of local government areas – led by N Hutley SC, J Hutton and T O'Brien                                   |
| <i>AMP Life Ltd v AMP Capital Funds Management Ltd</i> [2016] NSWCA 176; 115 ACSR 421; 312 FLR 391                          | Construction of s 253E <i>Corporations Act</i> – led by A Leopold SC and E Holmes   |

## NSWSC

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| <i>Pearson v Jamaica Blue Pty Ltd</i> [2019] NSWSC 1737; [2020] NSWSC 121  | Inferring entry into guarantee by conduct; appeal from Local Court - unled                              |
| <i>Wang v Botany View Hotel (No 4)</i> [2019] NSWSC 1323   | Vexatious proceedings application – unled   |
| <i>ZLF v South Western Sydney Local Health District</i> [2019] NSWSC 1016; <i>A Duty List Plaintiff v A Local Mental Health Service (No. 2)</i> [2019] NSWSC 872 | Injunctions to restrain electroconvulsive therapy – unled   |
| <i>Potkonyak v Attorney General of NSW</i> [2019] NSWSC 987  | Summary dismissal of class action – unled   |
| <i>Wilson v Lord Howe Island Board</i> [2019] NSWSC 724  | Injunction to restrain Rodent Eradication Project on Lord Howe Island – led by J Kirk SC and J Davidson |
| <i>Attorney General for NSW v Bar-Mordecai</i> [2019] NSWSC 13   | Vexatious proceedings application – unled   |
| <i>In the matter of ICB Medical Distributors Pty Ltd</i> [2018] NSWSC 1315; [2018] NSWSC 1415; [2019] NSWSC 5; [2019] NSWSC 174                                  | Competing oppression claims under <i>Corporations Act</i> – led by V Whittaker SC                       |
| <i>Austar Plumbing Services Pty Ltd v Sydney Water Corporation</i> [2018] NSWSC 864  | Judicial review and alleged breach of contractual duty of good faith – led by N Sharp SC                |

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| <i>Downer EDI Rail Pty Ltd v John Holland Pty Ltd</i> [2018] NSWSC 581                     | Construction dispute, costs of related proceedings referred to arbitration – led by P Braham SC         |
| <i>Gupta v Fordham Laboratories Pty Ltd</i> [2018] NSWSC 551; [2018] NSWSC 694             | Specific performance of an equitable lease arising following exercise of an option – led by P McEwen SC |
| <i>Lewin v Racing NSW</i> [2018] NSWSC 269   | Validity of Racing Appeals Tribunal Regulation 2015 – led by P Braham SC                                |
| <i>Sharma v Segal</i> [2017] NSWSC 867; [2017] NSWSC 973                                   | Contractual construction – led by S Lawrance  |
| <i>Healthcare Australia Pty Ltd v Randstad Pty Limited</i> [2016] NSWSC 1407               | Restraint clause in contract for sale of business – led by E Holmes                                     |
| <i>Re AMP Capital Funds Management Limited</i> [2016] NSWSC 986; 116 ACSR 198; 310 FLR 382 | Construction of s 253E <i>Corporations Act</i> – led by A Leopold SC                                    |

## **FCA**

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| <i>BrisConnections Finance Pty Limited (Receivers and Managers Appointed) v Arup Pty Limited</i> [2017] FCA 590; [2017] FCA 1268 | Claim by the receivers and managers of BrisConnections Finance Pty Ltd against Arup alleging misleading and deceptive conduct in relation to traffic forecasts (settled during trial in 2017; interlocutory decisions include admissibility of jointly authored expert report and implied waiver of legal professional privilege) – led by G Rich SC and J Arnott |
| <i>Hardy v Reckitt Benckiser (Australia) Pty Limited (No 2)</i> [2017] FCA 341; [2017] FCA 785                                   | Class action alleging misleading and deceptive conduct in relation to Nurofen advertising – led by N Hutley SC and S Lawrance   |
| <i>WDR Delaware Corporation v Hydrox Holdings Pty Ltd</i> [2016] FCA 1164  | Claim in relation to the joint venture agreement for the Masters business; stay pursuant to arbitration clause – led by N Hutley SC and S Lawrance  |

## **NSWLEC**

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| <i>Newland Developers Pty Ltd v Tweed Shire Council</i> [2020] NSWLEC 1107  | Class 1 – development application for residential subdivision of land allocated as potential school site; whether abuse of process – led by D Miller SC |
| <i>Woollahra Council v Minister for Local Government</i> [2016] NSWLEC 86; 218 LGERA 65; <i>Hunter's Hill Council v Minister for Local Government</i> [2016] NSWLEC 124 | Class 4 – Judicial review of proposal for amalgamation of local government areas – led by N Hutley SC, J Hutton and T O'Brien                           |

## **NSWDC, NSWLC and FCCA**

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| <i>Soutar Accountants Pty Ltd v Estate Of Cosimo Gasparre</i> [2019] FCCA 1766                                     |
| <i>Balls &amp; Tackles Pty Limited v International Management Group of America Pty Ltd (No 2)</i> [2019] NSWDC 617 |
| <i>Hayes v Riverside Marine Pty Ltd</i> (NSWLC, 22 October 2018)   |
| <i>Royal Agricultural Society of NSW v Silkroute International Pty Ltd</i> (NSWLC, 1 November 2018)                |
| <i>Symsafe Pty Ltd v Woven Image Pty Ltd</i> (NSWLC, 19 March 2018)  |

## NCAT

Various unled administrative review matters, including:

*Nilufar v Secretary, Department of Education* [2020] NSWCATAD 37

*Forbidden Foods Pty Ltd v Rice Marketing Board of New South Wales* [2020] NSWCATAD 18; [2020] NSWCATAD 73

*Miskelly v Roads and Maritime Services* [2019] NSWCATAD 133

*Larter v Commissioner for Fair Trading; Commissioner of Police* [2019] NSWCATAD 81

*Bellamy v Transport for NSW* [2019] NSWCATAD 54

*Telstra Corporation Ltd v Independent Pricing & Regulatory Tribunal* [2018] NSWCATAD 269

*DPR v Independent Liquor and Gaming Authority* [2018] NSWCATAD 251

*Infrastructure NSW & Department of The Premier and Cabinet v Mookhey* [2018] NSWCATAP 213

*Zidar v Department of Justice (No 2)* [2018] NSWCATAD 214

*Walker v NSW Department of Premier and Cabinet* [2018] NSWCATAD 178

*CGU Workers Compensation (NSW) Ltd v Department of Planning* [2018] NSWCATAD 169

*Park v Transport for NSW* [2018] NSWCATAD 82; *Park (No 2)* [2018] NSWCATAD 134

*DFD v New South Wales Education Standards Authority* [2018] NSWCATAD 48

## Alternative dispute resolution

Transport for NSW – dispute with Salini Impregilo S.p.A

Dispute concerning defects in the construction of Sydney Metro Northwest – led by M Dempsey SC and L Shipway

WDR Delaware Corporation v Hydrox Holdings Pty Ltd – arbitration before the Hon Mr Gleeson AC QC

Claim in relation to the joint venture agreement for the Masters business – led by N Hutley SC and S Lawrance

AMP Life Ltd – Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry

Round 6 (insurance): advising in preparation of evidence and submissions – led by R Hollo SC and E Holmes

## Professional background:

### Solicitor, Clayton Utz (2012 –2016)

Commercial litigation, working on matters including *Novartis Pharmaceuticals Australia Pty Ltd v Bayer Australia Limited* [2013] FCA 929, [2013] FCA 1201, [2013] FCA 1323; *HRX Pty Ltd v Scott* [2013] NSWSC 451. Secondments to Commonwealth Bank of Australia and Cochlear Ltd.

### Tipstaff to Justice J C Campbell (2011)

New South Wales Court of Appeal

### Tutor, University of Sydney (2011-2016)

Public law, constitutional law and equity

## Publications:

Contributor to *Robson's Annotated Corporations Law*, Parts 2D.2 to 2D.6 and Ch 9 (2016 - current)

Managing Editor of *UK Supreme Court Yearbook* (2014 – 2016)

D Birch, "Validity of Asymmetric Jurisdiction Agreements in England, Australia and New Zealand" (2016) 5 *Journal of Civil Litigation and Practice* 96

D Birch & A Zheng, "Private Law" [2015] *UK Supreme Court Yearbook* 332

D Birch & A Zheng, "Private Law" [2014] *UK Supreme Court Annual Review* 283

D Birch & A Zheng, "Cutting the Gordian Knot or entangling it further?" (2012) 86 *Australian Law Journal* 748

D Birch, "The Cleaver principle: Re-uniting mutual wills and secret trusts" (2011) 5 *Journal of Equity* 288

D Birch, "The slippery nature of a constitutional guarantee: acquisition of water rights in *ICM Agriculture v Commonwealth*" (2011) 13 *Constitutional Law and Policy* 58

D Birch, "Tabet v Gett: The High Court's own lost chance of a better outcome" (2011) 19 *Tort Law Review* 76

D Birch, "The Justifiability of Criminal Responsibility for Negligent Conduct" (2010) *Pandora's Box* 48 – 1st place in 2010 Australian Legal Philosophy Students' Association National Essay Competition