

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

2nd 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 3rd 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>Collier v Attorney General for New South Wales</i> [2021] NSWCA 16	Access to documents in context of vexatious proceedings application – unled
<i>Wang v Purpose Pty Ltd t/as Botany View Hotel</i> [2021] NSWCA 10	Appeal concerning vexatious proceeding order – unled
<i>Golden v V'landys</i> [2020] NSWCA 120	Appeal against summary dismissal of judicial review proceedings – led by P Braham SC
<i>Gaynor v Attorney General of New South Wales</i> [2020] NSWCA 48	Constitutional validity of Part 3A of <i>Civil and Administrative Tribunal Act 2013</i> (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, 100 NSWLR 1; (<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	
<i>In the matter of Reserve Hotels Pty Ltd</i> [2021] NSWSC 376	Claims for relief under <i>Contracts Review Act</i> , undue influence and unconscionable conduct; removal of trustee; unauthorised transactions by director – led by I Jackman SC
<i>McKane v Commissioner of Corrective Services for NSW</i> [2021] NSWSC 324	Judicial review of inmate's security classification; application for injunctive relief – unled
<i>In the matter of Beverage Freight Services Pty Ltd</i> [2021] NSWSC 154	Partnership / joint venture dispute – led by G Sirtes SC
<i>Attorney-General of NSW v George</i> [2020] NSWSC 1621	Judicial review of decision of State Parole Authority – unled
<i>Attorney General of NSW v Collier</i> [2020] NSWSC 1572	Access to documents in context of vexatious proceedings application – unled
<i>In the matter of Sumo Australia Ltd</i> [2020] NSWSC 1142	Transfer of shareholder compulsory acquisition proceedings where oppression proceedings subsequently commenced in another Court – led by E Muston SC
<i>Pearson v Jamaica Blue Pty Ltd</i> [2019] NSWSC 1737, [2020] NSWSC 121	Appeal from Local Court; inferring entry into guarantee by conduct – 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
<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

<i>Quach v Marks</i> [2021] FCA 335	Intervention by Attorney General of NSW – unled
<i>ASIC v Union Standard International Group Pty Ltd</i> [2020] FCA 603	Section 1323 <i>Corporations Act</i> asset preservation orders – led by D Thomas SC
<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

Hardy v Reckitt Benckiser (Australia) Pty Limited (No 2) [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

WDR Delaware Corporation v Hydrox Holdings Pty Ltd [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

Modog Pty Ltd v North Sydney Council [2020] NSWLEC 1342

Class 1 – development application involving demolition of a heritage item – unled

Waverley Council v Ash Samadi [2020] NSWLEC 67; *(No 2)* [2020] NSWLEC 162

Class 4 – injunction to restrain work in breach of development control order; validity of CDC; indemnity costs – led by D Miller SC

Newland Developers Pty Ltd v Tweed Shire Council [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

Woollahra Council v Minister for Local Government [2016] NSWLEC 86; 218 LGERA 65; *Hunter's Hill Council v Minister for Local Government* [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

CLC Deliveries Pty Ltd t/as Hunter Self Storage v Horizons (Asia) Pty Ltd (NSWLC, 16 December 2020)
Soutar Accountants Pty Ltd v Estate Of Cosimo Gasparre [2019] FCCA 1766; [2020] FCCA 1959
Balls & Tackles Pty Limited v International Management Group of America Pty Ltd [2019] NSWDC 290; *(No 2)* [2019] NSWDC 617
Hayes v Riverside Marine Pty Ltd (NSWLC, 22 October 2018)
Royal Agricultural Society of NSW v Silkroute International Pty Ltd (NSWLC, 1 November 2018)
Symsafe Pty Ltd v Woven Image Pty Ltd (NSWLC, 19 March 2018)

NCAT

Various unled administrative review matters, including:

Zonneville v Department of Customer Service [2021] NSWCATAD 35
Hanna v Commissioner for Fair Trading [2020] NSWCATOD 107
Gabriel's Family Day Care Pty Ltd v Secretary, Department of Education (No 2) [2020] NSWCATAD 249
Rice Marketing Board of New South Wales v Forbidden Foods Pty Ltd [2020] NSWCATAP 182
Nilufar v Secretary, Department of Education [2020] NSWCATAD 37
Forbidden Foods Pty Ltd v Rice Marketing Board of New South Wales [2020] NSWCATAD 18; *(No 2)* [2020] NSWCATAD 73; *(No 3)* [2020] NSWCATAD 257
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; *(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