

DAVID F C THOMAS

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QUALIFICATIONS:

- BA (1st Class Honours & the University Medal) – University of Sydney
- LLB (1st Class Honours & the University Medal) – University of Sydney
- BCL (with Distinction) – University of Oxford (Sir Robert Menzies Memorial Scholar in Law and Broughton & Forrest Exhibitioner).

PRIOR EXPERIENCE:

- Associate to Justice William Gummow AC, High Court of Australia (2003)
- Solicitor (2002, 2004-2005), Mallesons Stephen Jaques (now King & Wood Mallesons)
- Lecturer (part-time) in Equity & Trusts at the University of Sydney (2004 – 2005)
- Reporter for the Commonwealth Law Reports (2006 – 2010), Federal Court Reports (2003 – 2007) and New South Wales Law Reports (2003 – 2006).

AREAS OF PRACTICE:

David practice is wide-ranging, with a particular focus on:

- Appellate
- Commercial / Corporate law
- Equity & Trusts
- Public and constitutional law
- Private international law
- Tax litigation
- Trade practices and consumer protection

David has a national practice. He has appeared, both led and unled, in the High Court, Full Federal Court, Federal Court, NSW Court of Appeal, and the Supreme Courts of NSW, Victoria, Queensland and Western Australia.

CURRENT AND RECENT MATTERS:

- Acting for one of Australia's largest banks in connection with ASIC's on-going BBSW market misconduct investigation
- Acting for *RBS Group Australia* in the defence of class action proceedings arising out of the collapse of Navra Financial Services (with Payne SC)
- Acting for *Brickworks Limited* in oppression proceedings concerning its cross-shareholding structure with Washington H Soul Pattinson and Company Limited (with Jackman SC)
- Acting for *Investa Office Fund* in its proposed acquisition by DEXUS (with Brereton SC)
- Acting for *PMI Group* in proceedings to recover approximately \$22 million in payments under a Sale Agreement (with Jackman SC)
- Acting for *Carillion Construction* in insurance proceedings concerning damage to the Darwin East Port (with Sheahan SC)
- Acting for the *Commissioner of Taxation* in proceedings against Uber BV concerning the tax status of UberX (with Hmelnitsky SC)
- Acting for the *Commissioner of Taxation* in fraud proceedings brought against Mrs Radhika Oswal in aid of the recovery of \$186 million in unpaid tax debts (with Neil Williams SC)
- Acting for the *Commonwealth* in High Court proceedings defending the constitutional validity of reforms the entitlements paid to retired parliamentarians (with Gleeson SC, Solicitor-General)
- Acting for *Primary Health Care* in proceedings arising out of an institutional entitlement offer conducted in connection with its acquisition of Symbion Health Limited (with Jackman SC)
- Acting for *Macquarie Bank* in NSW proceedings to recover a \$16 million foreign judgment (with McHugh SC)
- Defending former directors of *BDO* in proceedings brought with respect to the merger of BDO with Grant Thornton (unled)
- Acting for *Australia Post* in proceedings seeking a refund of payroll tax (unled)
- Acting for *Boral* in proceedings seeking the recovery of over \$6 million in sale proceeds (unled)

SELECTED FORMER CASES:

Commercial / Corporate law

- Acting for a director of *Tamaya Resources Limited* in defence of class-action proceedings (settled, with Jackman SC)
- Acting for *Marathon Asset Management* in proceedings brought against AustralianSuper for unpaid performance fees (settled, with Hutley SC)
- Acting for interests of the *Seven Group* in s 444GA administration proceedings [2014] NSWSC

1910 (with McHugh SC)

- Acting for *National Australia Bank* in defence of a market misconduct investigation by ASIC into index arbitrage trading (settled, with Thangaraj SC)
- Acting for ASIC in High Court proceedings concerning the operation of the MIS provisions of Ch 5C of the Corporations Act (with Gleeson SC, Solicitor-General and Halley SC)
- Acting for the claimants in breach of partnership and oppression proceedings brought against *Clarins SA* (settled, with AS Bell SC)
- Acting for the *Seven Network* in proceedings brought by Network Ten concerning the employment of Mr John Stephens [2014] NSWSC 752 (with AS Bell SC)
- Acting for the partners of *Atanaskovic Hartnell* in proceedings brought by Hudson Investment Group [2014] NSWCA 255 (with Jackson QC)
- *Westpac Banking Corporation v The Bell Group Ltd (in liq)* (High Court, with Archibald QC, settled) - acting for 20 domestic and international banks in an appeal from the largest compensation award in Australian history (approximately \$2.6 billion)
- *Eastmark Holdings Pty Ltd v Kabraji* [2013] NSWSC 1763 (with Hutley SC) – applicability of the standing principles in *Foss v Harbottle* to NSW strata schemes
- *Addenbrooke Pty Ltd v Duncan (No 2)* [2013] FCA 820 – successfully striking out proceedings brought against John Kinghorn arising out of matters the subject of recent ICAC hearings
- *Kronos International Inc v Austpac Resources NL* (Federal Court, with Richard McHugh SC, settled) – acting for the claimant in a contractual dispute concerning the construction of a \$20 million synthetic rutile manufacturing plant
- *Kang v iCash Payment Systems Pty Ltd* [2013] NSWSC 1239 (with AS Bell SC) – acting for plaintiffs in respect of purported cancellation of 11% of share capital in ASX listed company
- *Amcor Packaging (Australia) Pty Ltd v Baulderstone Pty Ltd* [2013] FCA 253 (with Jopling QC) – defending Baulderstone in court proceedings brought in breach of an arbitration agreement concerning a contractual dispute worth in excess of \$20 million
- *Australia and New Zealand Banking Group v Trust Company* (2012, settled, with AS Bell SC) – acting for plaintiff seeking \$29 million under an ISDA swap transaction
- *Pathway Investments Pty Ltd v National Australia Bank* [2012] VSC 72 (with Karkar QC); [2012] VSC 97 (with Harris SC) – defending NAB in a \$450m class action arising out of the valuation of various collateralised debt obligations (CDOs)
- *Confidential arbitration before the Hon Murray Gleeson AC* (with Sheahan SC) – acting for plaintiffs in \$15 million contract dispute
- *ASIC v Commonwealth Bank of Australia / Sherwood & Anor v Commonwealth Bank of Australia* (with Finch SC, Payne SC and Hollo SC) – defending CBA in multiple proceedings arising out of

the collapse of Storm Financial Limited

- *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389 (with Leopold SC) – agency / unconscionability / contracts review
- *Re Centro Properties Limited* (2011) 87 ACSR 131, 86 ACSR 584, 1481 (with McHugh SC) – acting for PriceWaterhouseCoopers in opposition to schemes of arrangement
- *APT SEA Gas Holdings Pty Ltd v ANP SEA Gas Holdings Pty Ltd* [2010] NSWSC 1221 (with Bathurst QC) – construction of contracts concerning the disposal of electricity infrastructure worth \$98 million
- *Re CSR Limited* (2010) 183 FCR 358 (with Young QC) – acting for CSR in contested scheme of arrangement and capital reduction
- *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 (with Bathurst QC) – acting for defendants in successful submission that that class action was an illegal managed investment scheme
- *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 10)* (2009) 39 WAR 1 (with Ryan SC)
- *CGU Insurance Pty Ltd v Porthouse* (2008) 235 CLR 103 (with Meagher SC) – construction of professional indemnity insurance policies for barristers
- *Tullett Prebon (Australia) Pty Ltd v Purcell* (2008) 175 IR 414 – restraints of trade
- *Idameneo (No 123) Pty Ltd v Symbion Health Ltd* (2007) 165 FCR 19 (with Bathurst QC) – challenge to capital reduction / break fees
- *Bakarich v Commonwealth Bank of Australia* [2007] NSWCA 169 (with Sackar QC) – acting for CBA in long-running banking dispute

David also regularly appears throughout Australia, both led and unled, in schemes of arrangement: eg *Aspen Funds Limited* [2015] NSWSC 1718 (with Jackman SC); *David Jones* (2014, with Jackman SC); *Westfield Group* (2014, with Jackman SC); *Horizon Oil Limited* [2014] FCA 733 (with Jackman SC); *Wotif.com* (2014, unled); *The Trust Company Limited* [2013] NSWSC 1947 (with Oakes SC); *Re Bravura Solutions Pty Ltd* (2013, unled); *Re Eastern Star Gas Limited* [2011] FCA 1225 (unled); *Re Alinta Energy Services Ltd* (2011, with Jackman SC); *Re Spark Infrastructure Group* (2010) 79 NSWLR 756 (with Bathurst QC); *Re Macquarie Communications Infrastructure Ltd* [2009] NSWSC 487 (with Bathurst QC); *Re Bluefreeway Limited* [2009] FCA 535 (unled).

Equity & Trusts

- *Segelov v Ernst & Young Services Pty Ltd* [2015] NSWCA 156' [2014] NSWSC 283 (with Jackman SC) – successfully defending an alleged breach of trust

- *Sidhu v Van Dyke* (2014) 251 CLR 505 – important High Court decision concerning proprietary estoppel
- *Nicholls v Michael Wilson & Partners Limited* [2012] NSWCA 383 (with Walker SC) – acting for the claimant/respondent in proceedings alleging breach of fiduciary duty
- *Hope Rinehart Welker & Ors v Gina Rinehart & Anor* (NSW Supreme Court, with AS Bell SC) – acting for the claimants in multiple proceedings in the NSW Supreme Court, NSW Court of Appeal and High Court concerning a multi-billion dollar family trust
- *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 241 CLR 539 (with DMJ Bennett QC) – status of the ‘political disqualification’ principle in the law of charitable trusts
- *Moran v DJ Moran Nominees Pty Ltd* (with Meagher SC) – acted for the defendant Moran family in a confidential family dispute
- *Westfield QLD No 1 Pty Ltd v Lend Lease Real Estate Limited* [2008] NSWSC 610 (with Bathurst QC) – Equity & Trusts / construction of trust deeds

Public & Constitutional law

- *Queensland Nickel Pty Ltd v Commonwealth of Australia* [2015] HCA 12 (with Gleeson SC, Solicitor-General) – defending the constitutional validity of the Commonwealth’s carbon pricing legislation
- Acting for *John Kinghorn* in judicial review proceedings brought against the NSW Independent Commission Against Corruption [2015] NSWCA 342; [2014] NSWSC 1018 (with Archibald QC)
- *A v Independent Commission Against Corruption* [2014] NSWCA 414 (with McClintock SC)
- *Fortescue Metals Group Limited v Commonwealth of Australia* (2013) 250 CLR 548 (with Gleeson SC, Solicitor-General) – defending the constitutional validity of the Commonwealth’s mining tax legislation
- *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 (with Gleeson SC, Solicitor-General) – defending the constitutional validity of the NSW *Criminal Assets Recovery Act*
- *Seven West Media Limited v Commissioner, Australian Federal Police* (2014) 223 FCR 234 (with Bell SC) – validity of search warrants
- *Sydney Local Health District v ANU* [2013] NSWADTAP 47 (unled) – anti-discrimination
- *Guardian Industries Corp Ltd v Attorney-General of the Commonwealth* (2013) 213 FCR 507 (with Kennett SC) – anti-dumping
- *Panasia Aluminium (China) Limited v Attorney-General of the Commonwealth* (2013) 217 FCR 64 (with Kennett SC) – anti-dumping
- *ACCC v MSY Technology Pty Ltd* (2012) 201 FCR 378 (with Gageler SC, Solicitor-General) – scope of Federal Court’s power to grant declaratory relief

- *Rinehart v Welker* [2012] HCA Trans 57; [2012] NSWCA 95; [2012] NSWCA 1 (with AS Bell SC) – confidentiality powers in the *NSW Court Suppression and Non-publication Orders Act 2010*
- *Paul Hogan v Australian Crime Commission* (2010) 240 CLR 651 (with Gageler SC, Solicitor-General) – confidentiality powers in s 50 of the *Federal Court of Australia Act 1976* (Cth)
- *Bakarich v Commonwealth Bank of Australia* [2010] NSWCA 314 (with Bathurst QC) – apprehended bias
- *ASIC v P Dawson Nominees Pty Ltd* [2009] FCAFC 183 (with Jopling QC) – public interest immunity
- *Lote Tuqiri v Australian Rugby Union Limited* [2009] NSWSC 781 (with Sackar QC) – acted for the ARU in confidential employment dispute and related confidentiality proceedings
- *P Dawson Nominees Pty Ltd v ASIC* (2009) 255 ALR 466 (with AS Bell SC) – public interest immunity
- *Dale v Veda Advantage Information Services and Solutions Limited* (2009) 175 FCR 456 (with Hale SC) – s 109, Constitution
- *Muc v Deputy Commissioner of Taxation* (2008) 73 NSWLR 378 (with Hmelnitsky) – s 109, Constitution
- *Paul Hogan v Australian Crime Commission* (2007) 72 ATR 107 (with Game SC and Payne SC) – validity of statutory notices issued under the *Australian Crime Commission Act*
- *MM v Australian Crime Commission* (2007) 244 ALR 452 – client legal privilege
- *Burns v John Laws* [2008] NSWADTAP 32 (with Reynolds SC) – anti-discrimination

Trade Practices & Consumer Protection

- *ACCC v Fisher & Paykel Customer Services Pty Ltd* [2014] FCA 1393 (with NJ Williams SC)
- *Perpetual Trustee Company Ltd v Ishak* [2012] NSWSC 697 (with Leopold SC)
- *ACCC v Smash Enterprises Pty Ltd* [2011] FCA 375 (with Payne SC)
- *ACCC v Edirect Pty Ltd* (settled, with Payne SC)
- *Unilever Australia Ltd v Goodman Fielder Consumer Foods Pty Ltd* [2009] FCA 1305 (with Sackar QC)
- *ACCC v Ozdirect Online Brands Pty Ltd* [2009] FCA 1604

Tax litigation

- *John Holland Pty Ltd v Federal Commissioner of Taxation* (2015) 232 FCR 59 (with Slater QC) - FBT
- *Commissioner of Taxation v Hunger Project Australia Ltd* (2014) 221 FCR 302 (with Lloyd SC) –

public benevolent institution status

- *Batchelor v Commissioner of Taxation* (2014) 219 FCR 453 (with Richmond SC) – assessability of refund of partnership contribution
- *Commissioner of Taxation v Fabig* (2013) 215 FCR 122 (with Richmond SC) – scrip-for-scrip rollover relief
- *Mills v Federal Commissioner of Taxation* (2012) 250 CLR 171 (with Slater QC) – successful appeal for the appellant concerning the tax treatment of the Commonwealth Bank’s PERLS V stapled securities
- *Mount Pritchard & District Community Club Limited v Commissioner of Taxation* (2011) 196 FCR 549 (with NJ Williams SC) – validity of assessments
- *Colonial First State Investments Pty Limited v Federal Commissioner of Taxation* (2011) 192 FCR 298 (with Alan Robertson SC) – trust provisions of the Income Tax Acts
- *Commissioner of Taxation v Wentworth District Capital* (2011) 191 FCR 151 (with Alan Robertson SC) – Community service purposes / banking services
- *Sunchen Pty Ltd v Commissioner of Taxation* (2010) 190 FCR 38 (with NJ Williams SC) – acted for respondent in GST dispute
- *Commonwealth Bank of Australia v Deputy Commissioner of Taxation* (2009) 180 FCR 161 (with Bathurst QC) – Consolidation; Bank integration
- *Commissioner of Taxation v Star City Pty Ltd* (2009) 175 FCR 39 (with NJ Williams SC) – Capital/revenue / Anti-avoidance
- *Fowler v Commissioner of Taxation* (2008) 167 FCR 425 (with NJ Williams SC) – personal services income
- *Kafataris v Deputy Commissioner of Taxation* (2008) 172 FCR 242 (with B Sullivan SC)

Private international law

- *Macquarie Bank v Juno Holdings sarl* [2015] NSWSC 1260 – enforcement of ju
- *Ocean Marine Insurance Company Limited v CSR Limited* [2012] NSWSC 1229 – enforceability within forum of foreign schemes of arrangement
- *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 (with Walker SC) – status of foreign arbitral awards
- *ACE Insurance Ltd v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (with AS Bell SC) – acted for plaintiff in private international law / exclusive jurisdiction clause claim
- Advice to Commonwealth regulatory agency concerning the extraterritorial effect of Commonwealth legislation (with Gageler SC, Solicitor-General)

Selected unled appearances (cases marked * against silk)

- **In the matter of Investa Listed Funds Management Limited* [2016] NSWSC 369
- **T-D Joint Venture Pty Ltd (in liq) v SGH Energy Corporate Pty Ltd* [2016] WASC 102
- **Alexander & Anor v Burne & Ors* [2015] NSWCA 377
- **Tamaya Resources Limited (in liq) v Deloitte Touche Tohmatsu* [2015] FCA 1098
- **Davies v Commissioner of Taxation* [2015] FCA 773
- **Qantas Airways Limited v Chief Commissioner of State Revenue* [2015] NSWSC 826
- **Stern v Commissioner of Taxation* (Federal Court, settled)
- **Statewide Property Ventures Ptd Ltd v Commissioner of Taxation* (settled, Federal Court)
- **Alexander & Anor v Burne & Ors* [2013] NSWSC 1953
- **Addenbrooke Pty Ltd v Duncan & Ors (No 2)* [2013] FCA 820
- **Nicholls v Michael Wilson & Partners Ltd (No 2)* [2013] NSWCA 141
- *The Hunger Project Australia v Commissioner of Taxation* [2013] FCA 693
- *Commonwealth Bank of Australia v Chamos* [2012] NSWSC 1345
- **Fortescue Metals Group Ltd v Commonwealth of Australia* [2012] HCA Trans 239
- *Ferguson v Commissioner of Taxation* [2012] FCA 706
- **Cass Care Limited v Commissioner of Taxation* (Federal Court - settled)
- **Welker v Rinehart (No 7)* [2012] NSWSC 222
- **Welker v Rinehart (No 6)* [2012] NSWSC 160
- **Welker v Rinehart (No 5)* [2012] NSWSC 45
- **Bakarich v Commonwealth Bank of Australia* [2011] NSWSC 1559
- **Welker v Rinehart (No 3)* [2011] NSWSC 1471
- *ACCC v MSY Technology Pty Ltd* (2011) 279 ALR 609
- *Wynnum Holdings Pty Ltd v Commissioner of Taxation* [2011] AATA 296
- **Hawkins v Abetz* [2010] HCATrans 310 (High Court sitting as Court of Disputed Returns)
- **TZ Limited v ZMS Investments Pty Ltd* [2010] NSWSC 138
- **Paul Hogan v Australian Crime Commission* (2009) 177 FCR 205
- **Praetorin Pty Ltd v TZ Limited* (2009) 76 ACSR 236
- **Paul Hogan v Australian Crime Commission* [2009] FCA 761
- **Vidler v Commissioner of Taxation* [2009] FCA 1426

Advice practice

David provides advice to a wide range of companies and other entities on a range of corporate, commercial and taxation matters, including recent advices for BHP Billiton, Macquarie Bank, Westpac Banking Corporation, Commonwealth Bank of Australia, OZ Minerals, Thiess John Holland, the Government of Brunei, ACTEW and NBN Co.

PEER REVIEW:

- *Best Lawyers in Australia – Litigation* (2016)
- *Doyle’s Guide to Leading Commercial Litigation and Dispute Barristers (NSW)* (2015)

PUBLICATIONS:

- 'Reflections on the *Quistclose* Trust - *Twinsectra Ltd v Yardley*' (2002) 20 *Company & Securities Law Journal* 352
- 'A Public Interest Defence to Copyright Infringement?' (2003) 14 *Australian Intellectual Property Journal* 225
- 'Contractual prohibitions on the assignment of copyright' (2004) 120 *Law Quarterly Review* 218
- 'International commercial fraud and the enforcement of foreign consumer protection legislation' (2005) 121 *Law Quarterly Review* 364
- 'Constitutional and administrative aspects of tax law', *Key Issues in Judicial Review* (2014)