

Donald Mitchell
Barrister

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Practice

Donald is an experienced commercial counsel who regularly appears in the superior courts and tribunals of New South Wales and the Commonwealth. His practice encompasses a wide spectrum of commercial law, with a particular focus on insurance, professional negligence, insolvency, corporations and general equity matters. Donald has also been involved in a number of commissions of inquiry (including as counsel assisting) and class actions.

Qualifications

2007: Barrister, New South Wales

2005: High Court of Australia

2004: Supreme Court of New South Wales

1998-2003: Bachelor of Arts/Law (first class honours equivalent), University of New South Wales

Previous experience

February 2005 to October 2007: Solicitor, Mallesons Stephen Jaques, Sydney:

February 2004 to January 2005: Tipstaff to the Hon Justice J C Campbell, Supreme Court of New South Wales (Equity Division)

December 2002 to February 2004: Summer Clerk/Law Clerk, Mallesons Stephen Jaques, Sydney

Selected current and recent matters

Insurance

- *Horizon Capital Financial SARL v BCC Trade Credit Pty Ltd* – acting for the assignee of the benefit of a trade credit insurance policy in proceedings in the Supreme Court of New South Wales seeking indemnity under the policy for multiple trade credit transactions (interlocutory judgment regarding leave to proceed against foreign defendants [2023] NSWSC 917)
- *Façade Innovations Pty Limited v Asta Managing Agency Limited for and on behalf of Everest Syndicate 2786 & Ors* – acting for insurers in a cross-claim brought against them in the Supreme Court of New South Wales by a building contractor seeking indemnity in respect of non-compliant exterior building cladding. Concerns, among other things, the operation of an exclusion for non-compliant building products and the obligation to advance defence costs
- *Strand Fitness Pty Ltd v QBE Insurance (Australia) Ltd; Cody Gemtec Retail Pty Ltd v The Underwriting Members of Syndicate 2003 at Lloyd's* – acting for the applicants in class actions against QBE and a Lloyd's syndicate seeking indemnity for business interruption caused by COVID-19 and government responses thereto
- *Certain Underwriters at Lloyd's of London v Dural 24/7 Pty Ltd* [2022] FCA 206; [2022] FCAFC 147 – acting for the defendant (insured) in proceedings by insurers seeking a declaration that the defendant's policy of

Liability limited by a scheme approved under Professional Standards Legislation

insurance does not respond to business interruption losses caused by COVID-19 and government responses thereto

- *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021] FCA 907; [2022] FCA 16; [2022] FCAFC 16 (appeal) and [2022] HCATrans 173 – acting for Star Entertainment Limited in a claim under its industrial special risks insurance policy for business interruption caused by government responses to COVID-19
- *Gentle Dental Care Group Pty Ltd v Al-Mozany* – acting for MDA National in proceedings by a dental practice in the Supreme Court of NSW pursuant to s.5 of the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW). Interlocutory decision on joinder: [2021] NSWSC 1234
- *R&B Directional Drilling Pty Ltd (in liq) v CGU Insurance Limited (No 2)* [2019] FCA 458; 369 ALR 137 – acting for CGU Insurance Limited in successfully resisting a contract works claim brought by an insured under a public liability insurance policy in the Insurance List of the Federal Court
- Advising primary and excess layer insurers in relation to a number of issues arising under an investment manager’s liability insurance policy in the context of multiple third party claims against multiple insureds where claims and defences costs exceeded the \$20m combined policy limit
- Advising AAI Limited t/as Vero Insurance concerning claims for indemnity by directors of a company in liquidation under a management liability insurance policy in respect of third party claims in excess of \$15m
- Advising reinsurers in relation to multiple insurance issues that arose in connection with an approximately \$900m claim under a property damage and time element insurance policy in connection with a mine collapse (settled)
- *AAI Limited t/as Vero ats Cash Converters Personal Finance* – acting for Vero in defending Federal Court proceedings brought by Cash Converters seeking indemnity in respect of the payday lending class action (proceedings dismissed without ability to bring them again)
- *Amlin Corporate Member Ltd v Austcorp Project No 20 Pty Ltd* [2014] FCAFC 78 – acting for primary and excess layers insurers in an appeal to the Full Court of the Federal Court concerning whether or not a claim was first made in the period of insurance (see also *Austcorp Project No 20 Pty Ltd v LM Investment Management Ltd* [2014] FCA 44)
- *Nonox Australia Pty Ltd v Certain Underwriters At Lloyd's Subscribing To Contract No CV0263CGL* [2014] NSWSC 221; [2014] NSWSC 222; and [2014] NSWSC 790 – acting for underwriters in Supreme Court of NSW proceedings brought by a diesel additive manufacturer seeking indemnity under a public and product’s liability insurance policy (proceedings dismissed after the plaintiff failed to provide security for costs)

Professional negligence

- *OP v Australian Securities and Investments Commissioner* – acting for the responsible manager of a financial services licensee in proceedings against ASIC seeking review of ASIC’s decision to ban him from involvement in a financial services business
- *Robert Angius v Geoffrey Granger and Brian Silvia* – acting for liquidators in proceedings in the Supreme Court of New South Wales alleging negligent payment of distributions to shareholders
- *Australian Capital Investment Pty Ltd v Baker McKenzie; Aoyin Group Limited v Baker McKenzie* - acting for Baker McKenzie in two related proceedings in the Supreme Court of New South Wales alleging negligent advice in relation to the establishment of a bank
- *Charlie Cordina v Malcolm Katon & Ors* – acting for a firm of accountants and tax agents in proceedings in the Supreme Court of New South Wales alleging negligent advice in relation to superannuation fund assets (settled)
- *Jersey Road Properties Pty Ltd v EMF Griffiths Consulting Pty Ltd* – acting for a firm of consulting engineers in a claim in the Supreme Court of New South Wales concerning an alleged failure to identify building defects (settled)

- *SFGW v AIG* – acting for a financial planner in a claim against its insurer seeking indemnity in respect of multiple claims made against the planner
- *Strictly Property Developments Pty Ltd v Meryl Anne England* – acting for a forestry contractor in a claim in the Supreme Court of New South Wales alleging conversion and trespass to goods (settled)
- *Borody v Vickers* [2021] FCA 618 - acting for a gastroenterologist sued for misleading or deceptive conduct in relation to an expert report he prepared in other proceedings
- *Aldi v Enterprise Law* – acting for Aldi in proceedings against its solicitors in the Supreme Court of New South Wales alleging negligent advice concerning superannuation (settled)
- *Budd ats NGI Savannah* – acting for a project manager and its director in proceedings brought against them in the Supreme Court of New South Wales by their former principal alleging negligence and breach of fiduciary duty in connection with the construction of a home estate (settled)
- *DFK Laurence Varnay ats Veysel's Catering and Hospitality* – acting for a firm of accountants in proceedings brought against them in the Supreme Court of New South Wales by purchasers of a business alleging misleading or deceptive conduct in the presentation of financials (settled)
- Acting for an international law firm in proceedings brought against it by the trustee of a managed fund in the Supreme Court of Western Australia (settled)
- *Bassal v Savills (NSW)* – acting for the directors of a development company in an appeal to the New South Wales Court of Appeal (settled after the two day appeal)
- *Sydney Accounting Practice ats Condor Blanc Mines* – acting for an accountant in proceedings brought against him in the Supreme Court of NSW by Condor alleging negligence in his role as accountant, chief financial officer and company secretary (settled)
- *Insurance Australia Limited v Goddard* – acting for IAL in Supreme Court of NSW proceedings against solicitors alleged to have falsely witnessed a deed of guarantee (settled)
- *Wang Lawyers ats Zha* – acting for a solicitor in Supreme Court of NSW proceedings brought by a former client alleging negligence in a conveyancing transaction (settled after 6 days of hearing)
- *Hampshire Assets and Services Pty Ltd v Blackman* [2018] NSWSC 1096 - acting for a firm of accountants in successfully defending proceedings brought in the Supreme Court of NSW by a client in relation to tax advice
- *Crowe Horwath ats Rick* – acting for Crowe Horwath and one of its former officers in Supreme Court of NSW proceedings brought by the director of a client alleging misleading or deceptive conduct (settled)
- *Financial Wise ats Westpac* - acting for a mortgage broker in proceedings brought by Westpac in the Supreme Court of NSW concerning a fraudulent mortgage (settled)
- Acting for multiple officers of BDO East Coast Partnership in liquidator's examinations in the Supreme Court of New South Wales
- *Owners – Strata Plan 64415 v Serman* [2017] NSWSC 806 – acting for Queens Counsel in proceedings brought in the Supreme Court of NSW by former clients alleging negligence (settled following an award of security for costs)
- *GPO Atrium Café Pty Ltd v Martin Heritage Management Pty Ltd* [2017] NSWSC 670 – acting for the manager of GPO Martin Place in defending Supreme Court of NSW proceedings brought by a tenant alleging misleading or deceptive and unconscionable conduct (proceedings discontinued by the tenant only on condition they could not be brought again)
- *Neville's Bus Service Pty Ltd v Pitcher Partners Consulting Pty Ltd* [2016] FCA 859 – acting for Pitcher Partners in an application to transfer Federal Court proceedings from New South Wales Registry to Victoria

General commercial and equity

- *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* – acting for the Chief Commissioner in a payroll tax in the Supreme Court of New South Wales
- *B1 Shiyong Ashmore Pty Ltd v Marsh Pty Ltd* – acting for Marsh in Supreme Court of New South Wales proceedings brought by a developer alleging that Certificates of Currency issued by Marsh were misleading or deceptive and that the developer thereby lost the benefit of recovery under an insurance policy that would otherwise have been held by a contractor
- *Eric Stanford v Pittwater Aquatic Club Co-Operative* – acting for the plaintiffs in proceedings in the Supreme Court of New South Wales seeking an easement under s.88K of the *Conveyancing Act 1919* (NSW)
- *Southern Cross Community Healthcare Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1317 – acting for the Chief Commissioner in a dispute over approximately \$80m in payroll tax
- *Re Nagirrac Moree* – acting for the plaintiffs seeking specific performance of an oral contract and relief from oppression in the Supreme Court of New South Wales (settled following the first day of hearing)
- Acting for an industrial racking contractor in an arbitration with the head contractor concerning liquidated damages, alleged construction defects and unpaid fees (settled)
- *Insurance Australia Limited v Bartlett* – acting for IAL in Supreme Court of NSW proceedings against directors of a home builder seeking recovery of payments made to third parties pursuant to home builders warranty insurance (settled)
- *Sigma Company ats Harrisons* – acting for Sigma in multiple unfair preference claims brought by the liquidator of certain Harrisons Pharmacies in the Supreme Court of NSW (settled)
- *Re Belmont Sportsmans Club Co-Op Ltd (liq)* [2016] NSWSC 1949 – acting for the liquidators of Belmont Sportsmans Club in an application to terminate a winding up
- *Kumar Motors (Bankstown) Pty Ltd v Insurance Australia Ltd (t/as NRMA Insurance)* [2016] NSWSC 1874 – acting for Insurance Australia Limited t/as NRMA Insurance in successfully resisting a claim brought in the Supreme Court of NSW by a motor vehicle dealer seeking commissions on the sale of compulsory third party motor vehicle insurance
- *Kazacos v Shuangling International Development Pty Ltd* [2016] NSWSC 1504; 18 BPR 36,353 – acting for a purchaser who defaulted under a contract to purchase a \$13m office block in successfully defending proceedings brought by the vendor in the Supreme Court of NSW seeking damages and payment of the remaining 5% deposit:
- *Cavar v Commonwealth (as represented by and acting through the Department of Human Services)* [2016] NSWCA 312 and [2016] NSWCA 195 – acting for the Commonwealth in NSW Court of Appeal proceedings brought by a litigant in person appealing against orders summarily dismissing her claim
- *Interleasing (Australia) Limited v Tieman Industries (In Liq)* [2015] FCA 1120 – acting for a liquidator in defending Federal Court proceedings concerning the validity of security interests over 40 buses (settled)
- *Heyday5 Pty Ltd v Cockram Constructions NSW Pty Ltd* [2015] NSWSC 884 – acting for an electrical subcontractor in Supreme Court of NSW proceedings against the head contractor concerning return of performance bonds and liquidated damages for delay (settled)
- *Jobson v Owners — Strata Plan No. 66870* [2015] NSWSC 776 – acting for the sub-lessees of marina berths in Supreme Court of NSW proceedings against the sub-lessor alleging unauthorised charging of outgoings
- *Visy Paper Pty Ltd v Glass Granulates Pty Ltd* [2014] NSWSC 1387 – acting for a glass processor in successfully defending Supreme Court of NSW proceedings brought by Visy alleging breach of contract for failure to receive glass contaminated with asbestos

Other notable matters

- *Montenegro v Secretary, Department of Education* [2020] FCAFC 210; 281 FCR 346 – acting for a student in an appeal to the Full Court of the Federal Court from a decision to refuse to remit his FEE HELP liability in respect of study he could not undertake due to ill health
- *Marcolongo v Chen* [2011] HCA 3; 242 CLR 546; *Chen v Marcolongo* [2009] NSWCA 326; 260 ALR 353; *Marcolongo v Lym International Pty Ltd* [2009] NSWSC 182 – acting for the plaintiff from first instance through to the High Court of Australia in the landmark litigation concerning transfers to defraud creditors under s.37A of the Conveyancing Act 1919 (NSW):
- Counsel Assisting the inquest into the death of Skye Sassine
- Counsel Assisting (with Sarah McNaughton SC) the inquest into the death of Margaret Hills
- *New South Wales Crime Commission v Police Integrity Commission; Giorgiutti v Police Integrity Commission* [2011] NSWSC 443 – acting for the New South Wales Crime Commission in proceedings in the Supreme Court of New South Wales seeking to prevent the Police Integrity Commission from investigating the Crime Commission
- *SIRs ats Pharm-a-Care & Ors* - acting for five individual officers of the Therapeutic Goods Administration in multiple Federal Court class actions concerning the collapse of Pan Pharmaceuticals
- Acting for Darley Thoroughbreds in the Equine Influenza Inquiry