

# DAVID THOMAS SC

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## AREAS OF EXPERTISE:

David Thomas SC has over 20 years' experience acting in complex commercial and civil litigation across Australia. He appears at both trial and on appeal, including in the High Court. He has a particular focus on:

- Class Actions
- Regulatory litigation
- Commercial matters
- Mergers & Acquisitions / Takeovers / Schemes of Arrangement
- Tax
- Constitutional Law

## EDUCATION AND BACKGROUND:

David was awarded University Medals in both Law and History at the University of Sydney. David subsequently received a BCL (with Distinction) from the University of Oxford, while holding the Menzies Memorial Scholarship in Law. Prior to coming to the Bar, David was Associate to Justice Gummow at the High Court of Australia and a solicitor at Mallesons Stephen Jaques (now King & Wood Mallesons) in Sydney.

## PEER RECOGNITION:

- *Best Lawyers in Australia* (Litigation and Class Action Litigation & 2022 Class Action Lawyer of the Year)
- Recommended Senior Counsel, *Doyles' Guide to Class Action Barristers*
- Leading Senior Counsel (Litigation), *Legal 500*
- Leading Senior Counsel, *Who's Who Legal*

## OTHER:

- Chair, Practice Development Committee, NSW Bar Association
- Member, Professional Conduct Committee, NSW Bar Association

## SELECTED CURRENT AND COMPLETED MATTERS:

### *High Court of Australia*

- *Vanderstock v State of Victoria* (ongoing) – landmark proceedings concerning the constitutional validity of usage charges for zero and low emission vehicles
- *Comptroller of Customs v Zappia* [2018] HCA 54 – accessorial liability under the Customs Act
- *Air New Zealand v Australian Competition and Consumer Commission* [2017] HCA 21 – market definition in relation to alleged air cargo restrictive practices
- *Cunningham v Commonwealth of Australia* [2016] HCA – constitutional validity of changes to parliamentary entitlements
- *Queensland Nickel v Commonwealth of Australia* [2015] HCA – constitutional validity of the Commonwealth’s carbon tax
- *Wellington Capital v Australian Securities and Investments Commission* [2014] HCA – role of responsible entities under the managed investment scheme regime
- *Sidhu v van Dyke* [2014] HCA 19 – proprietary estoppel
- *Lee v Commonwealth of Australia* [2013] HCA 39 – examination orders under Proceeds of Crime legislation
- *Fortescue Metals Group v Commonwealth of Australia* [2013] HCA 34 – constitutional validity of the mining tax
- *Mills v Commissioner of Taxation* [2012] HCA 51 – franking credit anti-avoidance regime
- *Michael Wilson & Partners v Nicholls* [2011] HCA 48 – apprehended bias and breach of fiduciary duty
- *Aid/Watch v Commissioner of Taxation* [2010] HCA 42 – rejection of the political objects doctrine for charitable trusts
- *Hogan v Australian Crime Commission* [2010] HCA 21 – confidentiality and non-disclosure orders
- *CGU Insurance v Portbouse* [2008] HCA 30 – coverage under ‘known circumstance’ insurance policies

In addition, David has appeared in numerous applications seeking (and opposing) special leave to appeal to the High Court.

### ***Class Actions***

- *Fox v Westpac Banking Corporation* [2023] VSC 414 (ongoing) – defending Westpac and St George Bank in a class action concerning the lawfulness of automotive flex commissions
- *Huang v Star Entertainment Group* (Vic Supreme Court, ongoing) – defending Star in four class actions arising from the Bell inquiry
- *Brady v NULIS Nominees (Australia) Limited* [2022] FCA 224; [2021] FCA 999; [2021] FCA 1517 (ongoing) – defending NULIS/Insignia in a class action concerning the imposition of grandfathered commissions and conflicted remuneration in superannuation
- *Anderson-Vaughan v AAI Limited* (Vic Supreme Court, ongoing) – defending Suncorp in a class action concerning the lawfulness of add-on insurance
- *Kemp v Westpac Banking Corporation* [2023] FCA 830; [2021] FCA 1366; [2020] FCA 1392; [2020] 437 – defending Westpac in a class action concerning the lawfulness of certain consumer credit insurance products
- *Clark v National Australia Bank* [2020] FCA 652; [2019] FCA 933 – defending NAB in the first class action brought arising out of the Banking Royal Commission
- *Asirifi v Swann Insurance* [2020] FCA 1885; [2021] FCA 459 – defending Swann in a Federal Court class action concerning the lawfulness of add-on motor vehicle insurance
- *Clurname v McGraw Hill* [2018] FCA 1289 – amicus curiae in multiple Federal Court class actions concerning collateralised debt obligations and the then largest funder commission in Australian history
- *Dillon v RBS Group* [2018] FCA 395; [2017] FCA 896 – defending RBS in a Federal Court class action concerning rolling warrants
- *Pathway Investments Pty Ltd v National Australia Bank* [2012] VSC 72; [2012] VSC 97 – defending NAB in a \$450m class action arising out of the valuation of various collateralised debt obligations (CDOs)
- *Brookfield Multiplex Limited v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 – acting for defendants in successful submission that the class action was an illegal managed investment scheme

### *Regulatory litigation and inquiries*

- *ASIC v Macquarie Bank* (Federal Court, ongoing) – defending Macquarie in Federal Court proceedings concerning fraud systems and controls in its cash management product suite
- *ASIC v Nuix* (Federal Court, ongoing) – defending the former CEO of Nuix in Federal Court proceedings concerning the accuracy of market disclosures of financial report
- *ASIC v HCF Life* (Federal Court, ongoing) – defending HCF Life in test case proceedings concerning the alleged unfairness of pre-existing condition clauses in accident insurance
- *ASIC v eToro Aus Capital* (Federal Court, ongoing) – defending eToro in proceedings concerning the recently enacted design and distribution obligations regime
- *ASIC v MLC Limited* [2023] FCA 539 – defending MLC Insurance in Federal Court proceedings concerning three challenges to certain life insurance products.
- *ASIC v Westpac Banking Corporation (Omnibus)* [2022] FCA 515 – defending Westpac in Federal Court proceedings concerning duplicate policies of insurance
- *ASIC v Westpac Banking Corporation (The Consumer Credit Insurance Case)* [2022] FCA 359 – defending Westpac in Federal Court proceedings concerning the lawfulness of its consumer credit insurance product suite
- *ASIC v Rio Tinto* [2022] FCA 184 – defending Rio Tinto in Federal Court proceedings concerning market disclosures arising from the Mozambique Riversdale acquisition
- *ASIC v Aware Financial Services* [2022] FCA 146 – defending Aware in fees for no service proceedings
- *ASIC v National Australia Bank* [2021] FCA 1013 – defending NAB in Federal Court proceedings concerning the lawfulness of ongoing fee arrangements
- *ASIC v Union Standard International Group* [2020] FCA 603; [2020] FCA 1871; [2020] FCA 1263 – acting for ASIC in Federal Court proceedings concerning margin FX products
- *ASIC v MLC Nominees* [2020] FCA 1306 – defending Australia’s largest retail superannuation trustee in the first ‘fee for no service’ proceedings arising out of the Banking Royal Commission
- *Banking Royal Commission* (2018 – 2019) – acting for National Australia Bank

- *ASIC v National Australia Bank* [2017] FCA 1338 – defending NAB in Federal Court proceedings concerning alleged market misconduct in the operation of Bank Bill Swap Rate (BBSW)
- *Independent Commission Against Corruption v Kinghorn* [2015] NSWCA 342 – overturning adverse findings of ICAC, in the first such successful challenge in almost 25 years

### **General commercial matters**

- *Greensill Bank v LAL* (Federal Court, ongoing) – defending IAL in multiple proceedings worth around \$7 billion arising from the collapse of the Greensill Group of companies
- *National Australia Bank v Human Group* [2023] NSWSC 360; [2023] NSWSC 28; [2020] NSWSC 1900; [2019] NSWSC 1404 – acting for NAB in proceedings alleging substantial fraud within the office of the CEO
- *HSBC Bank Australia v Potts* [2022] NSWCA 165; [2023] HCA Trans 49 – acting for HSBC in High Court and NSW Court of Appeal litigation concerning the financial performance of the Dick Smith Group in obtaining loan finance
- *Rinehart v Rinehart* (ongoing) – acting for the Trustee of the billion dollar Hope Margaret Hancock Trust in numerous interlocutory and final proceedings, and appeals, against Gina Rinehart and Hancock Prospecting.
- *Perpetual Investment Management Limited v RBC Investor Services Trust* (NSW Supreme Court, ongoing) – acting for RBC in proceedings concerning an alleged breach of a custody agreement
- *Seven Network (Operations) Limited v Gravity Media (Australia)* (NSW Supreme Court, settled on eve of trial) – acting for Seven in proceedings alleging breaches of an Umbrella Turnkey Deed executed in connection with Olympic broadcast coverage.
- *Katz v Epoch Systems Development* (NSW Supreme Court, settled prior to trial) – acting for Epoch in proceedings alleging breaches of employment and trust agreements
- *Seven Network v Cricket Australia* [2022] FCA 1290; [2021] FCA 1031; [2021] FCA 1032 – acting for Seven in multiple proceedings against Cricket Australia for alleged non-performance of a media rights agreement
- *Network Ten v TX Australia* [2019] NSWCA 51; [2018] NSWCA 312 – acting for Australia’s largest broadcast infrastructure company in proceedings concerning the compulsory buy-out of shares in TX
- *In the matter of TEN Network Holdings* [2017] NSWSC 1359; [2017] NSWSC 1247 – acting for WIN in proceedings arising from the collapse of Network Ten
- *RinRim v Deutsche Bank AG* [2017] NSWCA 169 – acting for Primary Health Care in proceedings concerning the lawfulness of an Accelerated Renounceable Entitlement Offer

- *RBC Investor Services v Brickworks Limited* [2017] FCA 756 – acting for Brickworks in landmark oppression proceedings arising from listed cross-shareholding
- *Sheaban v Crossman* [2017] HCATrans 75; [2016] NSWCA 200 – defending a claim for fraudulent misappropriation of trust assets
- *Bell v Westpac Banking Corporation & Ors* (multiple hearings in the WA Supreme Court, Court of Appeal and High Court) – defending 20 domestic and international banks in Australia’s largest commercial dispute

### ***Mergers and Acquisitions***

David represents both bidders and targets in many of Australia’s largest and most complex acquisitions, including numerous schemes of arrangement. Publicly disclosed clients include *Macquarie Bank*, *Magellan Asset Management*, *Australian Unity*, *Pfizer*, *Westfield Corporation*, *Crestone*, *Cheung Kong Group*, *Fairfax Media*, *David Jones*, *Alinta*, *Investa*, *Ontario Teachers Pension Plan*, *KKR*, *Cooke Group*, *Spark Infrastructure*, *CSR* and *Cooke Inc*.

### ***Tax***

- *Tabcorp Holdings v Commissioner of Taxation* (Federal Court, settled at trial) – tax characterisation of almost \$1 billion in payments made to acquire gambling and wagering licences
- *Hannover Life Re of Australasia v Commissioner of Taxation* [2023] FCA 680 – GST treatment of acquisition supplies in a life insurance business
- *Commissioner of Taxation v Wood* [2023] FCA 574 – acting for the taxpayer in proceedings concerning the tax characterisation of settlement amounts
- *Leppington Pastoral Co v Chief Commissioner of Revenue* [2023] NSWSC 463 – acting for the taxpayer in proceedings concerning the dutiable status of call options and step-in rights
- *Crown Melbourne v Commissioner of Taxation* [2022] HCA Trans 93; [2021] FCAFC 151 – GST characterisation of casino junkets
- *Greig v Commissioner of Taxation* [2020] FCAFC 25 – tax characterisation of share acquisitions under the ‘principle’ in *Myer Emporium*
- *Deputy Commissioner of Taxation v Rennie* [2018] FCAFC 38 – scope of the Harman principle in tax proceedings
- *Oswal v Commissioner of Taxation* [2016] FCA 762 – multiple proceedings arising out of the business affairs of the Oswal family
- *Uber BV v Commissioner of Taxation* [2017] FCA 110 – GST treatment of uberX ride services

*Constitutional law*

David has acted for the Commonwealth in several important constitutional matters, including successfully defending challenges to the mining tax, carbon tax, and reform of parliamentary pension entitlements. David recently acting in the first s 90 High Court challenge since *Ha*.

**September 2023**