



**Ben Kremer SC**

Barrister

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Silk: 2023

Call: 2006

Admitted: 2002

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## Overview of Practice

Ben has a diverse practice, spanning commercial and private law, public and administrative law, intellectual property, building and construction, and international and domestic arbitrations. He has particular expertise in appellate law, equity, and matters involving computers, science and technology, and has appeared in many of the leading cases in these fields in the past two decades.

He regularly represents Australian and multinational clients, Australian governments and statutory bodies, and is sought after for his advice work. Ben is usually briefed early, and is known for his ability to grasp complex issues of law and fact, his strategic insight and judgment, and the quality of his advocacy. He has been Recommended by Doyles Guide as Commercial Litigation & Dispute Resolution Junior Counsel, Intellectual Property Junior Counsel and Technology, Media & Telecommunications Junior Counsel.

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## Previous Experience and Qualifications

- 2001-2006: Solicitor and Senior Associate, Freehills, Sydney (Commercial Litigation; Intellectual Property)
- 2000-2001: Associate to the Hon Justice Gummow AC, High Court of Australia, Sydney and Canberra
- 1997-2001: Doctorate of Philosophy in Law, Magdalen College, University of Oxford, "Illegal Transactions"
- 1995-1996: Bachelor of Laws degree with First Class Honours and the University Medal in Law, University of Sydney
- 1991-1994: Bachelor of Science degree with First Class Honours and the University Medal in Organic Chemistry, University of Sydney

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## Memberships and Fellowships

Fellow, Australian Academy of Law

Member, Royal Australian Chemical Institute

Member, Society of Construction Law Australia

Member, Selden Society

Board Member, Australian Science Innovations Inc, since 2016. Deputy Chair 2017-2019; Chair 2019-2022.

## Notable and Selected Recent Matters

### *Appellate*

- *Doble v Chaffey Services Pty Ltd* [2023] WASCA 180 [appellate practice and procedure]
- *Barnett v Secretary, Department of Communities and Justice* [2023] HCA 7 (pro bono, leading Ada Lim) [international child abduction; revocation of special leave to appeal]
- *Wright v Lemon & ors* [2024] WASCA 19 (leading James Healy) [equity]
- *Commonwealth of Australia v Sanofi* [2023] FCAFC 97 (with Justin Gleeson SC leading Fiona Roughley) [equity; usual undertaking as to damages]
- *National Disability Insurance Agency v KKTB, XZJYT and YHPS* (2022) 295 FCR 379 (leading Ada Lim) [administrative law]
- *National Disability Insurance Agency v Davis* [2022] FCA 1002 (leading Ada Lim) [administrative law]
- *Merck Sharp & Dohme Corp v Sandoz Pty Ltd* (2022) 291 FCR 26 (with David Shavin QC leading Cynthia Cunliffe) [patent term extension]
- *Talacko v Talacko* (2021) 272 CLR 478 (with Dominic O'Sullivan QC leading Olaf Ciolek) [deceit and unlawful means conspiracy]
- *Kraft Foods Group Brands LLC v Bega Cheese Limited* (2020) 151 IPR 369; [2020] FCAFC 65 (with Justin Gleeson SC and Bruce Caine QC) [assignment of unregistered trade marks]
- *Commissioner of Patents v ROKT Pte Ltd* (2020) 277 FCR 267; [2020] FCAFC 86 (with David Shavin QC) [patentability of computer software]
- *Mighty River International Limited v Hughes* (2018) 265 CLR 480 (with Justin Gleeson SC) [deed of company arrangement and ss 438A, 439A, 444A, 445G of the *Corporations Act* 2001]
- *Live Board Holdings Ltd v Cody Live Pty Ltd* [2017] NSWCA 302 [security for costs]
- *Friend v Brooker* (2009) 239 CLR 129 (with Robert Newlinds SC) [equitable contribution]
- *Lumbers & Anor v W Cook Builders Pty Ltd (In Liquidation)* (2008) 232 CLR 635 (with Guy Reynolds SC) [restitution and quantum meruit]
- *MW v Director-General, Department of Community Services* (2008) 82 ALJR 629; (2008) 244 ALR 205; [2008] HCA 12 (with Guy Reynolds SC) [international child abduction]

### *Building & Construction*

- Acting for AkzoNobel in Federal Court litigation with Inpex and JKC Australia LNG (2023–)
- Acted for Australian client in claim for negligent manufacture and installation of electrical equipment [settled] (2022)
- Acted for Australian company against French joint venture partner in international arbitration seated in Singapore before Adam Constable QC, the Hon Robert French AC and the Hon Susan Crennan AC QC – marine engineering works (with Simon Hughes QC; 2019–2022)
- *G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd* [2021] NSWSC 1052 (with Michael Christie SC)
- Acted for Korean manufacturer of high voltage electrical equipment in international arbitration seated in Sydney before the Hon Robert McDougall QC (leading Jesse Kennedy; 2018–2021)
- *G&S Engineering Services Pty Ltd v MACH Energy Australia Pty Ltd (No 3)* [2020] NSWSC 1721 and [2021] NSWSC 1052 (with Michael Christie SC)
- *J Hutchinson Pty Ltd v Glavcom Pty Ltd* [2016] NSWSC 126 (with Michael Christie SC) [fraud; voidability of adjudications and non-compliance with sec 34]

- *John Holland Pty Limited v Roads & Traffic Authority of New South Wales* (2007) 23 BCL 205; [2007] NSWCA 19 (with Michael Christie) [good faith and natural justice in adjudications]

## **Commercial Law**

- *Pigozzo v Mineral Resources Ltd (No 2)* [2023] FCA 1489 (2022-) (leading Robert French) [Corporations Act and Fair Work Act]
- Acting for AAL Aviation and Qantas in relation to valuation of terminal facilities at Perth Airport (2021-): *AAL Aviation Limited v Perth Airport Pty Ltd* [2022] FCA 437 and [2022] FCA 813
- *Roberts-Smith v Fairfax Media Publications Pty Limited (No 40)* [2022] FCA 1614 [appeared for former SAS operator, Person 4, for orders under s 128 of the *Evidence Act* 1995 and suppression]
- *Perth Airport Pty Ltd v Qantas Airways Ltd (No 3)* [2022] WASC 51 [quantum meruit for landing fees at Perth Airport] (with John Sheahan QC leading Eric Heenan)
- Acted for Spectrum Metals in litigation brought by Venus Metals Corporation (with Steven Penglis SC) [alleged breach of confidence and fiduciary duties]
- *Mighty River International v Hughes and Bredenkamp as deed administrators of Mesa Minerals Ltd (Subject to Deed of Company Arrangement) [No 2]* [2018] WASC 368 (with Steven Penglis SC) [challenge to deed of company arrangement]
- Acted for the McTaggart claimants in the GetSwift class selection litigation, including *Perera v GetSwift Limited* [2018] FCA 732 (unled, and with Peter Brereton SC)
- *Addenbrooke Pty Limited v Duncan (No 3)* [2017] FCAFC 166 (with Robert Newlinds SC) [rehearing and power of Federal Court]
- *Mighty River International Ltd v Hughes & Bredenkamp* [2017] WASC 69, and appeals to the Court of Appeal of Western Australia and the High Court (with Justin Gleeson SC) [validity of deed of company arrangement]
- *Cape Lambert Resources Ltd, in the matter of Kupang Resources Ltd* [2017] FCA 1342 (unled) [security for costs in liquidator's examination]
- *Cody v Live Board Holdings Ltd* [2015] NSWSC 1790 and *Cody v Live Board Holdings Pty Ltd (No 2)* [2017] NSWSC 308 (unled) [security for costs]
- *Cody v Live Board Holdings Limited* [2014] NSWSC 78 (with Robert Newlinds SC) [validity of share issue in public company]
- *Onesteel Manufacturing Pty Ltd v BlueScope Steel (AIS) Pty Ltd* (2013) 85 NSWLR 1 (with Robert Dick SC) [sale of goods under iron ore supply contract]

## **Competition and Consumer Law / Trade Practices**

- *Unilever Australia Limited v Revlon Australia Pty Ltd (No 4)* [2014] FCA 1074, *(No 5)* [2014] FCA 1350, *(No 6)* [2014] FCA 1409 and *(No 7)* [2015] FCA 137 (unled; and with Michael Hall SC) [consumer protection and trade practices concerning composition of deodorant products]
- *Australian Competition and Consumer Commission v Dateline Imports Pty Ltd* [2015] FCAFC 114 (with Noel Hutley SC)
- *Australian Competition and Consumer Commission v Dateline Imports Pty Ltd* [2014] FCA 791 [claims under sec 52 and 53 of the *Trade Practices Act* regarding the advertising and chemical composition of a cosmetic product]
- *Application by APA GasNet Australia (Operations) Pty Ltd (No 2)* [2013] ACompT 8 (with Cameron Moore SC) [review of access arrangements for gas pipeline]

## **Constitutional and Administrative Law**

- Acting for charity in relation to State COVID relief payments (2022)
- Acting for the National Disability Insurance Agency (unled), including:
  - *YHPS and National Disability Insurance Agency* [2021] AATA 5456, *KKTB and National Disability Insurance Agency* [2021] AATA 5457 and *XZJY and National Disability Insurance Agency* [2021] AATA 5459 [supported independent living]
  - *Loadsmen and National Disability Insurance Agency* [2021] AATA 1990 [home modifications]
  - *QXDY and National Disability Insurance Agency* [2020] AATA 4180 [reasonable and necessary supports]
- *Buurabalayji Thalanyji Aboriginal Corporation v Onslow Salt Pty Ltd (No 2)* [2018] FCA 978 and *(No 4)* [2019] FCA 1275 [acting for claimant in claim for interference with their native title rights]
- Acting for the Department of Health against a challenge to a decision by the Therapeutic Goods Administration not to list a drug on the ARTG (unled; 2016–18)
- *McCloy v The Honourable Megan Latham & Ors* [2015] NSWSC 1782 (with Neil Williams SC) [apprehended bias]
- *Qarase v Bainimarama* HBC 60 of 2007; HBC 398 of 2007 [High Court of Fiji], acting for the Republic of the Fiji (with Guy Reynolds SC) [constitutional law; reserve powers and executive power; justiciability of dismissal of elected government and appointment of interim government]

## **Equity**

- Acted pro bono for appellant in New South Wales Court of Appeal concerning summary judgment for possession (2022-2023; settled)
- Acted pro bono for claimant in undue influence claim in Supreme Court of NSW (unled, leading Bernard Lloyd and Ada Lim) (2022; settled)
- *Commonwealth v Sanofi* [2023] FCAFC 97 (with Justin Gleeson SC) [usual undertaking as to damages]
- *Commonwealth v Sanofi-Aventis* (2020) 151 IPR 237; [2020] FCA 543 (with Peter Brereton SC) [usual undertaking as to damages]
- *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* (2018) 136 IPR 8; [2018] FCA 1556 (with Peter Brereton SC) [usual undertaking as to damages]
- *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296 (with Noel Hutley SC) [directors' duties at common law and under statute]
- *Friend v Brooker* (2009) 239 CLR 129 (with Robert Newlinds SC) [equitable contribution]

## **Intellectual Property; Computers, Science and Technology**

- Acting for listed Australian company in UNCITRAL arbitration relating to IT contract and data breach (2023–)
- Acted for Australian importer of lighting products in relation to claims concerning advertised performance characteristics in the Federal Court [settled; 2021-2022]
- *ViiV Healthcare Company and Shionogi & Co Ltd v Gilead Sciences Pty Limited* (2020) 152 IPR 31 and (2020) 155 IPR 490 (with David Shavin QC) [small molecule pharmaceutical patent infringement and validity]
- *Commissioner of Patents v Rokt Pte Ltd* (2020) 277 FCR 267 and *Rokt Pte Ltd v Commissioner of Patents* (2018) 139 IPR 1 (with David Shavin QC) [software patent]
- *Rokt Pte Ltd* [2017] APO 34 and *Rokt Pte Ltd* [2016] APO 66 (unled) [software patent]

- Acted for United States corporation in relation to tortious and potentially unlawful accesses to its gaming servers for the purposes of unfair competition (2014; unled) [settled]
- Acted for Optiver in relation to breach of confidence and infringement of copyright in computer source code against Tibra (2014; with Noel Hutley SC and Richard Lancaster SC) [settled]
- *CA Inc v ISI Pty Ltd* (2012) 201 FCR 23 (with John Ireland QC) [breach of confidence and infringement of copyright claims in computer source code]

### ***International and Domestic Arbitration***

- Approved BarADR arbitrator with NSW Bar Association
- See arbitrations listed above under: Building and Construction; Commercial Law; and Intellectual Property /Computers, Science and Technology
- *CPB Contractors Pty Ltd v DEAL S.R.L.* [2021] NSWSC 820 [stay of proceedings]

### ***Restitution***

- *Perth Airport Pty Ltd v Qantas Airways Ltd (No 3)* [2022] WASC 51 [acting for Qantas group companies concerning landing fees at Perth Airport] (unled; and with John Sheahan QC)
- *Nu Line Construction Group Pty Ltd v Fowler* [2014] NSWCA 51 and *Nu Line Construction Group Pty Ltd v Fowler (No 2)* [2014] NSWCA 188 (with Tim Hale SC) [recovery of partial payments in anticipation of contract for sale of land]
- *Lumbers & Anor v W Cook Builders Pty Ltd (In Liquidation)* (2008) 232 CLR 635 (with Guy Reynolds SC) [quantum meruit]

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## **Publications**

“The Origin of the Usual Undertaking as to Damages when Obtaining Interlocutory Injunctive Relief”, (2023) 17 *Journal of Equity* 211

“Equity and the Common Counts: The Development of the Action for Money Had and Received”, *Equity and Law: Fusion and Fission* Goldberg, Smith and Turner (Cambridge University Press, 2019)

“Equity and monetary remedies for patent infringement: The development of the account of profits” (2018) 12 *Journal of Equity* 168

Book Review: “Mason & Carter’s Restitution Law in Australia” (3rd ed), Mason, Carter and Tolhurst (2017) 91 *Australian Law Journal* 858

“Lord Mansfield”, *Historical Foundations of Australian Law*, vol 2, (Federation Press, 2013)

Book Review: “Restatement (Third) of Restitution and Unjust Enrichment” (2011) 35 *Melbourne University Law Review* 1197

Book Review: “Law and the Human Body: Property Rights, Ownership and Control”, Hardcastle (2008) 82 *Australian Law Journal* 876

“Open Source Software: What is it, and how does it work?” (2004) 55 *Computers & Law* 16

(with Rebecca Davies) “Pre-Trial Discovery: Order 15A of the Federal Court Rules” (2004) 24 *Australian Bar Review* 235

(with Adam Liberman) "Australia-United States Free Trade Agreement: Time to Rethink the Law Regarding Exclusive Licences of Patents and Copyright?" (2004) 17 *Australian Intellectual Property Law Bulletin* 28

"Restitution and Unconscientiousness: Another View" (2003) 119 *Law Quarterly Review* 188

"The Action for Money Had and Received" (2001) 17 *Journal of Contract Law* 93

"Recovering Money Paid Under Void Contracts: 'Absence of Consideration' and Failure of Consideration (2001) 17 *Journal of Contract Law* 37.

"Copyright Protection of Computer Programs" [2000] 6 *European Intellectual Property Review* 292

"Estoppel and Illegal Contracts" (1999) 26 *Journal of Malaysian and Comparative Law* 149

"Copyright and Computer Programs: *Data Access v Powerflex* Before the High Court" (1997) 20 *Syd L Rev* 296

"An 'Unruly Horse' in a 'Shadowy World?': The Law of Illegality after *Nelson v Nelson*" (1997) 19 *Syd L Rev* 240

"27th International Chemistry Olympiad, Beijing 1995", *Chemistry in Australia* February 1996, p. 105