

**Ben Kremer**  
Barrister

Banco Chambers  
Level 15, 60 Martin Place  
Sydney NSW 2000

Phone: +61 2 9376 0606  
ben@benkremer.com

## Curriculum Vitae

**Admitted: 2002; Called to the Bar: 2006**

### Principal Areas of Practice

- Appellate
- Building and construction
- Commercial
- Competition and consumer law / Trade practices
- Computers, science and technology
- Constitutional and administrative law
- Equity
- Intellectual property
- International and domestic arbitration
- International law and conflict of laws

### Notable and Selected Recent Matters

#### *Appellate*

- *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* (reserved) – 5 day appeal, Western Australia Court of Appeal (on appeal from [2021] WASC 159, 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) 377 ALR 387; (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; Mighty River International Limited v Mineral Resources Limited* (2018) 265 CLR 480 (with Justin Gleeson SC) [insolvency; 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]
- *Fitz Jersey Pty Ltd v Atlas Construction Group Pty Ltd* [2017] NSWCA 53 and [2017] NSWSC 72 (with Michael Christie SC) [duty of candour in ex parte applications for garnishee order]

Liability limited by a scheme approved under Professional Standards Legislation

- *HP Mercantile Pty Ltd v Plevy* [2014] NSWCA 374 [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 Australian construction company in international arbitration seated in Singapore before Sir Vivian Ramsay KC – civil engineering works (2021–)
- Acted for Australian client in claim for negligent manufacture and installation of electrical equipment against Australian supplier and Australian installer (2022)
- Acted for Australian construction 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]
- Acting for a State-owned corporation in relation to defective performance under a construction contract for construction of a pipeline (2013–2014) [settled]
- Acted for a multinational corporation in relation to defective performance under a construction contract for construction of a road (2013) [settled]
- *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***

- Acting for company director in *Pigozzo v Mineral Resources Ltd & ors* litigation in the Federal Court (2022–)
- Acting for Mineral Resources Limited in Supreme Court of Western Australia for claims brought by it for breach of contract and breach of fiduciary duty (2020–)
- *AAL Aviation Limited v Perth Airport Pty Ltd* [2022] FCA 437 and [2022] FCA 813 [valuation of terminal facilities and construction of commercial contract]
- *Ben Roberts-Smith v Fairfax Media Publications Pty Ltd & Ors* [appeared for former SAS operator for orders under s 128 of the *Evidence Act* 1995 and suppression orders]
- *Perth Airport Pty Ltd v Qantas Airways Ltd (No 3)* [2022] WASC 51 [quantum meruit for landing fees at Perth Airport] (unled; and with John Sheahan QC)
- 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 the National Disability Insurance Agency in numerous applications for review in the AAT (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 for the Commonwealth) [usual undertaking as to damages]
- *Commonwealth v Sanofi-Aventis* (2020) 151 IPR 237; [2020] FCA 543 (with Peter Brereton SC for the Commonwealth) [usual undertaking as to damages]
- *Sigma Pharmaceuticals (Australia) Pty Ltd v Wyeth* (2018) 136 IPR 8; [2018] FCA 1556 (with Peter Brereton SC for the Commonwealth) [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; Full Federal Court]
- *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 relation to IT contract and data breaches
- 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]
- Acted for The a2 Milk Company in litigation against Lion Nathan (2017–2018; with Cameron Moore SC) [settled]
- *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 international arbitrations listed under Building & Construction above
- *CPB Contractors Pty Ltd v DEAL S.R.L.* [2021] NSWSC 820 [stay of proceedings]
- Advised a listed Australian resources company in a challenge to an expert determination (unled; 2017)
- Acted for an Australian resources company against a Chinese corporation in an arbitration seated in Singapore involving Western Australian substantive law, including in relation to provisional measures (with Noel Hutley SC) [2013-2014; settled]
- Acted for an Australian power company against an international supplier (with Michael Rudge SC and Michael Christie)

### ***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]
- *Fitzsimons v TAB Limited* [2008] NSWSC 782 (with John Sheahan SC) [illegality; administrative law]

### **Previous Experience**

2001-2006: Graduate, Solicitor and Senior Associate, Freehills, Sydney.

- Commercial Litigation Section, 2001-2003 and 2004–2006
- Intellectual Property Section, 2003–2004

2000-2001: Associate to the Hon Justice Gummow AC, High Court of Australia, Sydney and Canberra.

## Education

- 1997-2001: Doctorate of Philosophy in Law, Magdalen College, University of Oxford, thesis topic: “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.

Awarded prizes including 1995 University of Sydney Convocation Medal for exceptional contribution to the University and academic excellence, and (in science) Arthur Hollis Prize, GS Caird Scholarship (Major), CH Wilson Prize for First Class Honours in Organic Chemistry and (in law) Aaron Levin Prize for Criminal Law, E M Mitchell Prize in Contracts, Australian Securities Commission Prize in Company Law, Butterworths Prize for most proficient in third year, John George Dalley Prize for proficiency in final year, RG Henderson Memorial Prize, Nancy Gordon Smith Prize and Ivan Roberts Scholarship in Law.

Winner, World 1996 Phillip C Jessup International Law Moot (Washington, DC) with award for Best Oralist in the International Rounds; Winner, Australian national round 1996 Phillip C Jessup International Law Moot (Canberra).

## Publications

- “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 Law Rev* 296

“An ‘Unruly Horse’ in a ‘Shadowy World’?: The Law of Illegality after *Nelson v Nelson*” (1997) 19 *Syd Law Rev* 240

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