

# NICOLAS KIRBY

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Curriculum Vitae

## ADMISSIONS

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Admitted as Legal Practitioner in 2004.

Called to the Bar in September 2009.

## MEMBERSHIPS

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Bar Councillor since 2021

Member of NSW Bar Council Professional Conduct Committee since 2018

Nationally Accredited Mediator (NMAS); Member of Resolution Institute

Member of Commercial Law Association of Australia

Member of Australian Association of Constitutional Law

## PRINCIPAL AREAS OF PRACTICE

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Appellate

Commercial

Commissions & Inquiries

Corporations & Insolvency

Criminal law

Equity & Trusts

Insurance

Intentional torts, professional negligence  
& defamation

Mining & Energy

Property

Protective matters

Revenue & Tax

Trade Practices

Wills, Probate & Succession

## SELECTED CASES (HYPERLINKED)

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### Commissions & Inquiries

- [Special Commission of Inquiry into the Ruby Princess](#) - Counsel Assisting the Commissioner, Bret Walker SC.

- *The Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* – Acting for Commonwealth Bank of Australia, instructed by Clayton Utz.
- *Independent Commission Against Corruption* – Appeared for clients in various inquiries including Operation Dasha and Operation Keppel.

## Appellate

- [\*Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd\*](#) [2022] WASCA 69 – Contract – Construction of services agreement – Essential terms – Time in the performance of contracts – Repudiation: willingness and ability – Credit findings: erroneous – Rejection of evidence assessment of damages (with Walker SC).
- [\*Cigno Pty Ltd v Australian Securities and Investments Commission\*](#) [2021] FCAFC 115 – Corporations – Financial services – Appeal concerning regulator’s use of Product intervention Orders in Pt 7.9A of the Corporations Act 2001 (with Walker SC & Free SC).
- [\*AIG Australia Limited v Kaboko Mining Limited\*](#) [2019] FCAFC 96 – Insurance – professional indemnity insurance - directors and officers liability policy - whether an insolvency exclusion applies - proper construction of the insolvency exclusion.
- [\*Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd\*](#) [2018] NSWCA 282 – Contract – Real Property – Appeal on whether contract was assigned or novated.
- [\*Esposito v Commonwealth of Australia\*](#) [2015] FCAFC 160 – Constitutional law – whether property acquired contrary to s 51(xxxi) – Administrative law – whether Minister empowered to prevent rezoning of land – Unjust enrichment.
- [\*Tobin v Ezekiel\*](#) [2012] NSWCA 285 per Basten, Campbell & Meagher JJA – Wills and Estates – revocation of probate – suspicious circumstances – knowledge and approval – evidentiary presumptions – Family Provision Order.
- [\*SPAR Licensing v MIS Qld\*](#) [2014] FCAFC 50 per Buchanan, Foster & Farrell JJ. Trade Practices – Franchise agreement. Breach of agreement. Whether misleading or deceptive conduct.
- [\*Hyder v Commonwealth\*](#) [2013] HCATrans 194 – Special leave application in relation to powers of arrest; grounds for arrest. False imprisonment. (with D. Brogan).
- [\*Hung and Anor v Anthony John Warner and Steven Kugel in their Capacities as Joint & Several Liquidators of Bellpac Pty Ltd \(Receivers & Managers Appointed\) \(in Liquidation\)\*](#) [2013] HCATrans 280 – Special leave application concerning the beneficial ownership of bonds.
- [\*Krecichwost v The Queen\*](#) [2012] HCATrans 294 – Special leave application – Criminal appeal – Crown alleged motive on the basis of arguably erroneous statement of the law in relation to the circumstances a dividend may be paid.

- [\*Shannessy v Beattie & Ors\*](#) [2012] NSWCA 88 per Basten JA and Sackville AJA- Appeal - civil - arguable case for appeal against primary judge's conclusions of law - leave refused where matter in issue \$100,000 or less.
- [\*Goodridge v Macquarie Bank Ltd & Anor\*](#) [2011] HCATrans 154 - Special Leave Application - Contract - Margin Loans (with Rayment QC and Kennett SC).
- [\*Northern NSW Football Ltd v Chief Commissioner of State Revenue\*](#) [2011] NSWCA 51 per Allsop P, Handley AJA and Gzell J - Taxation - Charitable exemption from payroll tax.

### **Contract & Commercial**

- [\*Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd\*](#) [2022] WASCA 69 - Contract - Construction of services agreement - Essential terms - Time in the performance of contracts - Repudiation: willingness and ability - Credit findings: erroneous - Rejection of evidence assessment of damages (with Bret Walker SC).
- [\*Narellan Franchise Pty Ltd v RBME Pty Ltd \(No 2\)\*](#) [2022] NSWSC 1590 - Restraint of trade - Franchisee - Reasonableness of contractual restraint - Contractual construction - Injunctions (with Fernon SC).
- [\*Armada Balnaves Pte v Woodside Energy Julimar \[No 2\]\*](#) [2020] WASC 14 - Contract - Breach of contract - Repudiation - Election - Affirmation - Damages - Counterfactual - Readiness, willingness & ability to perform (with Bret Walker SC).
- [\*Moorstone Financing Partners Pty Ltd v Stable Properties Pty Ltd\*](#) [2018] NSWSC 582 - Contract - Application for commission from finance obtained by defendant.
- [\*John v Toll North\*](#) [2014] NSWSC 152 per Button J - Appeal from Local Court decision concerning contract.

### **Mining & Energy**

- [\*Armada Balnaves Pte v Woodside Energy Julimar \[No 2\]\*](#) [2020] WASC 14 - Contract - Breach of contract - Repudiation - Election - Affirmation - Damages - Counterfactual - Readiness, willingness & ability to perform (with Bret Walker SC).
- [\*In the matter of Timor Sea Oil & Gas Australia Pty Ltd \(in liq\)\*](#) [2020] NSWSC 1832 - led by Kennett SC - Practice and Procedure - Notice to Produce - Claim for Public Interest Immunity - Court suppression and non-publication orders.
- [\*AIG Australia Limited v Kaboko Mining Limited\*](#) [2019] FCAFC 96 - Insurance - professional indemnity insurance - directors and officers liability policy - whether an insolvency exclusion applies - proper construction of the insolvency exclusion.
- [\*Kaboko Mining Limited v Van Heerden \(No 3\)\*](#) [2018] FCA 2055 - Insurance - Construction of Insurance Policy - Whether exclusion applies.

- [\*Kaboko Mining Limited v Van Heerden \(No 2\)\*](#) [2018] FCA 706 – Insurance – Whether plaintiff should be given leave to join defendants’ (who were plaintiff’s directors and officers) insurer.

### **Public & Administrative**

- [\*Cigno Pty Ltd v Australian Securities and Investments Commission\*](#) [2020] FCA 479 – Corporations – Financial Services and markets – product intervention orders in Pt 7.9A of the Corporations Act – Judicial Review (with Bret Walker SC and Stephen Free SC).
- [\*Pearlman v The University of Western Australia\*](#) [2018] WASC 245 – Freedom of information – Application for judicial review of decision by Information Commissioner.
- [\*Esposito v Commonwealth of Australia\*](#) [2015] FCAFC 160 – Constitutional law – whether property acquired contrary to s 51(xxxi) – Administrative law – whether Minister empowered to prevent rezoning of land – Unjust enrichment.
- [\*Pearce & Anor \(formerly Pascoe\) v Liprini\*](#) [2014] NSWSC 1316 per Hidden J – Vexatious Proceedings Act – application to set aside vexatious proceedings order.

### **Equity, Trusts & Property**

- [\*Mouin Junior Dalati v Shereen Rifat Brown\*](#) [2020] NSWSC 783 – Equity – Resulting trusts – Purchase money trusts.
- [\*Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd\*](#) [2018] NSWCA 282 – Contract – Real Property – Appeal on whether contract was assigned or novated.
- [\*Walker v Australian Forestry Holdings Pty Ltd\*](#) [2018] NSWSC 1535 – Real Property – Caveat – Whether leave should be given to lodge further caveat – Costs.
- [\*Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd\*](#) [2018] NSWSC 528 – Real Property – Contract – Whether contract novated – Whether contract assigned – Whether notices to complete and terminate contract valid – Requisitions.
- [\*Re Hegarty\*](#) [2011] NSWSC 1194 per Gzell J – Trusts. Acting for RSPCA. Non-charitable purpose trusts.
- [\*Bondi Beach Astra Retirement Village Pty Ltd v Gora\*](#) [2010] NSWSC 81 per Bryson AJ – Strata title – Vendor and purchaser – Retirement Villages – Laches – Restraint on alienation of property.
- [\*Sydneywide Pipecleaning Pty Ltd v McGee\*](#) [2016] NSWSC 424 – Freezing orders sought against the defendant – application dismissed.
- [\*QBE Insurance \(Australia\) Limited v Gregory Robert Hotchin and Ors\*](#) [2011] NSWSC 681 per Bergin CJ in Eq – Anti-suit injunction (with Fagan SC).

- [\*QBE Workers Compensation \(NSW\) Ltd v BAe Systems Regional Aircraft Ltd\*](#) [2010] NSWSC 82 per Latham J. Claim in relation to a certain class of aircraft. Summary dismissal, Abuse of Process (with R Williams QC).

### **Wills, Probate, Succession & Protective**

- [\*Pilotto v Cosoleto; Papi & Papi v Cosoleto and Cosoleto v Cosoleto\*](#) [2019] NSWSC 1454 – Succession – Family Provision – Four plaintiffs: former de facto partner, a previous former de facto partner, a daughter and a grandson.
- [\*Elizabeth Joan Paulsen as executor of the estate of the late Miriam Lesley Jean Douglass v Northern Sydney Local Health District\*](#) [2018] NSWSC 1473 – Judicial Advice – Application by executor concerning whether named trust in will had ceased to exist.
- [\*The Estate of Drummond; Drummond v Drummond\*](#) [2017] NSWSC 856 – Succession – Probate – Documents amending will – testamentary intention – Costs – applicability of offers of compromise in probate suits.
- [\*Re R\*](#) [2014] NSWSC 1810 per White J – Mental health – Financial Management Order – NSW Trustee & Guardian.
- [\*Smirski v Macander \(No 2\)\*](#) [2011] NSWSC 373 per Hallen AsJ. Succession – Property (Relationships) Act.

### **Insolvency**

- [\*David & Anor v Cohen\*](#) [2019] FCCA 70 – Bankruptcy – Service of bankruptcy notice – Meaning of “last known address”.
- [\*Haridemos, in the matter of ACT Builders Pty Ltd v ACT Builders Pty Ltd\*](#) [2017] FCA 25 – Corporations – Winding up – whether writ returned unsatisfied – whether writ returned unexecuted – whether insolvency established – whether otherwise just and equitable to wind up company.
- [\*Warner v Mayfair Limited, in the matter of the Personal Insolvency Agreement of Gore\*](#) [2015] FCA 441 per Farrell J – Bankruptcy – Personal Insolvency Agreement – Entitlement to dividends – Trustees costs.
- [\*Product People \(International\) v Box Seat Company \(in liq\)\*](#) [2013] FCA 277 per Farrell J. Winding up. Statutory demand.
- [\*Product People \(International\) v Box Seat Company \(in liq\)\*](#) [2013] FCA 1437 per Farrell J. Costs award made against non-party funder.
- [\*ASIC v ActiverSuper \(No 2\)\*](#) [2013] FCA 234 per Gordon J- Corporations – Appointment of Provisional Liquidators to trustee company (with Robins SC).

### **Corporations**

- [\*Cigno Pty Ltd v Australian Securities and Investments Commission\*](#) [2021] FCAFC 115 – Corporations – Financial services – Appeal concerning regulator’s use of Product

intervention Orders in Pt 7.9A of the Corporations Act 2001 (with Walker SC & Free SC).

- [\*Gordana Smith & Anor v Colin Steingold\*](#) [2018] NSWSC 1390 – Corporations – Legal representatives – Application to restrain solicitor from acting for the defendants in connection with oppression claim.
- [\*In the matter of Ryde Ex-Services Memorial & Community Club Limited \(subject to Deed of Company Arrangement\)\*](#) [2016] NSWSC 916 - Deed of company arrangement – Application by deed administrator for orders under s 447D of the Corporations Act 2001 (Cth) and certain declarations – Application by deed administrator for correction of register of members of incorporated club under s 175 of *Corporations Act*.
- [\*Australian Securities and Investments Commission v ActiveSuper Pty Ltd \(in liq\)\*](#) [2015] FCA 342 per White J – Corporations – Financial Services – SMSFs – Offshore funds – Misleading or deceptive conduct - Accessorial liability – Knowing concern.
- [\*Australian Securities and Investments Commission v ActiveSuper Pty Ltd \(in liq\) \(No 2\)\*](#) [2015] FCA 527 – Corporations – declarations and injunctions.

### **Trade Practices**

- [\*Snapperhead Productions Pty Ltd v Qantas Airways Limited\*](#) [2013] NSWLC 8 – Trade Practices – Misleading or deceptive conduct.
- [\*SPAR Licensing v MIS Qld\*](#) [2014] FCAFC 50 per Buchanan, Foster & Farrell JJ. Trade Practices – Franchise agreement. Breach of agreement. Whether misleading or deceptive conduct.