

CAPABILITY STATEMENT

David W Marks QC

(Revised 7 September 2021)

Areas of Practice

At Feez Ruthning (later Allen Allen & Hemsley) in Brisbane, from January 1990 until April 2000:

- Tax and revenue law, including taxation of trustees & executors, and of beneficiaries
- all Chancery work, including all commercial and corporate work
- Administrative law

At the Queensland Bar from April 2000 until the present:

- Dispute resolution practice: briefed in commercial, trust, estate, administrative law and tax matters. Selected cases listed below.
- Also, a paper practice based largely on tax, trusts and estates, and commercial

Selected cases

- Selected cases in which I have appeared (***) indicates as junior):
 - *Nendy v Armstrong* [2020] QSC 380 – estoppel – adverse possession of land
 - *Resolute Mining v Commissioner of State Revenue* 2020 ATC ¶130-017; [2020] QSC 281 – stamp duty – consideration and contingencies
 - *CLK Kitchens & Joinery Pty Ltd v Commissioner of Taxation* [2019] FCA 1086; 268 FCR 166 – income tax – collection of PAYG by estimates
 - *Commonwealth v Snell* [2019] FCAFC 57; 269 FCR 18 – administrative law – power of AAT to control own process
 - *Universal Supermodels v Commissioner of State Revenue* [2018] QSC 257; 2019 ATC ¶120-683 – payroll tax – employment
 - *Yarwood v Smith* [2018] QSC 279 – counterclaim re fiduciary duties, duties of attorney, unconscionable conduct
 - *Roo-Roofing Pty Ltd v The Commonwealth (Ruling No 5)* [2018] VSC 338, [3] – appear for witness claiming privilege against self-incrimination
 - *Ockenden v Ryan* [2018] QDC 94 – pleadings dispute in professional negligence claim
 - *Pearce v Gulmohar Pty Ltd* [2017] FCA 660 - directors' fiduciary duties, voidable transactions

- *Hacon v Commissioner of Taxation* (2017) 105 ATR 893 - private binding tax rulings, business restructure
- *Corbiere v Dulley (No. 2)* [2017] QSC 83 - alleged breach of trust
- *Pinter v Pinter* [2016] QSC 314 - equity, alleged constructive trust
- *Wangelin v van der Velde* [2016] FCA 410 - bankruptcy; review of trustees' decision
- *McEwans Australia Pty Ltd v Brisbane City Council* (2016) ATR 595 – construction of contract, GST indemnity clause
- *The MCF Group Pty Ltd v Coleman* [2015] QCA 268 – appeal, interlocutory injunction
- *Re Bundaberg Sugar Superannuation* [2014] QSC 118 - superannuation; judicial advice to trustee***
- *BERT Pty Ltd as Trustee for the BERT Fund No. 2 v Commissioner of Taxation* (2013) 95 A.T.R. 457 - income tax; nature of interest in trust
- *Re Constantinou* [2013] 2 Qd.R. 219 - private international law; judicial advice to executor; application of Hague Convention on Trusts
- *Lerinda v Laertes* [2010] 2 Qd.R. 312 - insolvency; corporate trustee; right of subrogation***
- *ING Life v Commissioner of State Revenue* 2008 ATC ¶120-057 - stamp duty, corporate reconstruction relief; nature of interest in unit trust
- *Confidential v Commissioner of Taxation* (2008) 73 A.T.R. 675 - income tax; trusts; disclaimer of interest
- *Hamilton v Commissioner of Taxation* (2007) 67 A.T.R. 235 - superannuation; tax***
- *Weyers v Commissioner of Taxation* (2006) 63 A.T.R. 268 - tax; trusts***

My [website](#) has links to cases in which I have appeared, where reasons are available.

Legal Work and Admissions to Practice

Legal professional work

Served 2 years as articled clerk at Feez Ruthning, Brisbane, commencing January 1990.

Practised under Mr Peter Allen, partner of Feez Ruthning, in the tax section within the commercial division, from commencement of articles of clerkship, later as a solicitor then senior associate, and until 1 September 1996.

Continued with Mr Allen in same capacity, with Allen Allen & Hemsley, from 1 September 1996.

Practising at the Bar in Brisbane from April 2000, starting with pupillage to Mr John Logan SC (now Logan J) and Mr Howard Alexander, both of whom practised tax.

Admissions

Admitted as solicitor, Supreme Court of Queensland, 28 January 1992 (until admitted as barrister)

Registered as practitioner, High Court of Australia, 31 May 1995, as a solicitor, and from 31 March 2000 as a barrister and solicitor

Registered as legal practitioner, Supreme Court of the Australian Capital Territory, 29 November 1999

Admitted instead as barrister, Supreme Court of Queensland, 28 February 2000

Appointed as Queen's Counsel, Queensland, 19 November 2015

Current practising certificate as Queensland barrister

Other registrations

Fellow, *Taxation Institute of Australia* (later "The Tax Institute"), from 1 July 1991 (later a "CTA")

Member, Business Law Section of the *Law Council of Australia* from 9 September 1996

Registered Tax and Estate Practitioner ("TEP") of *The Society of Trust and Estate Practitioners* (STEP) from 24 February 2005

Chartered Tax Adviser ("CTA"), *The Tax Institute* from 1 July 2012

Professional Associations

The Tax Institute:

- Presently serving on
 - Editorial Board (2021);
 - technical subcommittee: State Taxes (Queensland)
- Previously – on various committees including:
 - Queensland State Council;
 - Queensland Education Committee;
 - Dispute Resolution (National).
- Meritorious Service Award, 19 July 2013

STEP -- The Society of Trust and Estate Practitioners

- Presently – serving as:
 - Member, Disciplinary Panel (International)
 - Member, Policy Committee (Australia), (past Chair)
- Previously – served on Queensland committee

Law Council of Australia - Business Law Section

- Presently – serving as member, Tax Committee
- Previously – served as Queensland chair of Tax Committee

Bar Association of Queensland & Australian Bar Association

- Member of Tax Committees

Legal publications

Book chapters

Australian Chapter/Content, with Mr S Stevens, in *Business Development: A Practical Handbook for Lawyers* (2016)

Chapter on "Taxation", in Christensen & Duncan *Sale of Businesses in Australia*, (The Federation Press), 1st edition (1997) and 2nd edition (2009).

Articles in journals

"Discretionary Trusts – Challenging the Trustee's Discretion" (2021) 25(1) *The Tax Specialist* 39-49 *

"Novel Remedies for Dissipation, Absent Notional Estate" (2021) 95 *Australian Law Journal* 21-24

"Snell: Controlling the process of the Administrative Appeals Tribunal" (2020) 98 *AIAL Forum* 85-99 *

"Fraud & Evasion" (2019) 22(5) *The Tax Specialist* 190-200 *

"Tax Treaties: How to Read Them" (2018) 53(6) *Taxation in Australia* 314-321 *

"Not my money to give away" (2018) 22(1) *The Tax Specialist* 18-29 (about tax administration) *

"Proceeding in Certainty: Tax Rulings" (2017) 89 *AIAL Forum* 91-101 *

"Changing Perpetuity Periods and Vesting Dates" (2013) 16(3) *The Tax Specialist* 127-133

"What to do when the ATO asks for information from you or your clients" (2011) 45(11) *Taxation in Australia* 647-656 *

"Service agreements: everything has its season" (2002) 36(9) *Taxation in Australia* 460-467

"Intermediaries and GST: Who are 'you'?" (2000) 3(4) *The Tax Specialist* 194-201

"Rights of objection and appeal: stamp duty" (1999) 19(5) *The Queensland Lawyer* 150-164

"*Competition Policy Reform Act*: applying competition law to the States" (1996) 26(1) *Queensland Law Society Journal* 27-32

"Professional negligence: contribution and contributory negligence" (1989) 15(2) *University of Queensland Law Journal* 209-227

Notes in journals & bulletins

"Common professional adviser trips payroll tax exclusion" 2021 *Weekly Tax Bulletin* 6 [97]

"Exchange of information under DTA – end of the road in *Chatfield* (NZ Case)?" 2019 *Weekly Tax Bulletin* 37 [1197]

"Emails and SMS are revealing evidence" 2019 *Weekly Tax Bulletin* 35 [1136] (with Mr Terry Hayes)

"Exchange of information – NZ Commissioner loses *Chatfield* appeal ..." 2019 *Weekly Tax Bulletin* 17 [578]

"Exchange of tax information under DTAs: New Zealand case has wide import" 2018 *Weekly Tax Bulletin* 3 [68]

- “Exchange of tax information ...” 2017 *Weekly Tax Bulletin* 10 [299]
- “Guides in tax law – What use are they?” 2015 *Weekly Tax Bulletin* 11 [289]
- “Anomalies – trusts under Queensland’s *Duties Act*” (2002) 31(2) *Australian Tax Review* 119-124
- “The Commissioner as a litigant – the *Pacific Exchange* case” 2009 *Weekly Tax Bulletin* 43 [2006], pp.1872-1875
- “No GST indemnity: *Shaw (No. 2)* case – a problem for Draft GSTR 2000/D23” 2001 *Weekly Tax Bulletin* 7 [274], pp.219-220
- “Who is a “person aggrieved” by an assessment?” 2000 *Weekly Tax Bulletin* 39 [1627] and “Still aggrieved – NT stamp duty objections and appeals” 2000 *Weekly Tax Bulletin* 45 [1925]
- “*Interchase* – The meaning of ‘supply’ in GST” 2000 *Weekly Tax Bulletin* 31 [1297], pp.904-905
- “Qld stamp duty: New relief for land-rich company reconstructions – beware the traps” 1998 *Weekly Tax Bulletin* 39 [1143]
- “State and Territory revenue audits - access to Tax File Numbers” 1995 *Butterworths Weekly Tax Bulletin* 4 [74]; reproduced in 1995 *Butterworths Stamp Duties Bulletin* 2 [9]
- “Direct Federal Regulation of Australian Superannuation Mooted” (1992) 45 *British Pension Lawyer* 13-15 (co-author Ms Erin Feros)
- “Valuation of options” (1988) 6(4) *Company and Securities Law Journal* 295-298

Recent selected conference papers - unpublished

Some conference papers are linked from my website.

Asterisked publications above were first presented at TTI or AIAL events, as well.

STEP

- “STEP Code of Conduct” – presented for STEP WA (May 2020), and for STEP SA (Feb 2021)
- “Disclaimer of Testamentary Gifts” – *STEP Australia National Conference*, Brisbane, 15-17 May 2019
- “Liquidator of an Insolvent Corporate Trustee” - *STEP New Zealand Conference 2018*, 21-22 June 2018, Auckland; re-presented at *STEP SA Trusts Symposium* 6 March 2020, Adelaide
- “Partnerships of discretionary trusts” – STEP SA, *2018 Trusts Symposium*, 9 March 2018, Adelaide
- “The Right of Indemnity” - STEP South Australia, *2016 Trusts Symposium*, 11 March 2016, Adelaide
- “Extending the vesting date of trusts” - presented at *STEP Queensland Trusts Intensive*, 8 March 2016, Brisbane

Legalwise

- “Trustees: Suing and being Sued”, *Advanced Commercial Litigation*, 31 January 2020
- “Avoiding intra-family conflicts in advising”, *Business Succession and Estate Planning Conference*, 23 February 2018, Brisbane.
- Workshop - “Breach of trust, remedies and defences” - *Trusts and Deeds*, 26 March 2013, Brisbane

The Tax Institute

“Practical legal ethics for the adviser” – *2018 Death and Taxes Symposium*, 19 July 2018, Broadbeach; revised and repeated in Perth for TTI, February 2019

“What to leave out of trust deeds” - discussion paper, *Roundtable*, 7 March 2018, Adelaide

Law Council of Australia

Panel facilitator for national Tax Workshop (no papers available):

- Dispute resolution (2019)
- Tax treaties (2018)
- Trusts (2017)

Australian Bar Association

Panel facilitator – ABA Tax Workshop 2019

Commercial Law Association

“Maintaining Client Legal Privilege in Administrative Investigations”, May 2021

“Trust Busting”, August 2020 (with Beacham QC)

Higher Education

Bachelor of Commerce, First Class Honours, University of Queensland, 17 December 1988

- Thesis: “The Franchise Contract and Legal Frictions”,
DOI: <https://doi.org/10.14264/uql.2017.475>

Bachelor of Laws, First Class Honours, University of Queensland, 14 August 1990

Master of Laws, Queensland University of Technology, 8 March 1996

Contact details

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