LIST G
BARRISTERS

Justin Bourke KC



Justin Bourke KC is a deeply experienced and highly regarded trial and appellate advocate.

QUALIFICATIONS

Bachelor of Economics (Hon) (Mon)
Bachelor of Laws (Monash)
Master of Laws (Melbourne)

CORRESPONDENCE

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CHAMBERS

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COMMERCIAL LAW

Class Actions

EMPLOYMENT & INDUSTRIAL

Appellate | Confidential Information | Discrimination | Employment Contracts | Industrial Disputes | Restraint of Trade

PUBLIC LAW

Civil & Human Rights | Commissions & Inquiries | Discrimination

Justin specialises in litigation and advice in industrial, employment, human rights, and discrimination law matters across all Australian jurisdictions, including in class actions, regulatory actions, and public interest litigation.

Justin has been consistently ranked in **Chambers and Partners** as a Band 1 top tier national industrial law Silk, being referred to in the 2026 research findings as "an *excellent advocate and a clever strategist*" and "*the best industrial law barrister in Australia. When you walk into court with him you know you are 100% prepared."*

Justin is recognised in **Doyle's Guide** as a "*Preeminent*" national employment law senior counsel (one of only four senior counsel in Australia to receive this ranking). Justin is also recognised in **The Legal 500 Asia Pacific for the Australian Bar** as a leading senior counsel in Commercial Disputes (2026).

Justin conducts complex trials and appeals in the Federal Court and State Supreme Courts, especially proceedings involving or connected with industrial and employment law (statutory, contract and general law). Justin's work includes General Protections matters, human rights, and discrimination law, and proceedings involving judicial review of Commonwealth and State tribunal decisions or other government action.

Based in Victoria, Justin often appears and advises in proceedings and mediations in other States and Territories.

Justin has frequently advised and appeared on appeals in the High Court of Australia, involving the determination of issues and questions of critical importance not only to the parties, but also to the general understanding and application of the law in question.

Justin's practice and experience include:

- advising and appearing on injunction applications and other substantial interlocutory applications in proceedings, including applications concerning post-employment restraints and confidential information, fiduciary obligations, and the general law and corporations law duties of executive employees;
- advising and appearing for parties involved in proceedings brought by regulatory and compliance bodies such as the Fair Work Ombudsman;
- conducting class actions and other proceedings brought on a class or representative basis or which are connected with the pursuit of class interests or claims;
- advising on and conducting substantial proceedings in a variety of matters and appeals in the Fair Work Commission and other employment law jurisdictions, and in anti-discrimination and administrative law tribunals;
- providing advice and representation in complex matters and private mediations.

Justin has a thorough understanding of the procedure, practices and workings of the courts and tribunals in which he appears. Justin brings sound judgement and a sophisticated and highly strategic approach to the matters in which he is briefed. He regularly provides strategic advice to regulators, Commonwealth and State governments and agencies, public sector bodies, such as universities, and to large private sector employers and organisations.

Justin always strives to obtain a complete understanding of a client's fundamental objectives and the interests at stake. He prides himself on clear and timely communication with the solicitors who brief him and assisting them to ensure that their client has a proper understanding of the issues involved in their matter and of the implications of courses of action that are available.

Liability limited by a scheme approved under Professional Standards Legislation.

Recent Cases

HIGH COURT OF AUSTRALIA CASES

Setia and Ors v Hortle (2024)

In representing an employer who was subject to charges under the *Wage Theft Act 2020* (Vic), Justin formulated a High Court constitutional challenge as to the validity of that legislation. The charges against his client were ultimately withdrawn by the Victorian Wage Inspectorate just prior to the High Court considering the challenge.

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd **[2015] HCA 45; (2015) 256 CLR 137 – Operation of sham contracting provisions in the *Fair Work Act 2009* (Cth) (FW Act)**

Justin successfully argued on behalf of the Fair Work Ombudsman that s 357 of the FW Act (one of the "*sham contracting*" provisions in that Act) prohibited the knowing or reckless making of a representation that a contract was an independent contractor contract where it was properly classified as a contract of employment. That holding overturned the conclusion of a Full Federal Court that the provision only prohibited knowing or reckless representations by an employer to an employee that an existing contract of employment between them was an independent contractor contract.

Bendigo TAFE v Barclay **[2012] HCA 32; (2012) 248 CLR 500 – Operation and application of "*reverse onus*" provisions in ss 360-361 of the FW Act**

Justin successfully argued on behalf of the TAFE employer that a Full Federal Court was in error in holding that a person could be held to have contravened General Protections adverse action provisions which prohibited the taking of adverse action because there was a causal link between the workplace right exercised and the adverse action. In line with Justin's argument, the High Court held that a causal link was not the test, the question was whether the exercise of the workplace right was a substantial and operative reason for the adverse action.

New South Wales v Commonwealth of Australia (The Work Choices Case) **[2006] HCA 52; (2006) 229 CLR 1 – Constitutional validity of "*Work Choices*" legislation**

Justin was one of a number of Counsel who acted for the Commonwealth in the landmark Constitutional case where the High Court found that the Work Choices industrial legislation could be supported by s 51(xx) of the *Constitution* (the Corporations power).

Amcor v CFMEU **[2005] HCA 10; (2005) 222 CLR 241 – Redundancy entitlements under an enterprise agreement upon a company restructure**

Justin represented the Federal Minister for Employment, who intervened in this appeal in support of Amcor. Amcor and the Minister successfully argued on appeal that the relocation of its workforce to a related company did not trigger a redundancy entitlement for its workforce under the applicable enterprise agreement.

Gribbles Radiology v HSUA **[2005] HCA 9; (2005) 222 CLR 194 – Whether there was a transmission of business and thus whether associated employee entitlements were triggered**

Justin successfully argued that a decision of the Full Federal Court should be reversed. His argument that the "transmission of business" provisions in the *Workplace Relations Act 1996* (Cth) were not triggered in the circumstances of the case where a person opened the same type of business at the same location as a previous business of the same type and hired some of the previous business' staff was successful.

ABCC v Pattinson litigation 2022 **– Determination of the appropriate pecuniary penalty for a contravention**

of a FW Act civil penalty provision

Justin appeared before a five-member Full Federal Court on behalf of the Australian Building and Construction Commissioner in *Pattinson v Australian Building and Construction Commissioner* [2020] FCAFC 177; (2020) 282 FCR 580. In ruling against Justin's submissions, the Full Federal Court held that, despite the long history of contraventions by the union respondent (the CFMEU), the Court should proceed on the basis that the statutory maximum penalty was reserved only for the worst cases of contravention and that the notion of proportionality as applied in the criminal law also governed civil penalties. The decision of the Full Federal Court was appealed to the High Court. Because of the importance of the issues, the Commonwealth Solicitor General appeared in that appeal. The appeal was successful with the High Court rejecting the approach of the Full Federal Court on these questions and preferring the approach as contended below before the Full Federal Court.

FEDERAL COURT CASES

***Gillham v Melbourne Symphony Orchestra* [2026] FCA 89**

Justin successfully defended a General Protections proceeding that involved a three week trial brought by the musician, Jason Gillham, who alleged that he had his contract cancelled with the MSO because of the political beliefs he expressed on stage about Israel's conduct in Gaza.

Wilson v Commonwealth (proceeding current)

Justin is appearing for the Commonwealth in a class action under the *Sex Discrimination Act* where one lead applicant alleges, she was discriminated as a single woman and the other lead applicant alleges, she was discriminated as a lesbian, because they were both denied Medicare funding for IVF treatment because they were deemed to be "*socially infertile*" and not "*medically infertile*".

CPSU v State of Victoria (proceeding current)

Justin is appearing for the State of Victoria in a class action brought by the CPSU alleging that numerous employees of the Department of Justice and Community Safety were not given salary progression payments as required by the Victorian Public Sector enterprise agreement.

Scohel v Torrens University (proceeding current)

Justin is appearing for Torrens University in a class action where it is alleged that Torrens' casual academics across Australia have been underpaid under the Academics Award.

***Fair Work Ombudsman v Coles and Woolworths* [2025] FCA 1092 (initial judgment)**

Justin represented the Fair Work Ombudsman against Coles and Woolworths in the largest ever underpayment award claim, which was brought in parallel with overlapping class action proceedings. Justin led a team of five junior counsel in what was a procedurally and legally complex trial, which overlapped with two class actions. As a consequence of the initial judgment, Coles and Woolworths have advised the ASX that they have underpaid staff a combined estimated one billion dollars.

Fair Work Ombudsman v CFMEU (Kwinana Bulk Jetty Case) [2025] FCA 994

Justin represented the Fair Work Ombudsman in a contested trial where it was established that a person on an MUA picket made a death threat to a worker who crossed a picket line and thus contravened a number of provisions of the FW Act. The claim that the MUA was vicariously liable by reason of the death threat was

unsuccessful.

CEPU v SIMPEC **[2025] FCA 470**

Justin successfully defended a claim by multiple FIFO employees that alleged that their annual and personal leave entitlements had been incorrectly calculated under the enterprise agreement.

Hawthorn Football Club v Rioli and Ors (2024)

Justin represented Hawthorn in respect of a racial discrimination claim brought by a number of past indigenous players. The proceeding settled after a two-day private mediation.

FSU v Commonwealth Bank of Australia (2022)

Justin represented the Commonwealth Bank in class action style proceedings where the FSU alleged that the bank had not been providing tea breaks for its banking staff around Australia in breach of its enterprise agreement. The proceeding was settled at mediation.

Tucker v Broderick **[2022] FCAFC 174**

Justin successfully defended an appeal in the Full Federal Court brought against the summary dismissal of a claim brought in the Federal Court which had been instituted by a person who had previously prosecuted long running proceedings in the Victorian Supreme Court. Justin had appeared for the successful respondents on the application for summary dismissal before the primary judge. The Full Federal Court dismissed the appeal, concluding in line with a submission made by Justin, that the primary judge's finding that the proceeding in the Federal Court was an abuse of process because it sought to burden the respondents again with a claim that had been already determined in the Victorian Supreme Court and ordering the applicant to pay the respondents' indemnity costs.

Melbourne Stadiums Ltd v Sautner **[2015] FCAFC 20; (2015) 229 FCR 221**

Justin successfully argued before a five-member Full Federal Court that Melbourne Stadium (now Marvel Stadium) was entitled to summarily dismiss its senior manager for serious misconduct, overturning a contrary finding of a County Court Judge at trial. This case is now the leading case as to when an employer can rely on a ground to dismiss where the employer did not know of the existence of that ground at the time of the dismissal or did not raise it at the time of the dismissal.

Fair Work Ombudsman v Offshore Marine Services **[later known as Skilled] & MUA [2013] FCA 943; [2015] FCA 275; [2015] FCAFC 120**

Justin successfully established that the MUA had discriminated against a married couple because they did not have union membership. Penalties were secured against the MUA as well as a compensation order in favour of the couple totalling the sum of $723,300 (reduced on appeal to $330,000).

Tattsbet v Morrow **[2015] FCAFC 62; (2015) 233 FCR 46**

Justin successfully overturned a decision of a Federal Circuit Judge who found that a person who ran a Tattsbet outlet under an agency agreement was an employee of Tattsbet, not an independent contractor.

Chen v Monash University **[2015] FCA 130**

Justin successfully defended Monash University and two professors from a vast number of allegations of sexual discrimination and harassment in the workplace in a trial of 15 days' duration.

Shea v TRUenergy Australia [now EnergyAustralia] (No. 6) **[2014] FCA 271; (2014) 314 ALR 346; [2014]**

FCAFC 167; (2014) 242 IR 159

Justin successfully defended EnergyAustralia in a three-week trial and on appeal in a high-profile adverse action case brought by the former Director of Corporate & Government Affairs of EnergyAustralia. The applicant alleged that her dismissal by EnergyAustralia for redundancy was not genuine, and that it constituted adverse action in contravention of s 340 of the FW Act because she had made complaints about a corporate culture of sexual harassment in the workplace. Orders for indemnity costs were obtained against the applicant. The decisions at first instance and on appeal have significantly influenced the development of the law concerning what constitutes a complaint which an employee is able to make within the meaning of s 341(1)(c)(ii) of the FW Act.

Fair Work Ombudsman v MUA **[2014] FCA 440; (2014) 243 IR 312; [2015] FCA 814**

Justin successfully argued that the MUA had contravened the adverse action provisions of the FW Act when it published and distributed a scab poster on the Western Australian waterfront naming five men who the MUA claimed worked during a strike. Compensation orders were made in respect of each of these men. This decision was upheld on appeal: *Maritime Union of Australia v Fair Work Ombudsman* [2016] FCAFC 102.

VICTORIAN SUPREME COURT AND VICTORIAN COURT OF APPEAL CASES

Ekera Dental Pty Ltd v Creative Smiles Pty Ltd and Anor **[2025] VSCA 149**

Justin successfully on appeal overturned a finding of a County Court judge that a dentist who was working in a dental practice during an earn out period of a sale of business agreement for a dental practice was an employee and thus entitled to be paid under the relevant award. The appeal involved a detailed examination of the groundbreaking High Court judgments in *Personnel Contracting* and *Jamsek.*

Crowe Horwath (Aust) Pty Ltd v Loone **[2017] VSC 163; (2017) 266 IR 290;** ***Crowe Horwath (Aust) Pty Ltd v Loone*** **[2017] VSCA 181; (2017) 54 VR 517**

Justin successfully argued at trial and on appeal that the post-employment restraints on an executive employee did not survive his employer's repudiatory conduct that brought the employment contract to an end.

Tucker v State of Victoria litigation

Justin appeared in a series of proceedings in the Victorian Supreme Court for the State of Victoria and certain public officers. Those proceedings were brought by a plaintiff employee who was employed as a solicitor in the Victorian State Revenue Office and who was subject to an investigation of his conduct and disciplinary

proceedings. The series of cases primarily concerned the degree of natural justice that is needed to be provided to an employee who is subject to the investigation and disciplinary processes under the Victorian public sector enterprise agreement.

See: *Tucker v State of Victoria* [2021] VSCA 120; *Tucker v State of Victoria (Undertaking as to Damages)* [2020] VSC 121; *Tucker v State of Victoria [No 2]* [2021] VSCA 182; *Tucker v State of Victoria* [2023] VSCA 125 & 126; *Tucker v State of Victoria [No 2]* [2023] VSCA 180; *Tucker v State of Victoria & Anor (Summary Judgment Ruling)* [2024] VSC 135.

FAIR WORK COMMISSION CASES

Justin has appeared in many cases in the Fair Work Commission at single member and Full Bench level, including cases concerned with bargaining and contested enterprise agreement approval applications; industrial action; dispute settlement procedures under an award; enterprise agreement dispute resolution terms; and unfair dismissal. Recent cases in the Commission include:

Deliveroo Australia Pty Ltd v Diego Franco **[2022] FWCFB 156; (2011) 317 IR 253**

Justin successfully argued on the basis of recent High Court authority that the Full Bench of the Commission should overturn a decision of a single member who had decided in *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818 that a person who worked as a delivery person for Deliveroo was an employee of that business rather than an independent contractor and therefore was entitled to the protection of the unfair dismissal provisions in the FW Act.

Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd **[2024] FWCFB 287** ***& Transport Workers' Union of Australia v Cleanaway Operations Pty Ltd T/A Cleanaway Operations Pty Ltd*** **[2024] FWCFB 305**

Justin appeared for Cleanaway in two of the earliest " *Intractable Bargaining*" workplace determination proceedings in which a Full Bench of the Commission made Intractable Bargaining Workplace Determinations prescribing the employment conditions to apply to transport workers at each of two Cleanaway sites.

Memberships

Member of the Industrial Bar Association

Member of the Melbourne Football Club