

## Malcolm Harding SC



Malcolm Harding S.C is a trial and appellate barrister with extensive litigation experience

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### QUALIFICATIONS

Bachelor of Laws (Hons)  
Bachelor of Business

### CORRESPONDENCE

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### EMPLOYMENT & INDUSTRIAL

Appellate | Discrimination | Employment Contracts | Industrial Disputes | Public Sector Appeals | Restraint of Trade | Statutory Employment Rights | Work Health & Safety

### PUBLIC LAW

Administrative Law | Aged Care | Appellate | Civil & Human Rights | Commissions & Inquiries | Constitutional Law | Discrimination | Judicial Review

Malcolm has been a barrister since 2003. He has been consistently included in Doyle's Guide as a recommended Senior Counsel for industrial and employment law as well as in successive editions of Best Lawyers in Australia for this area of practice.

Malcolm has extensive experience in all areas of industrial and employment law, but also appears in public law and anti-discrimination matters and appeals. He is an experienced trial and appellate advocate and regularly appears in Federal courts and Federal tribunals such as the Fair Work Commission. Malcolm also appears in inquiries.

Malcolm is the current President of the Industrial Bar Association and has been a member of the Victorian Bar's Equality and Diversity Committee as well as the Bar's Human Rights Committee.

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## Recent Cases

### **Some of the matters Malcolm has appeared in as Counsel include:**

Until June 2020, one of counsel assisting the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability.

*AMWU v O-I Operations Pty Ltd* [2019] FCA 1331. Application by a Union for an injunction for alleged failure to comply with a term contained in an enterprise agreement and for alleged adverse action in contravention of the *Fair Work Act 2009*. Malcolm appeared for the Applicant.

*AWU v Chemring Australia Pty Ltd* [2019] FCA 750. Application by a Union for an injunction for alleged adverse action in contravention of the *Fair Work Act 2009*. Malcolm appeared for the Applicant.

*CZG v The Attorney-General for the State of Victoria* [2019] VSC 2033 (Appeal from the Victorian Civil and Administrative Tribunal). This case concerned a young man made a quadriplegic after being shot in the neck by another, who was later convicted of his attempted murder. The applicant had applied for victims of crime assistance under the *Victims of Crime Assistance Act 1998 (Vic)*, which application was rejected due to his own criminal conduct in the past. The critical issues on the appeal were whether the tribunal had correctly construed the provisions governing assistance and the legal reasonableness of the decision.

*Victoria Police v The Police Federation of Australia (Victoria Police Branch) Trading as the Police Association of Victoria* [2019] FWCFB 305 (Appeal – Full Bench of the Fair Work Commission). This appeal concerned a Victorian Detective who had applied for a change to his work arrangements under provisions in the *Fair Work Act 2009* and the industrial agreement that applied to him. These provisions granted employees aged 55 or older the right to request flexibility in their work arrangements.

*Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] 279 IR 120 (Full Court, led by Rachel Doyle SC). Appeal by the Commissioner. The case on appeal concerned the proper construction of the right of entry provisions of Part 3-4 of the *Fair Work Act 2010*. The question on appeal was whether two union officials who held right of entry permits had contravened the behavioural standards imposed by the *Fair Work Act 2009* on permit holders in circumstances where the primary judge had found that the officials had entered premises but had disavowed reliance on the powers conferred on permit holders. The appeal was upheld and the matter remitted to the primary judge. Malcolm appeared without a leader on the remittal.

*Review of the Supported Employment Services Award 2010* (Full Bench of the Fair Work Commission – modern

award review, 2018 – decision reserved). This proceeding concerned a review by the Commission of a modern award. Malcolm appeared for a disability legal advocacy service which had sought amendments to an award of the Commission that removed wage determination provisions that applied to and reduced the minimum wages of disabled workers employed by Australian Disability Enterprises throughout Australia. There was a considerable amount of evidence heard over 2 weeks.

*Gelagotis & Ors v Esso Australia Pty Ltd* [2018] FWCFB 6092 (Full Bench Appeal of the Fair Work Commission, Ross J presiding). This case arose from the dismissal of two union delegates employed by Esso at its Longford Plant in Gippsland. The dismissals occurred in the context of long running industrial disputation at the Plant. Malcolm appeared for the Applicants at every stage of the proceeding; at first instance and the appeal. Malcolm also appeared on the remedy remittal and the appeal from that decision.

*Minister for Industrial Relations v AGL Loy Yang Pty Ltd & CEPU & CFMEU* [2017] FWC 2533. This was an application by the Victorian Minister to end industrial action in the Latrobe Valley that threatened Victorian electricity supply. Malcolm appeared for the Minister.

*Pham v Victims of Crime Assistance Tribunal* [2016] VSCA 102 (Appeal to the Victorian Court of Appeal from the President of the Victorian Civil and Administrative Tribunal). Malcolm appeared for the Appellant. The Attorney-General intervened as contradictor. The case concerned the proper construction of provisions of the *Victims of Crime Assistance Act 1998 (Vic)* governing the assistance that could be awarded by the Victims of Crime Assistance Tribunal for loss of earnings. The Appellant had suffered injury and permanent disability affecting his capacity to work due to the criminal conduct of another.

*Australian Nursing and Midwifery Federation v Alfred Health* [2015] FWCFB 3045 (Appeal - Full Bench of the Fair Work Commission). Malcolm appeared for the Appellant. The main issue in the appeal was the proper construction of an enterprise agreement that governed Alfred Health's powers to discipline a nurse.

*Liviende Inc v Health Service Union* [2014] FWCFB 8089 (Appeal - Full Bench of the Fair Work Commission). Malcolm appeared for the respondent. The main issue on appeal was the proper construction of the classification and remuneration provisions of the enterprise agreement that governed Tasmanian disability workers. The relevant Tasmanian Minister intervened in the proceeding.

*Re Application by the Melbourne Fire Brigade to terminate an enterprise agreement* [2014] FWC 7929 (led by H. Borenstein QC). This month-long case examined the operation and impact on the Metropolitan Fire Brigade of clauses in an industrial agreement binding on it that it contended justified the termination of that agreement. The case was largely factual, utilizing case studies that examined particular operational impacts said to be impeding the effective and efficient operation of the Brigade.

*Energy Australia Yallourn Pty Ltd v CFMEU* [2014] 218 FCR 316 (Judicial review of a Full Bench of the Fair Work Commission - Full Court, led by H. Borenstein QC).

*State of Victoria v CFMEU* (2013) 218 FCR 172 (Appeal - Full Court, led by R. Doyle SC). This was an appeal from a single judge who had decided that the imposition of a building code by the Victorian Government, which applied to the Victorian building industry, contravened provisions of the *Fair Work Act* that proscribed coercion and adverse action against the employees of independent contractors.

*CFMEU v State of Victoria* (2013) 302 ALR 1 (Judgment at first instance that led to the aforementioned appeal, led by R. Doyle SC).

*Parks Victoria v The Australian Workers Union and Ors* [2013] 234 IR 242 (Full Bench of the Fair Work

Commission, Ross J presiding). Full Bench exercising original jurisdiction to make a workplace determination that fixed the terms and conditions of employment of employees of the State agency that manages Victorian National Parks. The case also dealt with the extent of the referral of industrial relations powers from the State of Victoria to the Commonwealth in the context of the implied constitutional immunity from the exercise of Commonwealth legislative power that affected the capacity of a State to function as a government. Malcolm appeared without a leader, save in respect of the Commission's consideration of the implied constitutional immunity for which he was led by H. Borenstein QC.

*Communications, Electrical, Electronic, Energy, Information, Postal and Allied Services Union of Australia v Dee Vee Pty Ltd* [2012] FCA 988 (Federal Court injunction application resulting in reinstatement.) This is a leading case on the principles that apply to the reinstatement of employees at an interlocutory stage of a proceeding in application of the remedial powers conferred on the Court by the *Fair Work Act* 2009).

*AIG v Fair Work Australia & Ors* (2012) 205 FCR 339 (Judicial review of a Full Bench of the Fair Work Commission – Full Court, led by H. Borenstein QC). This case concerned the proper interpretation of provisions of the *Fair Work Act* 2009 that govern the approval of enterprise agreements by the Fair Work Act where approval is dependent on the Commission's satisfaction).

*State of Victoria v Community and Public Sector Union* (2012) 223 IR 193 (Full Bench of the Fair Work Australia, led by H. Borenstein QC). Full Bench exercising original jurisdiction to make a workplace determination that fixed the terms and conditions of employment of Victorian public servants.

*Re Application by the ASU & Ors for an equal remuneration order* (2011) 208 IR 345 and (2012) 208 IR 446 (Full Bench of the Fair Work Commission, Guidice J presiding, led by H. Borenstein QC) Full Bench exercising original jurisdiction to make an equal remuneration order to deal with pay inequality between men and women that applied to the Australian non-government social and community services employers.

*AEU v Chief Executive, Department of Premier and Cabinet* (2010) 193 IR 1 and *AEU v Chief Executive, Department of Premier and Cabinet* [2010] SAIRComm 71. This was a proceeding in the South Australian Industrial Relations Tribunal proceeding that established employment conditions and wages for the South Australian teaching and TAFE workforce. Malcolm was led by M. Bromberg SC.

## Memberships

Industrial Bar Association

Victorian Bar Human Rights Committee