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## Brendan Avallone\*

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Brendan Avallone practises in all areas of employment and industrial relations law, building on his 15 years' of experience in these areas before he signed the Bar Roll on 22 October 2015. He acts predominantly for employers and government.

Brendan's practice has been ranked in peer review journals [Doyle's Guide 2018 \(Employment & WHS Junior Counsel - Victoria - Leading\)](#) and [\(Employment & WHS Junior Counsel - Australia - Recommended\)](#), [The Best Lawyers in Australia 2018 \(Labour and Employment Law\)](#), and [Doyle's Guide 2017 \(Employment & WHS Junior Counsel – Victoria - Recommended\)](#).

Prior to joining the Victorian Bar, Brendan was a Special Counsel in the Human Resources and Industrial Relations group of a major law firm, acting for a number of Victorian and Australian Government Departments and agencies, and private sector employers.

Brendan has advised and acted in a number of high profile industrial relations cases, including the Victorian public sector nurses dispute, Victorian government teachers EBA negotiations and industrial action, Australia Post enterprise bargaining over a number of years and the pre-Christmas 2009 industrial action, and picketing and industrial action at the Boeing Fisherman's Bend site.

Brendan has appeared on behalf of employers and Government agencies in the Courts, the Fair Work Commission and its predecessors, in matters regarding industrial action, protected action ballot applications, industrial disputes, unfair dismissal applications and underpayment claims.

Brendan was seconded to the Department of Employment to assist in drafting workplace legislation in 2005-2006 and the Department of Finance, and was an Associate at the Australian Industrial Relations Commission in 2001-2002. He has a Master of Laws from the University of Melbourne, specialising in workplace relations, with a First Class Honours average.

Brendan recently presented at the Victorian Bar Industrial Bar Association's inaugural industrial law update: **Recent developments regarding applications for protected action ballot order under s437**. He regularly gives presentations for organisations including the [Law Institute of Victoria](#), [Akolade](#) and [Legalwise](#).

**Committee Membership:** Brendan is a former member of the Committee of the Industrial Bar Association (2017). He also served as the Treasurer of the Industrial Relations Society of Victoria from 2007-2012 and on the IRSV Executive from 2007-2013.

### Experience

#### Victorian Bar

Signed the Bar Roll 22 October 2015

Bar Readers' Course: August-October 2015

- Brendan practises in all areas of employment and industrial relations law, building on his 15 years' of experience in these areas before coming to the Bar.
- Brendan also practises in public/administrative law (disciplinary proceedings and discrimination).

- Decided matters in which Brendan has appeared since coming to the Bar include the following. The party Brendan acted for appears in bold below:
  - [\*Fair Work Ombudsman v First Group Of Companies Pty Ltd \(Deregistered\) & Others\* \[2018\] FCCA 1228](#) (23 May 2018) – penalties for underpayment of employees, sham contracting, and penalties for involvement by principal contractor in underpayments by contractor
  - [\*Choppair Helicopters Pty Ltd and Anor v Bobridge\* \[2018\] FCA 325](#) (15 March 2018) and [\*Choppair Helicopters Pty Ltd v Bobridge \(No 2\)\* \[2018\] FCA 700](#) (18 May 2018) – appeal against decision of Federal Circuit Court – alleged award underpayments including superannuation – order for payment of compensation by person “involved” under s550 – appeal partially successful
  - [\*Bateman v Aldi Foods Pty Ltd\* \[2018\] FCCA 415](#) (23 February 2018) – opposing general protections application – termination was because of employee conduct, not an unlawful reason
  - [\*Fair Work Ombudsman v NSW Motel Management Services Pty Ltd & Ors\* \[2018\] FCCA 508](#) (21 February 2018) – application for costs under s570 of the *Fair Work Act 2009*
  - [\*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and others \(No 2\)\* \[2018\] FCA 47](#) (6 February 2018) – costs – whether s570 of the *Fair Work Act 2009* applies (decision subject to appeal) (junior to Chris O’Grady QC)
  - [\*Freeman v State of Victoria \[Department of Education & Training\]\* \[2018\] FWC 212](#) (11 January 2018) – opposing dispute notification under two enterprise agreements – no jurisdiction to deal with the dispute
  - [\*Fair Work Commission referral re right of entry permit of Stephen Long\* \[2017\] FWC 6867](#) (19 December 2017) - intervening on behalf of the **Australian Building and Construction Commissioner**, in relation to suspension of the right of entry permit of a CFMEU official
  - [\*Sensis Pty Ltd v Gundi\* \[2017\] FCA 1519](#) (15 December 2017) – appeal against decision that employee redundant when focus of duties changed – “reasonable alternative position” and “suitable position” – appeal successful (junior to Michael Wheelahan QC)
  - [\*Fair Work Ombudsman v NSW Motel Management Services Pty Ltd and others\* \[2017\] FCCA 2759](#) (14 November 2017) – opposing application for a suppression order and an objection under s128 of the *Evidence Act 1995* (junior to Chris O’Grady QC)
  - [\*Energy Australia Yallourn Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union and others\* \[2017\] FCA 1245](#) (23 October 2017) – opposing application to set aside application for declaration as to meaning of enterprise agreement (decision subject to appeal) (junior to Chris O’Grady QC)
  - [\*Fair Work Commission referral re right of entry permit of Mohammed Kalem\* \[2017\] FWC 5086](#) (18 October 2017) - intervening on behalf of the **Australian Building and Construction Commissioner**, in relation to suspension of the right of entry permit of a CFMEU official
  - [\*EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union\* \[2017\] FWCFB 3574](#) (10 July 2017) – appeal against decision in relation to decision about the application of an enterprise agreement – appeal successful
  - [\*Victorian WorkCover Authority TIA WorkSafe Victoria v CPSU, the Community and Public Sector Union\* \[2017\] FWC 3645](#) – application for an Order to stop industrial action

- **Monash University v National Tertiary Education Industry Union** [2017] FWCFB 2420 (7 June 2017) – appeal against decision in relation to decision to vary agreement – appeal successful (junior to Justin Bourke QC)
- **Adams v Department of Education and Training** [2017] FWC 2942 (5 June 2017) – opposing application alleging unfair dismissal – application dismissed
- **Davidson v Health Communications Network t/a Medical Director** [2017] FWC 2951 (30 May 2017) – dispute about modern award coverage – jurisdictional objection
- **Mohammed v City Of Whittlesea Council (No.2)** [2017] FCCA 1283 and **Mohammed v City Of Whittlesea Council** [2017] FCCA 1282 (both 15 May 2017) – opposing an application alleging contravention of the general protections of the *Fair Work Act 2009*
- **Minister for Industrial Relations for the State of Victoria v AGL Loy Yang Pty Ltd and others** [2017] FWC 2533 (9 May 2017) – application for an Order to terminate protected industrial action (junior to Frank Parry QC)
- **Halici v KDR Victoria Pty Ltd T/A Yarra Trams (No.3)** [2017] FCCA 764 (28 April 2017) – opposing an application alleging contravention of an enterprise agreement and breach of contract (junior to Chris O’Grady QC)
- **Construction, Forestry, Mining and Energy Union v EnergyAustralia Yallourn Pty Ltd** [2017] FWC 2298 (27 April 2017) - decision about the application of an enterprise agreement ([overturned on appeal](#))
- **Heading v Secretary of the Department of Education and Training on behalf of the State of Victoria** [2017] FWCFB 1352 (7 April 2017) – opposing an appeal against a decision about the application of an enterprise agreement
- **Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd** [2017] FWCFB 1019 (2 March 2017) - opposing an appeal against decision to terminate enterprise agreement (junior to Frank Parry QC)
- **Winters v Fogarty and others** [2017] FCA 51 (2 February 2017) – acting for **second and third respondents** seeking strike out of claim alleging contravention of discrimination laws during Court-ordered mediation (junior to Rachel Doyle S.C.)
- **AGL Loy Yang Pty Ltd v Construction, Forestry, Mining and Energy Union and another** [2017] FWC 432 (20 January 2017) - application for Order that industrial action (a ban on overtime and practices in relation to sick leave) stop, not occur and not be organised (junior to Chris O’Grady QC)
- **AGL Loy Yang Pty Ltd v Construction, Forestry, Mining and Energy Union and another** [2017] FWC 306 (16 January 2017) - application for order that industrial action (a ban on overtime) stop, not occur and not be organised (junior to Chris O’Grady QC)
- **Construction, Forestry, Mining and Energy Union v Kane Constructions Pty Ltd** [2016] FWC 8002 (9 November 2016) - opposing an application for a protected action ballot order – time period for ballot to occur

- National Tertiary Education Industry Union v Monash University [2016] FWCA 7945 (8 November 2016) – opposing application to vary an agreement to remove an ambiguity or uncertainty (junior to Justin Bourke QC) (decision overturned on appeal)
- Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd [2016] FWC 7839 (28 October 2016) - opposing an application for a protected action ballot order – opposing order for independent ballot agent other than Australian Electoral Commission - application to extend period of notice of industrial action to seven working days (junior to Frank Parry QC)
- Volunteer Fire Brigades Victoria v Country Fire Authority (Discovery ruling) [2016] VSC 573 (29 September 2016) – Discovery obligations in circumstances of expedited hearing in the Supreme Court of Victoria (junior to Chris O’Grady QC)
- Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd [2016] FWC 6332 (21 September 2016) - opposing an appeal against refusal to grant a protected action ballot order (junior to Chris O’Grady QC)
- Australian Commercial Catering Pty Ltd v Powell and Togia [2016] FWC 5467 (12 August 2016) – FWC appeal relating to ‘acceptable alternative employment’ and redundancy
- Construction, Forestry, Mining and Energy Union-Construction and General Division, Victoria-Tasmania Divisional Branch [2016] FWC 4256; [2016] FWC 4180 (15 July 2016) – intervening on behalf of the **Director of the Fair Work Building Industry Inspectorate**, in relation to CFMEU applications for right of entry permits to be granted to officials
- Construction, Forestry, Mining and Energy Union v Director of the Fair Work Building Industry Inspectorate [2016] FWC 4593 (12 July 2016) – opposing a stay application in relation to a decision not to grant a right of entry permit
- AGL Loy Yang Pty Ltd v Construction, Forestry, Mining and Energy Union and others (PR582599, 10 July 2016) – application for Order that industrial action (a ban on overtime) stop, not occur and not be organised
- Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd [2016] FWC 4364 (1 July 2016) - opposing an application for a protected action ballot order (junior to Chris O’Grady QC)
- Construction, Forestry, Mining and Energy Union v EnergyAustralia Yallourn Pty Ltd [2016] FWC 3961 (17 June 2016) - dispute about interpretation of enterprise agreement concerning ability of non-EBA employees to perform work also performed by EBA employees
- Halici v KDR Victoria Pty Ltd T/A Yarra Trams (No.2) [2016] FCCA 1391 (16 June 2016) - successful strike out of pleadings which alleged false imprisonment by employer of its employee (junior to Chris O’Grady QC)
- Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd [2016] FWC 3376 (2 June 2016) - opposing an application for good faith bargaining orders (junior to Chris O’Grady QC)
- Construction, Forestry, Mining and Energy Union-Construction and General Division, Victoria-Tasmania Divisional Branch [2016] FWC 3322; [2016] FWC 3190; [2016] FWC 3110 (31 May 2016) – intervening on behalf of the **Director of the Fair Work Building Industry Inspectorate**, in relation to CFMEU applications for right of entry permits to be granted to officials

- Construction, Forestry, Mining and Energy Union v **AGL Loy Yang Pty Ltd** [2016] FWCFB 2878 (11 May 2016) - opposing an application for a protected action ballot order (junior to Frank Parry QC)
- **EnergyAustralia Yallourn Pty Ltd v Construction, Forestry, Mining and Energy Union** [2016] FWC 2133 (5 April 2016) – dispute about interpretation of enterprise agreement concerning ability to outsource work
- **Turner v Australia Post** [2016] FWC 801 (2 March 2016) – jurisdictional objection to unfair dismissal application (applicant was not an employee – company was an independent contractor)
- **Australian Nursing and Midwifery Federation v Ryman HealthCare** [2015] FWC 8790 (22 December 2015) – opposing a majority support determination under the *Fair Work Act 2009*
- **Australian Commercial Catering Pty Ltd v Fair Work Commission and Powell and Togia** [2015] FCAFC 189 (22 December 2015) – judicial review of Fair Work Commission Full Bench decision, relating to ‘acceptable alternative employment’ and redundancy

#### **Minter Ellison Lawyers**

(March 2000 – August 2015; leave of absence November 2001–November 2002)

- Brendan was appointed a Special Counsel on 1 January 2011, having previously been a senior associate, lawyer and articled clerk at Minter Ellison.
- In his previous practice as a solicitor, Brendan appeared in matters including unfair dismissal hearings, adverse action conciliations, applications to stop industrial action, protected action ballot applications, and disputes about enterprise agreements in the Fair Work Commission, and award enforcement matters in the Courts, including the matters set out below.
- Acted for and advised clients including **AGL Energy, Australia Post, Catholic Archdiocese of Melbourne, Fair Work Building Industry Inspectorate** (formerly the Australian Building and Construction Commission), **Ferro Corporation, Fair Work Ombudsman**, Victorian **Department of Education and Training, Department of Health and Human Services** and **Department of Treasury of Finance, Industrial Relations Victoria, Lendlease**, the **Melbourne Racing Club** and **Southern Metropolitan Cemeteries Trust**.
- Seconded to the Australian Government **Department of Finance and Administration** to advise in relation to the drafting of a collective agreement, and a range of staff policies, for the staff of Members of the Parliament (August 2006).
- Seconded to the Australian Government **Department of Employment and Workplace Relations** to work as part of the Department’s Workplace Relations Legal Group, to assist in the preparation of the 2005 workplace relations amendments (July 2005 – Feb 2006).
- Advocacy experience while a solicitor included the following matters:
  - *ANMF re State reference public sector transitional award modernisation* (Local Government Awards) (FWCFB, 27 April 2015) - Appeared for the **Victorian Minister for Industrial Relations** in relation to modernisation of awards applying to Victorian local government employers and employees.

- Proceedings to modernise enterprise awards and State reference public sector modern awards (Various FWC conferences, 2015) – Appearing for the **Victorian Minister for Industrial Relations** and **Australia Post**
- *Madden v Woolworths Supermarkets* [2014] FWC 4338 (27 August 2014) – Successfully opposed extension of time for unfair dismissal application.
- *Yarra Valley Water Corporation re Yarra Valley Water Enterprise Agreement 2012* [2013] FWCA 3816 (4 July 2013) – Successful application to approve enterprise agreement, with opposition by both relevant unions arguing that the employer had not complied with the relevant pre-approval requirements contained in subsection 180(5) of the *Fair Work Act 2009*. (Decision was subsequently upheld on appeal)
- *CPSU v State of Victoria (Department of Education and Early Childhood Development)* [2012] FWA 6355 (26 July 2012) – Successful application for order under section 443(5) of the *Fair Work Act 2009* that non-teaching staff in Victorian government schools provide five working days' notice of protected industrial action (rather than the normal three).
- *Victorian Hospitals Industrial Association v HSU* (FWC, 28 May 2012) – Successful application to FWC to set aside an interim order, made by the Full Bench, preventing an enterprise agreement from being put to an employee ballot.
- *Victorian Hospitals' Industrial Association v HSU & ANF* (FWC, 3 May 2012) – Successful application for single interest employer authorisation in relation to the *Victorian Public Sector Nurses and Midwives Agreement 2012*.
- *Customs Officers Association of Australia v Australian Customs and Border Protection Service* (FWC, 20 July 2011) - Successfully opposed application for protection action ballot order.
- *CPSU v Australian Customs and Border Protection Service* [2011] FWA 3919 (22 June 2011) – Successful application for order that Customs Officers provide seven working days' notice of protected industrial action (rather than the normal three).
- *Award Modernisation – Termination of Instruments which are Modernisable under item 3 of Schedule 5* [2011] FWAFB 3773 (16 June 2011) – Appeared for **News Corporation Group of Companies** to oppose termination of enterprise awards applying to various News companies.
- *AWU v Fonterra Australia Pty Ltd* (FWC, 20 December 2010) – Dispute about application of agreement – pay cycles over the public holiday period.
- *CPSU v Australian Customs and Border Protection Service* [2010] FWA 8293 (26 October 2010) – CPSU application for protected action ballot order – submissions regarding permissibility of a 'rolled up' question seeking a single yes/no answer to whether multiple forms of industrial action are approved.

- **Fonterra Australia Pty Ltd** re *Fonterra (Farm Milk Collection – Tasmania) Agreement 2010* (FWC, 21 October 2010) – Successful application to approve enterprise agreement, requiring undertakings to meet better off overall test.
- *Thomas v Little Sisters of the Poor Aged Care Limited* (FWC, 8 July 2010) - Successfully appeared for the employer in the arbitration of this unfair dismissal application.
- **Australian Postal Corporation** v *CEPU* (AIRC, 1 June 2009) – Application for orders under section 496 that industrial action not occur and not be organised.
- **State of Victoria (Department of Education and Early Childhood Development)** v *CPSU and AEU* (AIRC, 9 December 2008) – Successful application to vary and extend the *Victorian Government School Services Offices Agreement 2004*.
- **Thales Australia Limited** v *AMWU* (AIRC, 4 June 2008) – Application for section 496 that industrial action stop, not occur and not be organised.
- *Australian Principals Federation* v **Department of Education and Early Childhood Development** [2008] AIRC 396 (8 May 2008) – Application by the APF to extend time allowed for voting in a protected action ballot. Successfully opposed the extension of time on jurisdictional and discretionary grounds.
- **Free (a workplace inspector)** v *Colin's Carpentry Services Pty Ltd and Bonnici* (Magistrates' Court of Victoria, 19 December 2007) - Appeared for a workplace inspector, successfully seeking the imposition of a penalty for underpayments, including penalties paid by the director of the company for involvement in the company's breach.
- **Bradford (a workplace inspector)** v *Taylor Lakes Family Hotel Pty Ltd* (Magistrates' Court of Victoria, 7 November 2007) - Appeared for a workplace inspector, successfully seeking the imposition of a penalty for underpayments.
- **Hawker de Havilland Aerospace Pty Ltd** v *AMWU* (FWC, 7 September 2007) - Successful application for order under section 496 that industrial action stop and not occur.
- *CEPU* v **Australia Post** [2007] AIRC 130 (21 February 2007) – Application for the Commission to withdraw an earlier finding that there was a dispute about the application of the enterprise agreement, on the basis that the Commission had erred as to jurisdiction and was therefore not *functus officio*. Commission accepted it was not *functus officio*.
- *CPSU* v **State of Victoria (Department of Education and Training)** (AIRC, 4 October 2006) – Appeared for the Department in relation to the CPSU's claim that non-teaching staff should be reimbursed for their costs in relation to applying for a Working with Children check under the *Working With Children Act 2005*



- *SDAEA and others re Application to vary Victorian Minimum Wage Orders* (AIRC, 24 April 2006) - Appeared for the **Commonwealth Minister for Employment and Workplace Relations**, to put submissions explaining the legislative status of Victorian Minimum Wage Orders.
- *FSU v Ace Insurance Agencies Pty Limited and others* (AIRC, 16 March 2006 and 21 March 2006) – Application to adjourn roping-in award application, to test whether a union log of claims against our client was properly approved.

#### **Australian Industrial Relations Commission**

Associate to Deputy President Ives (November 2001 – November 2002)

### **Education**

#### **Master of Laws (University of Melbourne)** (2008)

- First-class honours average across all subjects, focussing on employment and workplace relations
- Awarded the Harmers Workplace Lawyers Prize for Labour Relations Law

#### **Bachelor of Laws (Hons) (University of Melbourne)** (2000)

- Graduated with Second Class Honours (H2A)

#### **Bachelor of Commerce (Hons) (University of Melbourne)** (1997)

- Graduated with First Class Honours (H1)
- Dean's Honours List - Third Year of Bachelor of Commerce

### **Admission details**

- Supreme Court of Victoria: 2 April 2001
- High Court of Australia: 10 May 2001
- Signed the Bar Roll: 22 October 2015