

Justin Pen

Solicitor 2017

Barrister 2022

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Justin specialises in all areas of labour law, including employment, anti-discrimination, and work health and safety law. He also regularly accepts briefs in commercial law and public law matters.

He is regularly briefed to act unled in proceedings before the Federal Court of Australia, Federal Circuit Court and Family Court of Australia, and the Fair Work Commission in his principal areas of practice.

Before coming to the bar, Justin was a Senior Associate with Harmers Workplace Lawyers and a Solicitor with the Marrickville Legal Centre. He also previously served as Tipstaff to the Hon. Justice Robertson Wright in His Honour's then role as President of the New South Wales Civil and Administrative Tribunal.

His work has been published in, among other places, the Alternative Law Journal, a quarterly peer-reviewed legal affairs journal; Workplace Review, Thomson Reuters' industrial relations journal; and Bar News, the journal of the New South Wales Bar Association. He also maintains Recent Cases in Labour Law, a monthly case-note bulletin of decisions of interest, and presents to law firms and community legal centres on topics of interest.



Justin brings to each matter a strong knowledge of case law, robust strategic issue identification and problem-solving skills, and an attentive demeanour. He takes a collaborative and egalitarian approach to litigation and encourages input from all members of a legal team.

Copies of his presentation slides and published articles are generally available on request.

QUALIFICATIONS

2022	Called to the Bar
2017	Admitted to practice
2016	Bachelor of Laws, University of Sydney
2014	Bachelor of Arts, University of Sydney

LABOUR LAW

Monash IVF Pty Ltd (ACN 006 942 990) v Dr Charlotte Mooring (New South Wales Supreme Court, 29 July 2024) (Parker J) – Restraint of Trade – interlocutory application by fertility services and treatments provider to enforce a restrictive covenant to prevent a medical doctor from working for a competing provider; relevance of delay and prejudice to third-party patients to balance of convenience (for the defendant, instructed by Gadens, led by D Mahendra).

Primerano v Schisan Investments Pty Ltd [2023] FedCFamC2G 667 (D. Humphreys J) – Employment Law – separate question to be determined regarding whether applicant was an employee or independent contractor; contested findings of fact where contract between the parties was wholly oral (for the respondents, instructed by Kent Attorneys, led by P Thew).

Fair Work Ombudsman v Rainbow Wholefoods Pty Ltd (ACN 604 881 870) & Anor (Federal Circuit and Family Court of Australia, penalty orders made by consent, 5 July 2023) (Goodchild J) – Civil Penalties – regulatory prosecution against a company and its director for non-compliance with orders of the Fair Work Commission; application of common law “course of conduct” principle to admitted contraventions of the Fair Work Act 2009 (Cth) and role of deterrence where a genuine and reasonable belief is held as to lawfulness of non-compliance (for the respondents, instructed by Wall & Company Lawyers, unled).

Tattersalls Capital Pty Ltd trading as Tattersalls Real Estate v Rebecca Colban (Local Court of New South Wales, 16 February 2023) – Restraint of Trade; Penalty Doctrine – claim by a real estate agency for liquidated damages for real estate agent’s alleged breach of non-solicitation clause; whether restraint of trade was reasonable having regard to duration and whether agreed damages clause was an unenforceable penalty (for the defendant, instructed by Harmers Workplace Lawyers, unled).

COMMERCIAL LAW

Shapkin v The University of Sydney [2024] NSWSC 1091 (Campbell J) – Appeals; Leases and Tenancies – appeal from the New South Wales Civil and Administrative Tribunal regarding the application of the Residential Tenancies Act 2010 (NSW) to student accommodation; whether statutory exemptions enlivened because the agreement was one under which the student “lodges with another person” or because the premises were “used, or intended for use, principally as a... hall of residence for students of an educational institution” (for the defendant, instructed by Bartier Perry, led by B Tronson).

Shapkin v The University of Sydney [2024] NSWCA 156 (Meagher JA, Griffiths AJA) – Appeals; Practice and Procedure – application for leave to appeal decision by primary judge to decline to conduct, and stay, judicial review proceedings; whether discretion of primary judge miscarried in refusing to conduct judicial review concurrent with a statutory appeal from decisions of the New South Wales Civil and Administrative Tribunal (for the respondent, instructed by Bartier Perry, led by A Rao).

JKM Window Door Facade Strata Professionals Pty Ltd v Probuild Project Management Pty Ltd Local Court (Local Court of New South Wales, 9 October 2023) – Building and Construction – application by contractor for summary judgment; whether email was a

“payment schedule” under section 14 of the Building and Construction Industry Security of Payment Act 1999 (NSW) (for the defendant, instructed by MistryFallahi, unled).

Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd [2023] NSWSC 178 (Rees J) - Building and Construction – claim by a builder for damages and specific performance under a design and construct contract and cross-claim by principal for defective building work and failure to achieve practical completion; whether “conditional” certificates comprised certificates of practical completion (for the defendant /cross-claimant, instructed by William Roberts Lawyers, led by I G Roberts SC and H Pintos-Lopez).

PUBLIC LAW

FKT v Children’s Guardian [2023] NSWCATAD 22 (Senior Member J McAteer and General Member R Royer) - Administrative Law – external review of Children’s Guardian decision to refuse a working with children’s check to a person who had been found not guilty of various criminal offences; whether a reasonable person would allow the applicant to work unsupervised with their child (for the respondent, instructed by the Crown Solicitor’s Office, unled).

AZ v Sydney Local Health District [2022] NSWSC 878 (Richmond J) - Child Welfare – claim by parents of a child in the parens patriae jurisdiction of the Supreme Court of New South Wales to restrain a local health district from discharging the child from a hospital (for the plaintiffs, instructed by McGirr & Associates, led by B Tronson) (pro bono referral from the New South Wales Bar Association’s Legal Assistance Referral Scheme).

Publications

ARTICLES/ CASE NOTES

Justin Pen and Emily Aitken, ‘Vox ex machina: recent cases in audio-visual link law’ (2024 Autumn) Bar News: Journal of the NSW Bar Association 58.

Brenda Tronson and Justin Pen, ‘Preparing expert evidence: “Render unto the expert the things that are the expert’s”’ (5 August 2022) Law Society Journal (online).

Justin Pen, ‘(I Can’t Get No) Jurisdiction’ (2022 Winter) Bar News: Journal of the NSW Bar Association 14.

Justin Pen, ‘Employees vs Independent Contractors’ (2022 Autumn) Bar News: Journal of the NSW Bar Association 26.

Justin Pen, ‘Workers’ rights in the gig economy’ (Spring, 2018) 9(1) Workplace Review 26.

BOOK REVIEWS

Justin Pen, ‘The Odyssey by Homer: translated by Emily Wilson’ (2024 Autumn) Bar News: Journal of the NSW Bar Association 106.

Justin Pen, ‘Common Law, Equity and Statute: A complex entangled system’ by Mark Leeming (2023) 48(4) Alternative Law Journal 305-306.

PRESENTATIONS

“The Right to Disconnect” to the Piddington Society (March 2024).

“Deeds of Release: Doing Them and Undoing Them” to Legal Aid NSW (March 2024), Herbert Smith Freehills (May 2023), and Community Legal Centres NSW’s Employment and Discrimination Network (February 2023).

“Industrial manslaughter and recklessness offences” - Greenway Chambers CPD (February 2024) (with Colin Magee).

“Work Health and Safety Update” (March 2023) - Greenway Chambers CPD (with Ingmar Taylor SC and Malcolm Scott).

“Unreasonable additional working hours - claims under the Fair Work Act 2009 (Cth)” to the New South Wales Young Lawyers’ Workplace and Safety Law sub-committee (October 2022), Harmers Workplace Lawyers (October 2022), and Herbert Smith Freehills (October 2022).

Other Experience

2023 - Present	Committee Member, Bar News Committee NSW Bar Association
2021-2022	Art + Culture Editor Alternative Law Journal
2020-2021	Co-Chair, Employment and Discrimination Law Network
2018-2021	Editorial Board Member Alternative Law Journal