HIGH COURT OF AUSTRALIA

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY
BETWEEN:

**Construction, Forestry, Maritime, Mining and Energy Union**

First Appellant

**Daniel McCourt**

Second Appellant

and

**Personnel Contracting Pty Ltd**

Respondent

## APPELLANTS' SUBMISSIONS

### Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

### Part II: Issues

2 There are five issues:

(a) what is the significance of Mr McCourt not conducting his own business;
(b) how is control assessed in triangular labour hire arrangements;
(c) what is the significance of the characterisation terms;
(d) whether casual engagement contraindicates employment;
(e) whether the decision in *Personnel Contracting v Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312 was plainly wrong.

### Part III: Section 78B notices

3 No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

### Part IV: Decision below

4 This is an appeal from the decision of the Full Court of the Federal Court of Australia in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 381 ALR 457; [2020] FCAFC 122 (FC), dismissing an appeal from the judgment

in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 (O'Callaghan J) (TJ).

**Part V: Statement of facts**

5 The facts are not in dispute (Core Appeal Book (**CAB**) 14 TJ [17]) and are summarised in CAB 94 FC [27] and [42]. In July 2016 the second Appellant, Mr McCourt, was a 22-year-old backpacker on a working holiday visa who did not conduct a business. On 25 July 2016 he attended an interview at the offices of the Respondent where he signed an Administrative Services Agreement (the ASA) and an Induction Manual which contained nine pages of directions and stated that it is 'not intended to replace instructions given on site by our clients, their supervisors, or other authorised persons'.[1] The next day an employee of the Respondent called Mr McCourt and offered him work at the Concerto site of Hanssen, a builder largely of high-rise residential apartments, and told Mr McCourt what to wear, where to go, and when to start, and Mr McCourt accepted the offer.[2] On 27 July 2016 Mr McCourt attended the Concerto site, the supervisor directed him to be inducted by a worker engaged by Hanssen, was told he would be directly supervised by a leading hand engaged by Hanssen, Ms O'Grady, and was given the Induction Form and Hanssen Site Rules.[3]Mr McCourt was a general labourer principally engaged to clean and move materials who worked under the close supervision of Ms O'Grady and other workers engaged by Hanssen at that site. He was told what to do and how to do it.[4] He usually worked about 50 hours over 6 days per week from 26 July 2016 until 6 November 2016 and then again from 14 March 2017 to 30 June 2017.[5]

6 The arrangement involved a typical triangular labour hire relationship in which there was a contract between the worker (Mr McCourt) and a labour hire company (the Respondent); a contract between the labour hire company and a third-party client (Hanssen), under which the labour hire company agreed to provide workers to Hanssen; and no contract between the worker and the client. The contract with the worker was terminable on no or short notice.[6] On 22 July 2016 Hanssen placed a job order for a cleaner, without any required

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1 The full terms of the ASA are at CAB 102, 137, 140 FC [49], [151], [160].
2 CAB 14-15, 31 TJ [19]-[29], [79], CAB 105-106 FC [55]-[57].
3 CAB 16 TJ [30]-[32], CAB 106 FC [58] (the Induction Form and Site Rules are TJ annexures C and D).
4 CAB 16, 18, 18, 36 TJ [34], [39], [41], [105], CAB 107 FC [60].
5 CAB 16-17 TJ [33]-[35], [42], CAB 102-104 FC [49], [50].
6 CAB 8, 9, 23 TJ [2], [9], [56], CAB 87-88, 94, 95, 101, 109, 111 FC [5], [27], [29], [48], [65], [70]; The terms of the labour hire agreement (LHA) are at CAB 57-59 TJ Annexure A.

skills, competence, qualifications or experience. The stated anticipated hours were 5.5 days per week and the anticipated duration was 'as required'. A similar job order for a labourer applied to the 2017 engagement.[7] The ASA (clause 4(a)) required Mr McCourt 'to co-operate in all respects with…the builder in the supply of labour' and under clause 4 of the LHA the workers were 'under the client's direction and supervision from the time they report to the client and for the duration of each day on the assignment'.

7 The Appellants allege the Respondent contravened various National Employment Standards and s 45 of the *Fair Work Act 2009* (Cth) (the Act) by not paying Mr McCourt in accordance with the *Building and Construction General On-Site Award 2010*. During his
10 period of engagement Mr McCourt was paid about 75% of what he would have received under the award.[8] The National Employment Standards and award only apply if Mr McCourt was an 'employee' as defined in s 15 of the Act.[9]

**Part VI: Argument**

**Issue 1: The significance of Mr McCourt not conducting his own business**

8 Ultimately the issue is whether Mr McCourt was an employee under s 15 of the Act. It may be that the meaning of 'employee' in s 15, other than the extended meaning in s 15(1)(a) and its narrower meaning in s 15(1)(b), mirrors the common law meaning of employee which is in turn based on the distinction drawn in the law governing vicarious liability.[10] The fundamental concerns and considerations underlying the doctrine of vicarious
20 liability should inform the criteria chosen and the content of those criteria in drawing the employee-independent contractor distinction.[11] A single, fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law.[12] There are multiple rationales.[13] As the underlying policy is to inform the criteria chosen, the rationale for imposing vicarious liability is important.

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7 CAB 9, 15, 31, 32 TJ [8], [29], [78], [84], CAB 101 FC [48].

8 CAB 87 FC [4].

9 Sections 11, 13, 14, 15 and 42 of the Act.

10 *C v Commonwealth* (2015) 234 FCR 81 at [34], [36], [54], *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at [27], [33] (*Sweeney*), *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 at [28], CAB 109 (FC at [64]) (*ACE Trial*): *cf ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at [28] (*ACE Appeal*).

11 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [36], [40], [43], [45] (*Hollis).*

12 *Hollis* at [35], *Sweeney* at [11], *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at [39] (*Prince Alfred College*), *State of New South Wales v Lepore* (2003) 212 CLR 511 at [106], [196] *(Lepore).*

13 *Hollis* at [35].

9 One rationale for imposing vicarious liability is enterprise risk.[14] Conducting a business involves the creation of certain risks. The person who derives the benefit of conducting an enterprise should bear the concomitant costs and burdens. However, putting the worker in the place to commit the wrong is insufficient to attract vicarious liability without reference to two matters that limit what is meant by enterprise risk. First, the risk must be in the course of the employment. Second, the enterprise risk which justifies the imposition of liability is 'the risk of injury caused by an employee in pursuing the *employer's* venture' and imposition of vicarious liability is not justified by conduct 'divorced from the conduct of the employer's business'.[15] On this narrow notion of the relevant enterprise risk,
10 the rationale is served when the liability is imposed for the way in which the employer's business is conducted, and is not served when the employee is conducting an independent venture or business. That distinction explains the results in both *Sweeney* and *Hollis*: in the former it was found the worker 'conducted his own business' and so there was no vicarious liability, and in the latter it was found the workers 'were not running their own business or enterprise' and vicarious liability was established.[16]

10 Another possible rationale for imposing vicarious liability in some circumstances is that the employee is acting on the employer's behalf, at least when liability arises from wrongful acts in the ostensible pursuit of the employer's business, in the apparent execution of authority which the employer holds out the employee as having, in the intended pursuit
20 of the employer's interests or in intended performance of the contract of employment.[17] A worker who performs the work in the conduct of an independent business does so as principal, not as agent: such work is 'the independent function of the person who undertakes it'.[18] Other possible rationales concern control, the selection of who does the work and the employer's implied indemnity. Workers conducting their own businesses tend to be able to

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[14] *Hollis* at [41]-[42], *Lepore* at [197], [202], *Scott v Davis* (2000) 204 CLR 333 at [253] (*Scott)*, *Bugge v Brown* (1919) 26 CLR 110 at 117 (*Bugge*).

[15] *Lepore* at [221] (emphasis in the original): see also at [202], [222], *Sweeney* at [23], [24], [31], *Hollis* at [40]-[42], *Bugge* at 117, P Bomball, 'Vicarious Liability, Entrepreneurship and the Concept of Employment at Common Law' (2021) 43(1) *Syd L R* 83 at 101-3 (*Bomball Vicarious Liability*).

[16] *Sweeney* at [31], *Hollis* at [47], see also *Prince Alfred College* at [46].

[17] *Lepore* at [108], [128], [231], *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Company of Australia Ltd* (1931) 46 CLR 41 at 49 (*Colonial Mutual*).

[18] *Colonial Mutual* at 48, *Hollis* at [40]: see also *Colonial Mutual* at 70 ('acting on his own account…' and 'he was pursuing his own agency business…'), *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 36, 37 (*Stevens)*.

exercise control over who does the work and how the work is done and the implied indemnity does not extend to independent contractors as they are 'trading on their own account and for their own financial benefit'.[19]

11 The trial judge at CAB 52 TJ [163] and the Full Court concluded that Mr McCourt was not conducting his own business and treated this as one fact or indicator. The Appellants advance their case about this conclusion in two alternative ways. First, the correct approach is to ask whether the worker when performing the work pursuant to a contract with the putative employer was conducting his or her own independent business (the ultimate question approach). The answer to that question is determinative of the character of the
10 relationship: if the worker was not conducting such a business he or she was an employee, and if the worker was conducting such a business he or she was an independent contractor. Second, alternatively, the correct approach is that whether a worker in performing the work pursuant to a contract with the putative employer is conducting his or her own independent business is the organising conception which guides the inquiry and informs judgements about the weight to be given to relevant facts (the organising conception approach).

12 Asking whether the worker when performing the work is conducting his or her own independent business is determinative as that question is simply a different way of asking – is the worker an employee? It is the same question as asking if the worker is engaged under a 'contract of service' or a 'contract for services'.[20] Both the ultimate question approach and
20 the organising conception approach continue be based on the multifactor and totality approaches, continue to afford appropriate weight to control and the importance of personal service in characterising the relationship, and are supported by the underlying policies of the law governing vicarious liability and the Act.

13 Windeyer J in *Marshall*[21] stated that the distinction between a servant and an independent contractor: 'is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own'. The distinction is between a person who serves and a person who conducts a business. Wilson and Dawson JJ in *Stevens* observed of that statement that 'he

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[19] J Neyers, 'A Theory of Vicarious Liability', (1995) 43 *Alberta Law Review* 287 at 301, 304, noted in *Sweeney* at [12].

[20] See eg *Stevens* at 36, *ACE Appeal* at [24], [26].

[21] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 (*Marshall)*.

was really posing the ultimate question in a different way' and 'the ultimate question will always be whether a person is acting as the servant of another or on his own behalf'.[22]

14 The majority in *Hollis,* after endorsing the distinction drawn by Windeyer J, concluded the couriers 'were not running their own business or enterprise, nor did they have independence in the conduct of their operations'.[23] This was not advanced as a reason why the couriers were employees: it was stated as a conclusion synonymous with the conclusion that they were employees.[24] The couriers were not 'running their own enterprise' and had limited scope for 'the pursuit of any real business enterprise on their own account'.[25] The decision in *TNT Worldwide Express (NZ) Ltd v Cunningham*[26] was distinguished by the
10 majority on the basis that the drivers there were conducting their own businesses.[27]

15 Similarly the majority in *Sweeney* stated: 'The mechanic was not an employee of the respondent. He conducted his own business…. That the mechanic was engaged in a business other than that of the respondent was demonstrated by a number of circumstances…'. The majority then considered the facts that supported that conclusion which 'give further support to the conclusion that he was engaged in a business other than that of the respondent'.[28] At [33] the majority stated: 'But he did what he did not as an employee of the respondent but as a principal pursuing his own business or as an employee of his own company pursuing its business.' The court treated the question of whether the worker was conducting or pursuing his own business as synonymous with whether the worker was an employee.

20 16 The Privy Council has advised: 'The fundamental test to be applied is this: "Is the person who has engaged himself to perform these services performing them as a person in business on his own account?". If the answer to that question is "yes", then the contract is a contract for services. If the answer is "no", then the contract is a contract of service'.[29] The

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22 *Stevens* at 35, 37.

23 *Hollis* at [47]: see at [68] per McHugh J.

24 See *Hollis* at [40], [48].

25 *Hollis* at [48], [55].

26 [1993] 2 NZLR 681.

27 *Hollis* at [58].

28 *Sweeney* at [31].

29 *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 at 382, see also at 384, *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 at 169 (the crucial question - whose business is it or in other words by asking whether the party is carrying on the business), *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184-5, *Hall v Lorimer* [1992] 1 WLR 939 at 944 (*Hall*).

Supreme Court of Canada has held that the central question in determining the nature of the relationship 'is whether the person who has been engaged to perform the services is performing them as a person in business on his own account' and explained how factors such as control, risk and profit, capital ownership and personal services are considered in answering that question.[30] Courts in Australia have variously described whether the worker was conducting his or her own business as 'the focal point', accepted that it is the ultimate question and asked whether the worker is only working in the employer's business or was also truly conducting a business of his or her own.[31]

17 Asking whether the worker when performing the work is conducting an independent business is not the same as asking if the worker is engaged in, or for the benefit of the hirer's business, or for the purposes or advantage of the hirer. Both independent contractors and employees may work in and for the benefit of the business of another.[32] Similarly, whether a worker is acting for the benefit or advantage, or for the purposes of another, or as a delegate or representative of another is an insufficient criterion for the imposition of liability.[33] The ultimate question approach and the organising conception approach are not the same as the 'organisation test' once advanced by Denning LJ. That test focused on the nature of the employer's business and required an unnecessary assessment of whether the worker was an integral part of the employer's business or an accessory to it.[34] For those exercising an independent civil, military or ecclesiastical office, the distinction will not simply be between those who conduct their own business and those who do not, as other considerations arise.

18 Asking whether the worker when performing the work is conducting an independent business is doing more than restating the problem of determining who is an employee in a different way. It is a better way of stating the problem: 'attention to these expressions of the

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30 *671122 Ontario Ltd v Sagaz Industries Canada Inc* [2001] 2 SCR 983 at [47] (*671122 Ontario*).

31 *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at [177], [178] (*Quest*), *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at [207] (*On Call Interpreters*): see also *ACE Appeal* at [15], [93], [94], [121], [126]-[129] and at first instance in *ACE Trial* at [29], [121], [123]. On appeal at [121], [125]-[129] the trial judge was found not to be in error in his approach.

32 *Hollis* at [40], *Sweeney* at [23]-[24], [29], *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at [61] (*Tattsbet*), *ACE Appeal* at [121], [128], *Dental Corporation Ltd v Moffet* (2020) 297 IR 183 at [68], *Colonial Mutual* at 48.

33 *Sweeney* at [13]-[17], [26].

34 *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 295, *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 at 111: rejected as a determinative test by Mason J in *Stevens* at 27-8.

underlying conceptions involved does not lead one to a simple formula or definition, but rather it illuminates the need' to assess the 'whole relationship'.[35] The multifactor approach involves weighing various facts that indicate, or contraindicate, employment. Without a meaningful ultimate question, the multifactor approach is vacuous. Employee and independent contractor are, as the majority observed in *Hollis*, 'tokens'[36] and employment is 'largely undefined as a legal concept except in terms of the various criteria'.[37] 'Employee' and 'independent contractor' are legal categories of meaningless reference unless they have some inherent meaning or an underlying principle or organising conception that informs the binary distinction.[38] The multifactor approach provides no guide to materiality. It requires a court to 'weigh' the relevant facts. It does not indicate whether the weight given to a factor will be significant or slight, telling or marginal. As a result, the assessment is sometimes said to be impressionistic, intuitive, involves a 'smell test', and that 'such an impressionistic and amorphous exercise is susceptible to manipulation and its application is inevitably productive of inconsistency'.[39] Indeterminacy will always be a challenge in any approach that requires the weighing of different facts, but an approach that is 'inevitably productive of inconsistency' about such a central issue in tort and labour law should be clearer. Partly as a result, numerous different approaches have emerged in the authorities each purporting to apply the multifactor test.[40]

19 Asking the ultimate question in the suggested form does not shift the focus from the real question as it is the same question reformulated. Relevant facts will continue to be weighed and marshalled in answering a more meaningful ultimate question. As Samuels JA observed:

> 'an accurate formulation of the ultimate question constructively determines the means of answering it…. It will… establish parameters; that is the quantities whose variable values, as they differ from case to case, will favour one answer or another

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35 CAB 90 FC at [15].

36 *Hollis* at [33], [36]: see also *Scott v Davis* (2000) 204 CLR 333 at [235], [299] (*Scott)* on a similarly conclusory use of 'agent'.

37 *Stevens* at 35 per Mason J.

38 CAB 89-90 FC at [13]: see also *Scott* at [253].

39 CAB 113-114 FC at [76]: see also CAB 91-92 FC at [18]-[20] and the cases referred to in CAB 113 FC [74].

40 See *Bomball Vicarious Liability* at 89-93, A Stewart and S McCrystal, 'Labour Regulation and the Great Divide' (2019) 32 *AJLL* 4 at 6-9.

> to the ultimate question posed. Such quantities, identical to Mason J's "indicia", will include the factors which he exemplified, and their "value" will be constituted by their factual content… More importantly, the ultimate question will give shape and meaning to the raw facts which examination of the totality of the relationship will reveal. It will constitute the external pattern to which the facts will or will not conform. … In seeking the answer I must examine all relevant indicia; that is to say all facts capable of elucidating the question, and thus consider the whole of the relationship between the parties. And in order to point up my external pattern I would reduce my question to more fustian terms by asking whether: "In treating the appellant was Dr Chambers engaged in his own business or the hospital's…'.[41]

20 Under both the ultimate question approach and the organising conception approach, facts concerning the degree and type of control and required personal service are relevant when assessing whether a worker is conducting an independent business.[42] The control by or of the worker over what work is done, where, when, by whom and particularly how indicate whether a worker is conducting an independent business. A non-exhaustive list of the other relevant facts include the pursuit of profit, the risk of loss, whether the business is a going concern, the tax arrangements between the parties, whether the worker represents the hirer, the ownership of significant tangible assets deployed in the work, the ownership of intangible assets such as the brand, reputation or goodwill of the business, and the presence of business systems such as invoicing and terms of trade.[43] None of these facts are determinative; all are relevant; all are weighed using the multifactor approach; the totality approach remains unchanged; it is not a two stage approach. Using the ultimate question approach, these diverse facts can be used to answer a more meaningful ultimate question, or using the organising conception approach the manner and extent to which the facts shed light on whether the worker is conducting an independent business will guide the inquiry and inform judgements about the weight to be given to those facts.

21 The ultimate question approach and the organising conception approach are supported by a policy on which the Act is based. The policy justifications for regulation are

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41 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 597-8 per Samuels JA, Meagher JA agreeing. The appellants do not rely on the final three words of that quote for the reasons in paragraph 17. See also I Neil and D Chin, *The Modern Contract of Employment*, 2nd ed, 2017, 16-7, 22 and CAB 90 FC at [15].

42 *671122 Ontario* at [47], *Hall* at 944-5, CAB 90 FC at [15], *ACE Trial* at [29].

43 *On Call Interpreters* at [210], *Quest* at [179]-[183].

not the same as the criteria by which employment is assessed, but do inform the criteria chosen in a way that should facilitate the achievement of that policy. Labour laws like the Act are a means to an end. They advance societal goals and serve a public interest.[44] In assessing who is covered by the laws, the protective and redistributive purposes of the Act are relevant.[45] The Act compels the redistribution of resources from employers to the employed. By awards and the National Employment Standards the Act heavily regulates minimum conditions for some types of work relations, the employment relationship, but barely touches the other, the independent contractor relationship. There are features (or vulnerabilities) of employment that distinguish one class from the other. Those features (or vulnerabilities) justify the subjection of the former to the comparatively detailed regulation in the Act. The 'vulnerabilities of workers which create the need for statutory protection are subordination to and dependence upon another person in relation to the work done'.[46] Similarly, the special dependence or vulnerability arising from the provision of subordinated labour is the reason a non-delegable duty of care is imposed.[47] If the employer and worker are both operating businesses, the relationship between them will lack both subordination and dependence. A worker conducting an independent business tends to be independent of, and not subordinate to, the hirer of his or her services.

22 No aspect of the relationship between Mr McCourt and the Respondent 'evinced any incident of Mr McCourt carrying or wanting to carry on any business of any kind: he merely sought payment for working as a builder's labourer'.[48] The trial judge at CAB 52 TJ [163] and the Full Court concluded that Mr McCourt was not conducting his own business and the trial judge treated this as just 'one indicator' or a single fact, equivalent to and counterbalanced by the possibility of performing work for another: CAB 48, 52 TJ [146], [163]. The error of the Full Court was either not giving effect to the conclusion at CAB 52

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44 *Duncan v Ellis* (1916) 21 CLR 379 at 385, P Bomball, 'Contractual Autonomy and the Domain of Labour Law' (2020) 44(2) *MULR* (adv) at 13-17.

45 CAB 88, 149 FC at [6]-[7], [189], *Tattsbet* at [5], *Rowe v Capital Territory Health Commission* (1982) 2 IR 27 at 28, P Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *Uni of Melb LR* 372.

46 *Uber BV v Aslam* [2021] UKSC 5 at [87] (*Uber*): see also at [72]-[77], *McCormick v Fasken Martineau DuMoulin LLP* [2014] 2 SCR 108 at [23] (*McCormick*).

47 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550-1.

48 CAB 95 FC [29]: see also CAB 50 TJ [157], CAB 94, 95-96, 100, 132 FC [27], [31], [42], [132].

TJ [163] that Mr McCourt was not conducting his own business or giving insufficient weight to that conclusion.

**Issue 2: Control in a typical labour hire relationship**

23 A significant reason the trial judge concluded the relationship was not one of employment was the lack of control of the Respondent over Mr McCourt: CAB 45-46 TJ [136]-[138]. Allsop CJ found there was a right to control: CAB 95 FC [29]. Lee J found control might yield a neutral result: CAB 117-118, 143-144 FC [88], [170]. If there was control in the relevant sense, the trial judge was in error to find that control contraindicated employment and the Full Court erred in not correcting that conclusion. When looked at practically, unless Mr McCourt obeyed Hanssen's directions he did not earn wages. Unless Mr McCourt obeyed Hanssen's directions then the Respondent did not earn income. Whatever the language used in the contracts, obedience to Hanssen's directions was central to achieving the purposes of both the LHA and Mr McCourt's engagement under the ASA.

24 Control may manifest itself in directions given or in terms imposing an obligation to obey directions. The express terms required Mr McCourt to supply his labour and co-operate with Hanssen in that supply: ASA clauses 4(a) and (c). Co-operation by Mr McCourt consisted of obeying directions given by Hanssen: CAB 95 FC [29]. Further, the Respondent's Induction document contained express terms. It contained nine pages of directions and stated it was 'not intended to replace instructions given on site by our clients, their supervisors, or other authorised persons' and in it Mr McCourt agreed to ensure that he will 'follow all safety rules and procedures given by the host client': CAB 137, 140 FC [151], [160]. The Hanssen Induction Form and Hanssen Site Rules were given to Mr McCourt by Hanssen. They contained detailed directions about when, what, and how work was to be done, including an obligation to adhere to site directions and to cooperate with site management at all times. These documents imposed on Mr McCourt an obligation owed to the Respondent to obey directions given by Hanssen: CAB 46 TJ [138], CAB 95 FC [29].

25 Further, control may be manifested in the allocation of work and determining where and when the work is done.[49] Mr McCourt worked on a site conducted by Hanssen. The Respondent had agreed in clause 4 of the LHA with Hanssen that Mr McCourt was placed 'under the client's [Hanssen's] direction and supervision from the time they report to the

[49] *ACE Appeal* at [103], *Hollis* at [57].

client and for the duration of each day on the assignment'. But what matters is 'lawful authority to command so far as there is scope for it…if only in incidental or collateral matters'.[50] By sending Mr McCourt to the Concerto site the Respondent determined what work was to be done, where, and for whom: CAB 15 (TJ [29]). The 'measures of safety to be observed'[51], the subject of nine pages of directions in the Respondent's Induction Manual, and the ability of the Respondent to terminate on short or no notice[52], were all further manifestations of control.

26 In the absence of an express right to exercise control, a right to control will be implied by law if, and only if, the relationship is one of employment as the duty to obey directions is not implied in law in non-employment contracts. Consequently, if in practice there is control being exercised over the worker it must be because the worker is an employee either pursuant to such an implied term, or because the worker has tacitly accepted 'a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties'[53] – that is, by variation.

27 Control is not only about enforceable contractual rights. It concerns a human relationship. It is assessed by reference to the totality of that relationship, including clause 4 of the LHA quoted in paragraph 25 above: CAB 89 FC [11]. The authority of Hanssen over Mr McCourt derived from the ASA and the LHA, and that authority to control Mr McCourt was relevant in determining if Mr McCourt was the subject of control.

28 What is meant by 'control' has different meanings in different contexts.[54] In the context of characterising the employment relationship, the content of control has evolved to reflect changing industrial conditions.[55] Australian courts have reached inconsistent outcomes when assessing the significance of control in typical triangular work labour hire relationships. Notwithstanding the same essential facts, some have considered the day-to-

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50 *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571 (*Zuijs*).

51 *Zuijs* at 572.

52 CAB 142-143 FC [169], *Zuijs* at 572, *J A & B M Bowden & Sons v Chief Commissioner of State Revenue* (2001) 105 IR 66 at [26], [74], [80] [83], *On Call Interpreters* at [264]: see also *PCS* at [51].

53 *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151 per Dixon, Fullagar and Kitto JJ (*R v Foster*).

54 See *Scott* at [137]-[138].

55 CAB 115 FC [82]-[83], *Hollis* at [35], [43], [84], *Lepore* at [196], *Scott* at [161].

day control by the client contraindicates employment; others consider it a matter of neutral or little importance; others consider it a matter that indicates employment.[56]

29 Control is manifested in a typical labour hire relationship when the worker is subject to day-to-day control by the client because it is day to day control of the worker, as much as control by the putative employer, that is significant. The significance of control lies in *who* determines, or has the right to determine, what, where, when, who and particularly how work is done. If the worker determines, or has the right to determine, those matters, the relationship is less likely to be one of employment. Asking whether there is control *by* the employer, or *of* the employee, will yield the same answer in bilateral employment arrangements.
10 However, the situation is different in triangular work arrangements where the worker is engaged to do work subject to the direction of a non-employer, such as when workers are engaged by a payroll entity to perform work for others within a corporate group, or when an employer outsources a function to an unrelated entity. In corporate groups an operations company may give the day-to-day direction, but a separate entity is the employer. Similarly in a typical triangular labour hire arrangement the control is manifested when there is either control by the putative employer, or of the worker. In this matter, Mr McCourt exercised no control, and no right to exercise control, over how the work was done. Those facts should have weighed in favour, and not against, a finding that Mr McCourt was an employee: CAB 46-47 TJ [138]-[141].

20 30 There are four reasons supporting this proposed approach. First, it recognises that control continues to be significant in the characterisation process.[57] Finding that close day to day control over the worker contraindicates employment or is a neutral factor – rather than a factor that indicates employment - disregards an important part of the process. Second, the characterisation process is centred on substance over form and applies the totality approach. It ensures 'artfully structured' arrangements do not distract from viewing control as a

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[56] Compare the disparate approaches in *Building Workers' Industrial Union of Australia v Odco* (1991) 29 FCR 104 at 125-6, *Personnel Contracting v Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312 at [29], [49]-[51], [116] (*PCS*), *Odco v Building Workers' Industrial Union of Australia* [1989] FCA 483 at [167], [185], [257], *Drake Personnel v Commissioner of State Revenue* (2000) 2 VR 635 at [55]-[57], *Young v Tasmanian Contracting Services* [2012] TASFC 1 at [4], *Forstaff v Chief Commissioner of State Revenue* (2004) 144 IR 1 at [114]-[115], *Country Metropolitan Agency Contracting Services v Slater* (2003) 124 IR 293 at [53], CAB 46-47 TJ at [138]-[141], 116-118 FC at [84]-[88].

[57] *Stevens* at 24, 36, *Hollis* at [43]-[45].

practical matter.[58] When ascertaining control within the totality of a relationship, the work system under which the worker is made subject to directions by the client is relevant. A work system that confers a power to a third party to control the when, what, where and how of the work, has the same effect as an express contractual right to control. Third, the distinction between independent contracting and employment partially lies in the distinction between independence and service, with service being a state of being subject to, or able to be subject to, control. A worker who promises by contract to obey a third party is not exercising independence: he or she is serving just as much as if the directions were given by an employer. He or she obeys the putative employer by obeying the third party. Fourth, vicarious liability is not imposed on the general employer when there is employment *pro hac vice*. It is imposed on the non-employer who controls the employee. If within the law governing vicarious liability 'control' only means 'control by the employer' there would be no vicarious liability imposed on the non-employer in such cases.

31 In this matter, a right to control has been shared with or devolved to a third party. When an employer engages subordinated labour, and appoints another to direct the labour, and the right of the other to direct the labour derives from the employer, then the direction of the labour by the other evidences control by the employer.[59] Clause 4 of the LHA between the Respondent and Hanssen gave control to the latter over Mr McCourt's subordinated labour. The Respondent earned remuneration under the LHA because Hanssen could control Mr McCourt.

**Issue 3: The significance of the characterisation terms**

32 Express terms in contracts sometimes seek to characterise the relationship as one that is not of employment (characterisation terms). The trial judge considered the characterisation terms of fundamental significance and used those terms to seek to ascertain the intention of the parties.[60] He treated those terms in the contract as the default position ('no sufficient reason not to find…') and used those terms as a 'tie-breaker' thereby giving them decisive weight.[61] It is trite to observe that characterisation terms are not determinative, even when

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58 CAB 95-96, 143-144 FC at [31], [170], *Hollis* at [47].

59 *Attorney-General (NSW) v The Perpetual Trustee Company (Ltd)* (1952) 85 CLR 237 at 299-300, *Swift Placements Pty Ltd v WorkCover Authority of NSW* (2000) 96 IR 69 at [43]-[44], *Damevski v Giudice* (2003) 133 FCR 438 at [77]-[78].

60 CAB 53-54, 55 TJ [172]-[174], [176]-[178], cf CAB 97 FC [35].

61 CAB 55 TJ [177]-[179], cf CAB 126-127, 132, 148 FC [116]-[117], [132], [184].

they are not part of a sham arrangement or a pretence, and the parties cannot by the mere device of labelling render the relationship something that it is not.

33 Under the multifactor approach all relevant facts are weighed. None is decisive. In every case there are competing facts to be balanced. No fact plays a unique role as the 'tiebreaker' when there are competing indicia, or to resolve any posited ambiguity arising from the balancing of other indicia. The trial judge erred when he used the characterisation terms as default terms and as a tie-breaker in a manner that was inconsistent with the multifactorial approach.[62]

34 It is the relationship that is being characterised, not the purport of the express terms of the contract. The totality of the relationship, including non-contractual work systems and practices, are relevant. Regard is paid to the reality of the obligations imposed by those systems and the practical position of the worker.[63] The totality included clause 4 of the ASA and clause 4 of the LHA which provided that Mr McCourt was 'under the client's direction and supervision from the time they report to the client and for the duration of each day on the assignment.' The reality was that Mr McCourt worked under direction: he was told what to do and how to do it: CAB 16-17, 18, 18, 36 (TJ [34], [39], [41], [105]), CAB 107 (FC [60]). The power granted by the LHA, and the position of practical subordination it created and which operated in practice, was not consistent with the characterisation terms. Further, the processes of construction of the terms and characterisation are different. Characterisation of relationships (be they fiduciary, agency, tenancy or employment) involves more than simply facilitating private ordering as it serves broad policy purposes and underlying values. In characterising relationships, 'there is a public interest which overrides unrestrained freedom to contract'.[64]

35 The relative significance of the characterisation terms should be assessed by reference to the totality of the relationship. This included the facts, known to the Respondent, that Mr McCourt was a young, unemployed, unskilled, temporary resident who was asked

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62 CAB 126-127 148 FC [116], [184]: see also at [36].

63 *Hollis* at [22], [24] [47], [48], [57], CAB 89, 90, 95-96, 121, 121-124, 127, 136-137 FC at [11], [15], [31], [99], [100]-[106], [117], [150], *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 119 at [196] (*Jamsek*), *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at [20]-[22], [25], [30], [36] (*Autoclenz*), *R v Foster* at 151, 155.

64 *Re Spectrum Plus Ltd* [2005] 2 AC 680 at [141], *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 at [32], P Finn, *Fiduciary Relationships*, 2016 at 373–8, J Allsop, 'Characterisation- Its Place in Contractual Analysis and Related Enquiries', (2017) 91 *ALJ* 471 at 482.

to sign a standard form contract honed by lawyers for the Respondent. It was not an arm's length negotiation between parties with equivalent power. He sought work and pay, not to start up and carry on an independent enterprise. The Respondent had a business with over 1,000 workers on its books.[65] Significant weight should not be given to characterisation terms given that power imbalance.[66]

36 In assessing the significance of the characterisation terms, it is important that the rights asserted by the Appellants are statutory rights. The primary question is one of statutory construction, not of contractual interpretation.[67] The proper approach to the statutory construction of provisions that refer to the common law relationship of employment would be undermined by privileging, contrary to the common law, characterisation terms.[68]

37 There is no reason in principle why characterisation terms should be afforded greater weight when characterising triangular labour hire relationships compared with paradigmatic bilateral work relationships.[69] Nor is there any reason in principle why the approach adopted below would not apply to other types of unskilled work in Australia, so long as the express terms of the triangular relationship replicated those used in this matter. Utilising such a system, the agency engaging the labour could provide the worker's subordinated labour to a client who would gain all of the practical benefits of control, but neither would not be obliged to pay the minimum wage set by an award.

**Issue 4: Whether casual employment contraindicated employment**

38 The trial judge found two of the 'significant matters' contraindicating employment were: first, Mr McCourt had entitlement to work for others; and second, Mr McCourt was free to accept or reject work as he wished and the contract lacked the stability and continuity that are a central part of every contract of employment extending over a period of time.[70] The FC accepted the trial judge was in error about these two matters, but incorrectly considered they were not decisive to the trial judge's conclusion.[71] The question was

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65 CAB 94, 95, 100, 101 FC at [27], [29], [42], [46].

66 CAB 92, 95-96, 97, 122, 123, 127 FC [21], [31], [36], [101], [103], [117], *Autoclenz* at [34]-[36]: see also *Jamsek* at [193]-[196].

67 *Uber* at [69].

68 *Uber* at [76], [87]: see generally at [72]-[77], *McCormick* at [23].

69 CAB 149 FC at [188].

70 CAB 48, 48 TJ [143], [146].

71 FC [175] per Lee J: Allsop CJ and Jagot J agreeing.

'reasonably evenly balanced' and the 'significant matters' at CAB 55 TJ [177] were a reference to these two matters.[72]

39 As to the first matter, a requirement the employee exclusively serve the employer has historically been used as an indicator of employment. It is premised on long-term, full-time and stable employment being the norm, a type of employment that is no longer as dominant due to the rise in the number of casual and part time workers and those performing multiple jobs. Using a distinction which operates to exclude a large proportion of the modern workforce is unsound. Casuals need statutory protection as their lack of stability and security increases their vulnerability.[73] The Act defines 'employee' as including a person who is 'usually such an employee', which extends the definition to include casuals who do not have continuity of engagement.[74]

40 Even if a requirement to work exclusively for another indicates employment, the absence of such requirement does not contraindicate employment.[75] It was impracticable for Mr McCourt to be employed elsewhere. He usually worked over 48 hours over six days per week doing manual labour.[76] Any entitlement to work for others, unexercised, was not a significant contraindicator of employment. The ASA conferred no right to work for others.

41 As to the second matter, the absence of a firm commitment to perform work according to an agreed pattern is the essence of casual employment.[77] The absence of those commitments cannot be both the essence of a common mode of employment and a contraindicator of employment. Clause 5(c) of the ASA, which gave Mr McCourt the right to terminate the engagement on four hours' notice, read with clause 4(c), which required him to 'supply to the builder … labour for the duration required', provided stability in the engagement. Once he had accepted the offer of work, he was not then free to reject work as

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72 CAB 53 TJ [170]. 'Integration', which 'tends slightly' against employment, was not significant: CAB 52 TJ [164].

73 *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at [43]-[45], [51], [100], [108].

74 Subsection 15(1)(a) of the Act, Explanatory Memorandum to the Fair Work Bill 2008 paragraphs 65, 72, *National Tertiary Education Industry Union v Swinburne University of Technology* (2015) 232 FCR 246 at [32].

75 *Sgobino v State of South Australia* (1987) 46 SASR 292 at 308 per Matheson J, with whom Cox J generally agreed at 293.

76 FC [60], CAB 16 TJ [31] and Annexure D paragraph 9.

77 *WorkPac v Skene* (2018) 264 FCR 536 at [153], [169], [172], *WorkPac v Rossato* [2020] FCAFC 84 at [31].

he wished, and it was his status when doing so that was in issue.[78] Mr McCourt was not re-engaged each day by Hanssen; he was called once and continued working until he decided to end that engagement by going on a holiday. Mr McCourt's freedom was attenuated as he was required to inform Hanssen, by virtue of the Hanssen Site Rules, when he wanted time off for a holiday, when he was running late, or when he was sick. In practice, his engagement involved a reasonably high degree of stability and was continuous in the two tranches.[79] The right to reject work was not a significant matter that contraindicated employment.

**Issue 5: Was the decision in *Personnel Contracting* wrong or distinguishable?**

42 The 2004 decision in *Personnel Contracting v Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312 *(PCS)* was plainly wrong or was distinguishable. Simmonds J stated the test in *Hollis* to be whether the workers were in business of their own and found that the workers were not in business of their own, except so far as the characterisation terms said they were.[80] In contrast with the trial judge in this matter, Simmonds J, and perhaps Steytler J, found control favoured a finding of employment.[81] In contrast with the trial judge, both Steytler and Simmonds JJ considered the mode of remuneration favoured a finding of employment.[82] In contrast with the trial judge in this matter, Simmonds J found integration favoured a finding of employment.[83] Steytler and Simmonds JJ found the access to sick and annual leave and the restraint of trade clause contraindicated employment, neither of which were relevant here.[84] Steytler J, but not Simmonds J or the trial judge here, considered tax and insurance arrangements contraindicated employment.[85] Steytler J, but not Simmonds J, considered the casual nature of the work contraindicated employment.[86] For Steytler and Simmonds JJ, the characterisation terms were decisive.[87] Other than this final point, every basis on which there was a finding about an indicator for or against employment by either judge in the *PCS*

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78 *Uber* at [91], *James v Redcats (Brands) Ltd* [2007] ICR 1006 at [84].

79 CAB 18-19 TJ [42], FC 60(4).

80 *PCS* at [98], [132], [133].

81 *PCS* at [29]-[32], [110], [116]: the CAB 45-46 TJ [136]-[138] reached the opposite conclusion.

82 *PCS* at [32], [118]; the CAB 51 TJ at [159] considered the same mode to be neutral.

83 *PCS* at [133]-[138]; the CAB 52 TJ at [164] reached the opposite conclusion.

84 *PCS* at [33], [122] and [130]: *cf* CAB 53 TJ at [169].

85 *PCS* at [33], [122] and [130]: *cf* CAB 52 TJ at [167].

86 *PCS* at [34]-[35], [121].

87 *PCS* [40], [143]-[150].

decision was contradicted by a finding either by the other majority judge or by the trial judge here, or was on the basis of an indicator not raised in this matter.

43 The decision in *PCS*, like that of the trial judge, was in error as it did not apply the correct approach to the issue of whether the workers were conducting their own businesses, nor to the assessment of control in a labour hire arrangement, nor to the role of the characterisation term, nor to the casual nature of the engagement.

**Conclusion**

44 If the Court finds error, it must consider whether Mr McCourt was an employee. The following features are particularly relevant: Mr McCourt had no assets or tools, just his labour; he had to personally perform the work and it could not be delegated; he had no business name, brand, or business reputation; no invoicing systems, standard conditions of trade, insurance coverage, payment or debt collection systems; no ABN; no goodwill to grow or shrink; no business to sell; and no clients. He did not control what work was done, where or how it was done. He could not manage the performance of the work in a manner that maximised the potential for profit. He could only increase income by working more hours. The hours were set, but not by him. There were no significant expenses as Mr McCourt only spent $100 in acquiring clothing. He ran no risk of making a loss. He suffered no financial consequences for poor performance. The rate was simply by the hour, not for the performance of a task and was unconnected to adequacy of the performance. The rate was set by the Respondent and when it increased it was not the subject of any negotiation. The finances of Mr McCourt were supervised in that Hanssen set up a clocking system involving fingerprint scanning and submission of timesheets which it forwarded to the Respondent who then paid Mr McCourt and issued payslips. Mr McCourt was paid regularly – each week. He did not submit any invoices. The work was unskilled.[88]

**Part VII: Orders sought**

1. The appeal be allowed.

2. The orders of the Full Federal Court of 17 July 2020 be set aside and their place order that:

   (a) The appeal be allowed.

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[88] CAB 14-15, 15, 16-17, 18, 18-19 TJ at [18]-[25], [28], [31]-[34], [39], [42]-[46].

(b) Order 1 of the orders of the Federal Court of Australia of 6 November 2019 be set aside.

(c) It be declared and ordered as follows: 'Between 27 July 2016 and 6 November 2016, and 14 March 2017 and 30 June 2017, the Second Appellant was employed by the Respondent.'

(d) The matter be remitted to the trial judge for determination according to law.

(e) There be no order as to costs.

3. The Respondent is to pay the Appellants' costs in this Court.

**Part VIII: Time estimate**

10 The Appellants estimate that 3.5 hours will be required for its oral argument.

Dated 16 April 2021

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## Annexure

List of constitutional provisions, statutes and statutory instruments referred to in submissions

| **Title** | **Provision/Section** | **Date** |
|---|---|---|
| *Fair Work Act 2009* (Cth) | Sections 11, 13, 14, 15 and 42 | 27 July 2016 to 30 June 2017 |