HIGH COURT OF AUSTRALIA

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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

Personnel Contracting Pty Ltd

Respondent

RESPONDENT'S AMENDED SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. The issues are: (a) was Mr McCourt an employee of the Respondent when, though he did not conduct his own business: (i) the Respondent had little or no legal or practical control over him; (ii) Mr McCourt was not a representative of the Respondent standing in its place, nor was he integrated into the Respondent's organisation; and (iii) the written terms indicated that Mr McCourt was a contractor; and (b) should the Court disturb a long standing line of authority if not satisfied it is plainly wrong or otherwise reformulate the established tests for identifying whether a worker is an employee?

Part III: Section 78B notices

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

Part IV: Additional facts

4. The facts were not in dispute and are mostly set out in the decision of the primary judge: TJ[18]-[114] CAB15-39. The Respondent is a labour hire company. It does not perform building work. At Mr McCourt's interview, before he signed the Administrative Services Agreement (**ASA**), the Respondent went through its standard procedure, taking Mr McCourt through a series of documents explaining the nature of the arrangement to him and how it would operate: TJ[64]-[73] CAB25-30. The ASA stated Mr McCourt was free to reject any offer of work. Once Mr McCourt accepted an offer of work, the ASA required him to provide his services to the builder 'for the duration required by the Builder' or until he gave 4 hours' notice. Hanssen directed every aspect of Mr McCourt's work: TJ[141] CAB48. In November 2016 Mr McCourt ceased work to travel. On his return in March 2017

Hanssen placed a new job order with the Respondent and Mr McCourt was re-engaged at the same site (Concerto). When that work came to an end in late June 2017, Mr McCourt requested and was offered further work at Hanssen's Aire site: TJ[37]-[38],[47] CAB 19. Hanssen placed a further job order for what was a new engagement. After a few days Hanssen advised the Respondent it no longer required Mr McCourt's services: TJ[87] CAB34. During the time he worked at Hanssen's sites, Mr McCourt had very little interaction with any representative of the Respondent save for the Respondent's representative meeting with him once each time he started a new engagement to check he had been properly inducted: TJ[76],[82],[86] CAB 32-33. Mr McCourt was not issued with nor required to wear a uniform or anything with the Respondent's branding: TJ[69] CAB30. Mr McCourt was entitled to negotiate rate increases directly with Hanssen: TJ(8) CAB10.

Part V: Argument

'Employee' and 'employment' in the FW Act mirror their common law meaning

5. The Appellants allege multiple contraventions of s.44 (National Employment Standards), s.45 (modern awards) and s.535 (record keeping) of the *Fair Work Act 2009* (Cth) (**Act**, **FW Act**).[1] Each relevant section is in a part of the Act in which the term 'employee' is defined to mean a 'national system employee'.[2] The term 'national system employee' is relevantly defined in s.13 of the Act to mean 'an individual so far as he or she is employed . . . by a national system employer.'[3] The Respondent is a 'national system employer' within s 14(1)(a), so the ultimate question is whether Mr McCourt was 'employed' by, so as to be a 'national system employee' of, the Respondent. The meaning of 'employed' in s.13 of the Act mirrors and is not wider than its common law meaning. Its meaning is not informed by the scope or purpose of the Act. There are six reasons for this.

6. Firstly, where a law of the Commonwealth employs as an integer for its operation a term with a content given by the common law as established from time to time 'then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time. Further, where . . . the general law comprises a body of doctrine with its own scope and purpose, the development of that doctrine is not directed or controlled by a curial perception of the scope and purpose of any

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1 It was also alleged at trial that the Respondent and Hanssen contravened s 357 of the FW Act (which adopts a different definition of employee: ss.15 and 325). The s. 357 allegation against the Respondent was abandoned at trial and against Hanssen was dismissed.

2 See FW Act Part 2-1, s.42, Part 2-2, s 60 and Part 3-6, s.529.

3 The definition is extended to include an individual so far as they are 'usually employed' by a 'national system employer', however that does not affect the meaning of the word 'employed': see *Australian Meat Industry Employees' Union v Belandra Pty Ltd* [2003] FCA 910; 126 IR 165 at [28]-[43]; Explanatory Memorandum to *Fair Work Bill 2008* (Cth) at [66]-[67], [71]-[72].

particular statute which has adopted the general law as a criterion of liability in the field of operation of that statute.'[4]

7. Secondly, not only is there no discernible contrary intention in the Act, but there are also clear indications that Parliament intended the word 'employee' and cognate expressions to have their common law and no wider meaning. Where Parliament has sought to extend entitlements or protections under the Act to persons other than employees, it has done so expressly. Chapter 3 of the Act extends workplace protections to 'independent contractors'[5] or more widely to 'persons'.[6] Provisions dealing with bullying are expressed to apply to 'workers'.[7] Other provisions extend employee entitlements and protections to contractors in the textile, clothing and footwear (**TCF**) industry.[8] All this indicates that where, in contrast, the word 'employee' is used without extension, no wider meaning is intended. That is the statutory purpose which appears from the text. Further, Parliament has enacted other legislation extending the definition of employee or employment beyond the common law[9] or expressly applying the legislation to contractors.[10] Parliament could have similarly extended the definition of 'employee' in ss.13 and 15 of the FW Act but did not.

8. Thirdly, while the terms and conditions afforded by chapter 2 of the FW Act are limited to employees, Parliament has enacted the *Independent Contractors Act 2006* (Cth) (**IC Act**) to provide a remedy for contractors who consider their terms to be harsh or unfair. There is therefore even less reason to take an expansive or policy based view of the meaning of 'employee' under the FW Act.

9. Fourthly, giving the term 'employed' in s 13 its ordinary common law meaning is consistent with the definition of 'non-national system employee' in s 12, which is defined to mean 'an employee who is not a national system employee'. The word 'employee' in the definition of 'non-national system employee' has its 'ordinary meaning': s 11.

10. Fifthly, the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) states at [28] that 'National system employers and national system employees are employers and

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4 *Aid/Watch Incorporated v Commissioner of Taxation* (2010) 241 CLR 539 (***Aid/Watch***) at [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See also *C v Commonwealth of Australia* (2015) 234 FCR 81 at [28]-[37], [51]-[53]; *R v Foster* (1951) 85 CLR 138 at 153; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 (***Barrett***) at 403.5; Irving, *The Contract of Employment*, 2nd edn, 2019 (**Irving**), at [2.8]-[2.9]; c.f. *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 (***Tattsbet***) at [4]-[5]; FC[189] CAB150.

5 FW Act ss 342, 350(2), 355.

6 FW Act ss 340-343, 345-350.

7 Part 6-4B and see s 789FC(2) and the note.

8 FW Act, s 12 (definition of 'outworker' and 'TCF outworker'), s 140(1)(b), s 483A, s 483(1A)(b), Part 6-4A and in particular, ss 789AA, 789AC, 789BA(1) and s 789BB.

9 For example, the *Racial Discrimination Act 1975* (Cth), s 3(1); *Sex Discrimination Act 1984* (Cth) s 4(1), *Disability Discrimination Act 1992* (Cth) s 4(1), *Superannuation Guarantee (Administration) Act 1992,* s 12(3), *Income Tax Assessment Act 1997* (Cth), s.290-65 and *Age Discrimination Act 2004* (Cth), s5.

10 *Work Health and Safety Act 2011* (Cth), s.7(1).

employees (at common law) who are within the constitutional limitations set out in clauses 13 and 14'.

11. Sixthly, giving 'employee' and 'employment' their common law meaning avoids the confusion which would otherwise arise were the meaning to differ from statute to statute and the common law producing different outcomes from the same set of work arrangements.

The own business test

12. Whether a worker has their own business is a relevant factor to be weighed in the mix but on the authorities is not, and as a matter of principle should not be, an alternative or organising test for employment.[11] There are eight reasons why this is so.

13. Firstly, the identification of a business as an alternative question or test was rejected in *Stevens v Brodribb Sawmilling Company Pty Ltd*.[12] In *Stevens* it was argued that the concept of a person carrying on business on his own account was more useful than the control test or other indicia in determining the servant-independent contractor issue.[13] Mason J, with whom Brennan J[14] and (on the present question) Deane J[15] agreed, set out a passage of Lord Wright in *Montreal* at p 169 in which his Lordship said '… it is **in some cases** possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior'[16] [Emphasis added.]. As the Appellants recognise,[17] Lord Wright's statement in *Montreal* expresses the same test now advanced by the Appellants, albeit his Lordship qualified his remarks and was not expressing any universal or overarching test. While referring to this statement as an expression of the organisation test, Mason J went on to reject the notion that this was an alternative test to the control test and said, at 27-28, that it should be treated '**simply as a further factor to be weighed**, along with control, in deciding whether the relationship is one of employment or of independent contract. This seems to be what Lord Wright had in mind in *Montreal v Montreal Locomotive Works*, supra, at p 169. For my part I am unable to accept that the organisation test could result in an affirmative finding that the contract is one of service when the control test either on its own or with other indicia yields the conclusion that it is a contract for services. **Of the two concepts, legal authority to control is the more relevant**

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[11] Irving at [2.13].
[12] (1986) 160 CLR 16 ***(Stevens***).
[13] *Stevens* at 19.7. The passages cited for that proposition included Lord Wright's statement in *Montreal v Montreal Locomotive Works* [1947] 1 DLR 161 (***Montreal***) at p 169 and Cooke J's statement in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (***Market Investigations***) at p 184.
[14] *Stevens* at 47.
[15] *Stevens* at 49.
[16] *Stevens* at 26.
[17] Appellants' Submissions, fn 29.

and the more cogent in determining the nature of the relationship.' [Emphasis added]. Mason J went on to confirm that it was the totality of the relationship between the parties which had to be considered. Wilson and Dawson JJ similarly did not regard the identification of a business as supplying an alternative, or a preferable, test. After observing that the 'modern approach' is to have regard to a variety of criteria, not all of which provide a relevant test in all circumstances and none of which is conclusive, their Honours said that Windeyer J in *Marshall v Whittaker's Building Supply Co*[18] 'was really 'posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer'. Their Honours put the question in a way which did not refer to the worker having a trade or business of their own. For Wilson and Dawson JJ, at 36-37, the question was 'whether the degree of independence overall is sufficient to establish that a person is working on his own behalf rather than acting as the servant of another'. The answer to that question could be 'indicated in ways which are not always the same', though 'in many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee'. In *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd*[19] Gibbs CJ, citing *Stevens*, referred to the organisation test or 'whether, to put it in slightly different terms, the person in question is performing the relevant services as a person in business on his own account' and said it was 'not right to say that this test, which involves difficulties of its own, has been accepted as the decisive test in Australia'.[20]

14. Secondly, in *Hollis v Vabu Pty Ltd* the majority endorsed the multi-factorial approach identified in *Stevens*.[21] In confirming that it was the 'totality of the relationship' which was to be considered, the majority said that this was to be found not merely from the contractual terms but also 'from the system which was operated thereunder and the work practices' and that guidance for the outcome was provided by 'various matters' which are expressive of the fundamental concerns underlying the doctrine of vicarious liability.[22] In the course of discussing those concerns, the plurality attached significance to 'the absence of representation and identification with the alleged employer as indicative of a relationship of principal and independent contractor'. It was 'these notions' which their Honours said had

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18 (1963) 109 CLR 210 (***Marshall***) at 217.
19 (1986) 160 CLR 626 (***Oceanic Crest Shipping***) at 638.
20 It is also of note that in *Accident Compensation Commission v Odco Pty Ltd* (1990) 95 ALR 641 (***ACC v Odco***), two workers engaged under the Odco system and working solely through TSA were regarded as contractors even though they were found not to be working in businesses of their own: at 644.4, 647.7. While the point was not argued in the High Court, had the workers been common law employees there would have been no need to consider whether they were caught by the extended definitions in the statute.
21 (2001) 207 CLR 21 (***Hollis***) at [24], [44].
22 *Hollis* at [26], [45].

been expressed positively by Windeyer J in *Marshall* in distinguishing between a servant and a person who carried on 'a trade or business' of their own: at [39]-[40]. The context indicates that the reference to Windeyer J's statement was not intended to erect a substitute or proxy for the multi-factorial test but rather to explain one of the fundamental concerns underlying the doctrine of vicarious liability which inform the employee-independent contractor distinction.[23] The majority in *Hollis* then applied a multi-factorial approach: at [48]-[57]. Whether the couriers were running their own enterprise fell to be considered as a factor to be weighed: at [48]. In the facts of *Hollis* the majority observed the couriers were not in business on their own account.[24] But nowhere did the majority suggest the identification of a business was an alternative or organising test. Had that been the intention, a clear statement may have been expected as that would have been a substantial departure from the judgments in *Stevens* which had rejected that proposition. Instead, the majority in *Hollis* endorsed *Stevens*, went through the exercise of considering various indicia and confirmed their decision 'applied existing principle informed by a recognition of the fundamental purposes of vicarious liability'.[25, 26]

15. Thirdly, any criticism that the multi-factorial approach in *Stevens* did 'not provide any external test or requirement by which the materiality of the elements may be assessed'[27] was answered in *Hollis.* It is the 'various matters' expressive of the fundamental concerns and purposes of vicarious liability which guide and inform the distinction between employees and independent contractors: at [45], [59]. That is the guiding principle.

16. Fourthly, the identification of a business test which originated in England has there fallen out of favour and has, further, not been applied in triangular cases. The test in England is generally attributed to the judgment of Cooke J in *Market Investigations*, at 184, in which Cooke J drew upon the statements of Lord Wolfe in *Montreal* and Lord Denning in *Bank Voor Handel*[28] (the same statements which Mason J had rejected in *Stevens*) to describe the identification of a business test as the 'fundamental test'. However, after initially being

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[23] Nor did Windeyer J intend to diminish the importance of control: see *Marshall* at 218.

[24] *Hollis* at [47], [48], [55]. Because the couriers were subject to extensive control by Vabu, whether control was the more relevant or cogent factor did not arise. Both factors pointed in the same direction.

[25] *Hollis* at [59]. *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 did not take matters any further. The analysis was again multi-factorial: see at [30]-[32].

[26] Australian courts since *Hollis* have continued to apply a multi-factorial approach. Whereas the business test was treated as determinative in *On Call Interpreters and Translators Agency Pty Ltd v FCT (No 3)* (2011) 214 FCR 82 at [208] and *FWO v Quest South Perth Holdings* (2015) 228 FCR 346 (***Quest***) at [179], [184]-[186], that approach has been questioned or rejected in subsequent cases: see for example *Tattsbet* at [61]; *Jamsek v ZG Operations Pty Ltd* (2020) 297 IR 210; [2020] FCAFC 119 (***Jamsek***) at [6], [179]; *Eastern Van Services Pty Ltd v VWA* (2020) 296 IR 391; [2020] VSCA 154 at [36]; *Jensen v Cultural Infusion (Int) Pty Ltd* [2020] FCA 358 at [85]-[89].

[27] *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 (***Ellis***) at 597-8 per Samuel JA.

[28] *Bank Voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 (***Bank Voor Handel***) at 295.

endorsed in *Lee Ting Sang v Chung Chi-Keung*,[29] the test has subsequently been little relied upon in England and not at all in cases involving triangular relationships. Instead, the tests formulated in *Ready Mixed Concrete* (*South East*) *Ltd v Minister of Pensions and National Insurance*[30] have prevailed, having been confirmed by the Supreme Court in *Autoclenz Ltd v Belcher*.[31] One of the necessary conditions identified in *Ready-Mixed* for a contract of service to exist is that '[the servant] agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master'.[32] Whether the worker has a business of their own falls to be considered with all other factors but only if the control condition is met first.[33] As a result, the English Courts have considered and decisively answered the present question. In a series of cases, in fact situations not relevantly distinguishable from the present, in each of which an agency provided a worker to an end-user and paid the worker, the Court of Appeal has held that the contract between the agency and the worker was not an employment contract, principally because the agency exercised no or insufficient control over the worker in the performance of the work.[34] In each of these cases the *Ready Mixed* test with its threshold requirement of a sufficient degree of control was applied.[35] It is now accepted in England that 'in a typical triangular case, the worker will usually be held not to be an employee of the agency'.[36] Further, the English courts have cautioned against finding a person to be an employee simply because they do not have a business of their own.[37]

17. Fifthly, the identification of a business test is not apt to provide an answer in all cases.

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[29] [1990] 2 AC 374 at 382.

[30] [1968] 1 All ER 433 (***Ready Mixed***) at 439–440.

[31] [2011] 4 All ER 745 (***Autoclenz***) at [18]. Also described as the 'classic exposition of the ingredients of a contract of service' in *Pimlico Plumbers Ltd v Smith* [2018] 4 All ER 641, UKSC, at [22].

[32] In explaining this condition McKenna J referred to *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 (***Zuijs***) at 571, *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 (***Queensland Stations***) at 552 and *Humberstone v. Northern Timber Mills* (1949) 79 CLR 389 (***Humberstone***) at 404 so indicating the requirement of a sufficient degree of control is to be applied consistently with those decisions.

[33] *Ready Mixed* at 440-441 and 446-447. Control is again considered as part of the latter inquiry.

[34] *Montgomery v Johnson Underwood* [2001] EWCA Civ 318; [2001] ICR 819 (receptionist) at [18]-[24], [28], [46]-[47]; *Bunce v Postworth Ltd* [2005] EWCA Civ 490 (***Bunce***) (welder) at [24]-[26], [29]-[30]; *Dacas v Brook Street Bureau (UK) Ltd* [2004] EWCA Civ 217; [2004] ICR 1437 (cleaner) at [9], [11], [64], [80], [89]; and see also, in the High Court, *Commissioners for HM Revenue and Customs v Wright* [2007] EWHC 526 (Ch) (labourers) at [11], [22] and *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220 (***Labour Force***) (labourers); see also *James v Greenwich London Borough Council* [2007] ICR 577 (***James EAT***) per Elias J at [13]-[14], [17]-[18], [20], [22] approved in *James v London Borough of Greenwich* [2008] EWCA Civ 35; [2008] ICR 545 (***James CA***) at [23].

[35] *Montgomery* at [18]-[23], [24], 28], [46]-[47]; *Dacas* at [49], [85]-[86]; *Bunce* at [13], [24]-[26]; *Cable and Wireless Plc v Muscat* [2006] EWCA Civ 220; [2006] ICR 975 (***Cable & Wireless***) at [31], [32], [35].

[36] *Cable and Wireless* at [24]; *James EAT* at [20] per Elias J 'it will be an exceptional case where a contract of employment can be spelt out in the relationship between the agency and worker'.

[37] *Dacas* at [49] per Mummery LJ; *Bunce* at [24].

The test was formulated in bilateral cases.[38] In a triangular arrangement, the worker may neither 'serve' the putative employer in the employer's business nor carry on a business of their own. In a triangular arrangement the business into which the worker is integrated and in which the worker works (and the business which takes the risk, creates the risk, provides the tools and controls the activity) is that of the host. The advantage of the multi-factorial test is its flexibility. The Appellants' approach, of deeming anyone who does not conduct a business to be an employee, fails to allow for the variety of different work arrangements. Not all contractors are entrepreneurs. There may be different types of independent contractors.[39]

18. Sixthly, posing the ultimate question as whether the worker has their own business wrongly suggests an archetype of independent contractor, or a single test or universal criterion.[40] It directs attention away from the totality of the relationship and inverts the order of inquiry. The central question is not whether the worker is an entrepreneur or even an independent contractor. It is whether he or she is an employee?[41]

19. Seventhly, the adoption of the identification of a business as an organising conception is not to be justified by some perceived social policy on which the FW Act is based.[42] The approach adopted in England in *Autoclenz* and explained in *Uber BV*,[43] in effect developing common law doctrine so as to further the protective reach of the statute ('the protective statutory purpose justification'[44]), is contrary to the 'important principle of statutory construction' explained in *Aid/Watch* whereby the development of the common law is not directed by a curial perception of the scope and purpose of a particular statute.[45]

20. Eighthly, to reformulate existing principle by giving primacy to the identification of a business would upset many established contracting arrangements which have relied upon

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[38] *Market Investigations* was a bilateral case which largely turned on the 'very extensive' degree of control which the company exercised: at 186E. A year later Clarke J wrote the leading judgment in *Labour Force* (a triangular case) expressly approving the tests formulated in *Ready Mixed* and without referring to *Market Investigations*. In *Hall v Lorimer* [1994] 1 WLR 209 (Ch), at 218D, the Court of Appeal said it was plain Cooke J in *Market Investigations* 'was not intending to lay down an all-purpose definition of employment'.

[39] In August 2018, 8% of Australia's workforce and 26% of those engaged in construction were classified as independent contractors. The occupations with the highest proportions of independent contractors were technicians and trades workers (16%) followed by labourers (11%) and professionals: ABS, Characteristics of Employment Australia, August 2018, series 6333.0, Exhibit 1R1: Respondent's Book of Further Materials (**RBFM**) at 86-8783-84. See also fn 104 and fn 108 below.

[40] *Eastern Van* at [35].

[41] *Tattsbet* [61]; *Forstaff Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2004) 144 IR 1 (***Forstaff***) at [75].

[42] Applicant's Submissions at [21].

[43] *Uber BV v Aslam* [2021] UKSC 5 (***Uber BV***) at [68]-[71], [76], [78], [87].

[44] P Bomball, 'Contractual Autonomy and the Domain of Labour Law' (2020) 44(2) MULR (adv) at 22-27.

[45] *AID/Watch* at [19], [23]. Further, a court should be careful not to construct its own idea of a desirable policy, impute it to the legislature, and then characterise it as a statutory purpose: *Australian Education Union v Dept of Education and Children's Services* (2012) 248 CLR 1at 14 [28]; *Deal v Father Pius Kodakkathanath* (2016) 258 CLR 281 at [37].

the existing statement of the law and the decided cases and would expose the principals in those arrangements to claims for compensation and numerous and significant civil penalties. This issue is further considered below.

21. The Full Court ought to have held the trial judge did not err as to the weight he gave to the fact Mr McCourt did not operate a business of his own: Notice of Contention (**NOC**) [6] CAB185; TJ[148]-[157] CAB150; FC[95]-[96] CAB121, [181] CAB148.

Control

22. It is submitted, for the reasons set out below, that in Australia, as in England: (a) lawful authority to command must exist in a 'sufficient degree' for a contract of service to exist; (b) that authority must reside in the employer; (c) even where there is a sufficient right of control, that is not determinative and the nature and extent of control will be an important factor to be weighed in the mix in determining whether the contract is one of service or not; and (d) the same principles apply in a triangular labour hire arrangement.

23. In *Zuijs*, at 571, the majority did not deny the need for a right of control. On the contrary, their Honours said 'What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters.' No subsequent statement in this Court has suggested that a contract of service can exist without some measure of lawful authority to command.[46] In *Stevens*, Mason J and Wilson and Dawson JJ endorsed what had been said in *Zuijs*, both judgments emphasising it is the right to control rather than its actual exercise that is important.[47] While acknowledging that control was not the sole criterion, neither judgment denied the need for there to be a right of control for a contract of service to exist. In *Oceanic Crest Shipping*, Dawson J distinguished between, on the one hand, the 'practical absence of control' such as that which 'stems from the fact that the employer lacks the skill or training necessary to exercise control' and which recent cases had 'reject[ed] as a decisive indication that there is no relationship of master and servant' and, on the other hand, an absence of control which stems from the very nature of the relationship and of the status conferred upon the worker.[48] This took the point no further than *Zuijs* and *Stevens*. In *Hollis*, the majority again did not

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[46] In *Marshall* (1963) at 218 Windeyer J (diss) referring to *Zuijs* said 'Lawful authority to command, so far as the work to be done gives scope for it, is still the important test . . . If there be no right at all in the employer to give directions during the currency of the engagement, the relationship can scarcely be that of master and servant'. See also *Barrett* at 401-2.

[47] *Stevens* at 24.2, 29.1-29.2, 36.4-36.8. That is the point Wilson and Dawson JJ were making when saying control was no longer a sufficient or even an appropriate test 'in its traditional form' in all cases.

[48] (1986) 160 CLR 626 at 682-683. *Oceanic Crest Shipping* has been cited as authority for the proposition that, after *Stevens*, control is no longer regarded as essential: e.g. *Ellis* at 596D. It is clear however that what is being referred to is the practical ability to control.

take the point any further,[49] though in that case whether control was a necessary element did not arise because the couriers were subject to extensive control both as to the manner and performance of the work and not being permitted to refuse work.[50]

24. The question is not whether it is possible to identify some element of control no matter how abstract, theoretical or incidental.[51] Even the most independent of independent contractors is subject to some direction in the performance of their work and some circumstances will justify the termination of the engagement.[52] There must be a 'sufficient degree' of control for the relationship of master and servant to exist.[53]

25. Even where there is a sufficient degree of control for a contract of service to exist, that is not determinative.[54] The nature and extent of the control exercised or able to be exercised by the putative employer then becomes an important factor to be weighed in the mix in determining whether the contract is one of service or not. The continuing importance of control was emphasised in *Stevens*.[55] In *Hollis*, control was clearly important.[56] In *Hollis*, the control, and in *Stevens*, the lack of control, exercised by the principal was in each case a significant, albeit not the sole, criterion.[57]

26. That a right of control remains a necessary and important element of a contract of service follows from the essential nature of the relationship which from its historical roots has been and remains a relationship of service and subordination.[58] As Kitto J observed in *Attorney-General (NSW) v Perpetual Trustee Co Ltd* 'without the obligation to obey orders there can be no meaning in the relationship, and it therefore cannot subsist'.[59] A person cannot be a servant without any obligation to serve and obey directions. Further, the right of control must reside in the employer.[60] A contract of service is a bilateral contract. It is not

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[49] *Hollis* at [44].
[50] *Hollis* at [49], [57].
[51] *Zuijs* at 571-572 is not authority for any such proposition. In *Zuijs*, there was 'a large measure of control and superintendence'.
[52] *Eastern Van* at [102].
[53] *Ready Mixed* at 439H-440D. In *Stevens* at 37.5-38.1, Wilson and Dawson JJ described the control exercised by Brodribb, through the bush boss and mill manager as 'fall[ing] short of the type of supervision or right of control which indicates the relationship of master and servant'. The supervision of the mill manager was said to be 'theoretical rather than actual'.
[54] *Queensland Stations* at 552.
[55] *Stevens* at 24.1-24.4, 27.6-27.9, 36.4-36.6; *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at [103].
[56] *Hollis* at [43]-[45], [49], [57], also [53] (deterrence assumes control).
[57] *Hollis* at [49], [57]; *Stevens at* 25.8-26.3, 37.5-38.1
[58] *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* (2007) 69 NSWLR 198 (***Russell***) at [84]-[93].
[59] See to the same effect *Marshall* at 218; *Boylan Nominees Pty Ltd t/as Quirks Refrigeration v Sweeney* (2005) 148 IR 123 [55]; *Mohareb v Kelso* [2017] NSWCA 98 at [13]; *Russell* at [93]-[94]; *Commissioner of Payroll Tax v Mary Kay Cosmetics Pty Ltd* [1982] VR 871 (***Mary Kay***) at 878.6.
[60] *Stevens* at 24.1 to 24.3; *Humberstone* at 404; *Attorney-General (NSW) v Perpetual Trustee Co Ltd* at 299–300; *Zuijs* at 571. See also *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 at 601C and *Ready-Mixed* at 440A and 440I-441A.

sufficient that the worker is subordinate to someone else. The Full Court was right to reject that proposition: FC[86] CAB117.

27. The authorities do not support the Appellants' proposition that a different approach to control has been or ought to be taken in cases involving triangular relationships. That there must be a right of control residing in the employer is the basis on which most of the labour hire cases in Australia and England have been decided.[61] The outcomes in those cases have been consistent. In those cases where Odco style arrangements have not been upheld and the workers have been found to be employees there has been some distinguishing feature such as an existing workforce being forced to convert from employment and nothing else changing.[62] In each of those cases it was the host client exercising the control who was found to be the employer, not the labour hire entity. In other cases, the contractual documents described the workers as employees.[63]

28. Hanssen alone supervised and directed every aspect of Mr McCourt's work: TJ [141] CAB48; FC[27], [54] CAB95, 106. It did so for its own purposes. The Respondent had no right to enter on to Hanssen's site and direct Mr McCourt as to what to do or how to do it, in effect to interfere with the work which Mr McCourt performed for Hanssen. Nor would Hanssen have allowed it: TJ [54(47)] CAB23. No express term in the ASA or the Labour Hire Agreement (**LHA**) gave the Respondent a right to control Mr McCourt and there is no basis for implying such a term. Clauses 4(a) and (c) of the ASA were contractual obligations of the type commonly found in services contracts but neither gave the Respondent any right to control or issue directions to Mr McCourt.[64] The Trial Judge was correct to so find [TJ 136-

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[61] See *Re Odco Pty Ltd v Building Workers Industrial Union of Australia* [1989] FCA 336 (***Odco Trial***) at [256]-[259] and *Building Workers Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 (***Odco Appeal***) at 124-6; *Tasmanian Contracting Services Pty Ltd v Young* [2011] TASSC 49 (***Young Trial***) at [19], [24], [30] and *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1 (***Young Appeal***) at [1], [4]-[5], [20], [34]-[35], [45] and in England the cases at fn 34 above.

[62] *Damevski v Giudice & Ors* (2003) 133 FCR 438 ***(Damevski)*** at [6]-[7], [14], [102], [151], [154], [172(3)]; also at [60]; *Quest* at [17], [21], [32] . *Cable v Wireless* at [48], [50], [51] was a similar case.

[63] *Forstaff* at [28]-[29], [120]-[121]. In *Forstaff*, McDougall J said only that control is not dispositive and noted the facts were 'far removed' from *Odco*: at [114]-[118]. The cases referred to for the proposition that control was not dispositive were cases in which an absence of control by the agency was a key factor or the point did not arise: see at [114], [116], [63], [96]-[97]. In *Drake Personnel Ltd & Ors v Commissioner of State Revenue* (2000) 2 VR 635 Drake exercised control over the temporaries and the documents 'did much to designate the temporaries as employees': at [38] (also (1998) 98 ATC 4915 at [27]). Phillips JA (at [51]-[52]) distinguished the case before him from *Odco* in which the contracts which were 'very different' and observed (at [55]), after referring to *Odco* and *Labour Force*, that where the question was whether the worker was an employee or an independent contractor 'the test of day-to-day control may be significant to establish or to deny that the worker is an independent contractor'. The other case cited in the Appellants' Submissions at fn 56 is *Country Metropolitan Agency Contracting Services Pty Ltd v Slater* (2003) 124 IR 293. It is submitted that case (which was disapproved in *Young Trial*) was wrongly decided with the Tribunal erring by misconstruing and wrongly applying *Drake Personnel* and holding that the absence of a right of control by the agency was of questionable or no significance: at [22], [53], [57]-[58], [77]-[79].

[64] *Zuijs* at 572.7 *Moffet v Dental Corporation Pty Ltd* (2020) 297 IR 183; [2020] FCAFC 118 at [37].

138] CAB46-47 and the Full Court erred to the extent it found otherwise: FC[29]-[30] CAB96, [41] CAB100, [170] CAB144.

29. It was also Hanssen and not the Respondent who had the right to terminate Mr McCourt's engagement.[65] The ASA did not give the Respondent an express right to terminate an engagement and instead referred to the contractor providing the services 'for the duration required by the Builder' subject to the contractor having the right to terminate by 4 hours' notice: ASA cls 4(c), 5(c) CAB12-13; also TJ[67(p)] CAB29. As such, it was neither necessary nor possible to imply a term giving the Respondent a right to terminate for non-performance.[66] The Full Court erred to the extent that it found the Respondent had a right to terminate Mr McCourt's engagement for poor performance and that this was a measure of control vesting in the Respondent: FC at [169] CAB144 cf. [170] CAB145.

30. Nor are the Appellants correct in saying that cl 4 of the LHA 'devolved' control to Hanssen such that Hanssen was exercising control delegated to it by the Respondent. Mr McCourt had never seen and was unaware of the LHA: FC[150] CAB137. Further the LHA could not devolve a right of control which the Respondent did not have.[67] It would also have been apparent to Hanssen from the description of the workers as self-employed contractors that the Respondent did not have a right of control capable of being devolved to Hanssen. The effect of clause 4 of the LHA, read in context and particularly with cls 1 and 5, was to make clear that it was for the builder to allocate tasks to the contractor. The Respondent was not performing or supervising any building work, only referring contractors to the builder to perform work at the builder's request and under the builder's direction and supervision. The Respondent undertook no responsibility for that work.[68]

31. The Appellant's submission (at [26]) that, because in practice Mr McCourt accepted direction from Hanssen, a right of control in the Respondent is to be implied, is not correct. It was not necessary for the Respondent to have a right to control Mr McCourt. Viewed objectively, neither the Respondent nor Mr McCourt contemplated that Mr McCourt would be subject to the Respondent's directions in the performance of the work on the building sites

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[65] See also LHA cl 6(c) (giving Hanssen an express right to terminate the hire of a contractor) CAB59.

[66] Even if such a term could have been implied, it would have been theoretical at best because it is not likely that the Respondent would terminate an engagement where the worker was required by the builder.

[67] Even if regard is able to be had to the LHA as part of the totality of the relationship, it still cannot be relied upon to imply a term into the ASA so as to found a lawful authority to control Mr McCourt.

[68] Similar arguments were rejected in *Odco Trial* at [177]-[178] and *Young Trial* at [19] where clauses in the hiring materials stated the personnel 'we supply to you are yours to direct'. In *Bunce*, the English Court of Appeal, while accepting on the facts of that case that the control exercised by the host did originate in the contract between the agency and the worker, held that was not enough to satisfy the minimum requirement of control necessary for a contract of service to exist. The Court said the law has always been concerned with who 'in reality' has the power to control what the worker does and how he does it and that was the host: *Bunce* at [6], [16], [25]-[30].

or even in incidental or collateral matters. Once Mr McCourt accepted an offer of work, he undertook to provide his services to the builder 'for the duration required by the Builder' (or until Mr McCourt terminated the arrangement 'on 4 hours notice').[69] As such it was in Mr McCourt's interests to take direction from the builder. Not only was there no need for the Respondent to retain any lawful authority over Mr McCourt, the builder would not have permitted the Respondent to interfere with its operations by giving Mr McCourt directions: TJ [54(47)] CAB 23. This was a case in which the Respondent not only lacked the practical ability to control Mr McCourt in the performance of his work, but in which there was also an absence of control stemming from the very nature of the relationship.[70]

32. The only obligation which Mr McCourt had to comply with the Respondent's instructions was a statutory duty to comply with instructions in relation to safety: FC[152]-[156] CAB138-140. Employment is a contractual relationship. A limited statutory duty to comply with instructions (imposed on employees and contractors alike) can have no bearing on whether a worker is an employee. In providing the "Contractor Safety Induction - Construction"(**Safety Guide**)[71] to Mr McCourt and requiring him to sign the acknowledgment page, the Respondent was acting in furtherance of its statutory obligations which applied to employers and principals alike.There was no need or reason for the Safety Guide to be contractual. It was not put to Mr McCourt on that basis: TJ [67(b)-(e)] CAB27. It stated it was 'intended as a general guide to workplace safety and health'. The acknowledgment page did not require Mr McCourt to abide by its terms, only to acknowledge he had read it. Nor was there any term in the ASA requiring Mr McCourt to abide by the Respondent's policies. Insofar as the acknowledgements required Mr McCourt to do certain things, they were all instructions given for his safety and the safety of others and he had a statutory obligation to comply. In holding the Safety Guide to be contractual, Lee J relied on *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403: FC [157]-[160] CAB140-141. In *Farstad*, the employment contract contained an express term requiring the employee to abide by the employer's policies. Ultimately whether or not the Safety Guide had contractual force turned on the intent of the Respondent and Mr McCourt, as objectively 'conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened'.[72] For the reasons set out above, assessed objectively, the parties did not have the

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[69] ASA paras 4(c) and 5(c).
[70] *Oceanic Crest Shipping* at 682-683
[71] The Safety Guide is annexure LVP-3 to the affidavit of Leon van der Plas RBFM 3633. The page signed by Mr McCourt is annexure LVP-14 RBFM 4643 and is extracted at TJ[14] CAB6.
[72] See *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [25] and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]-[41].

mutual intention that the Safety Guide formed part of the contract between them. Further and in any event the Full Court ought to have found that the steps taken by the Respondent to comply with its statutory safety obligations, including the provision of the Safety Guide, and Mr McCourt's statutory obligation to comply with safety instructions given by the Respondent 'as if' Mr McCourt was the Respondent's employee, were neutral or, in the further alternative, that they did not constitute a sufficient degree of control to sustain a finding of employment.[73]

33. Other indicia pointing to a lack of control by the Respondent over Mr McCourt and a degree of independence on his part included his right to reject offers of work and to work for others (discussed below) and his right to negotiate a rate increase with Hanssen.[74]

34. For the above reasons the Full Court ought to have found the Respondent had neither a legal nor practical right of control over Mr McCourt, or, alternatively, had very little control over him in the performance of the work: FC[169]-[170] CAB143-144, [175] CAB146 . The Full Court was wrong to hold that the control indicium was not an essential factor nor particularly helpful in the characterisation of multilateral arrangements, that an absence of control by the labour hire agency may be neutral and that the lack of interaction between Mr McCourt and the Respondent was minutia and by inference of minimal significance: FC [87]-[88] CAB118, [170] CAB144, [175] CAB146 cf. [81] CAB116 and ought to have held that the absence of any or any sufficient degree of control by the Respondent meant Mr McCourt was not its employee or, alternatively, strongly contraindicated employment: NOC [2], [3] CAB 183. The approach the Full Court took was in effect to remove control from the analysis.

Vicarious liability

35. None of the policy concerns and purposes underlying vicarious liability favoured a finding that the relationship between the Respondent and Mr McCourt was one of employment. Firstly, that an employer is able to control the exercise of the employee's duties is one of the reasons the common law imposes vicarious liability on the employment relationship.[75] Deterrence is not advanced by seeking to impose liability on a party which has neither the practical ability nor the ultimate legal authority to organise, allocate or control the performance of the work.[76] In *Hollis*, the extent to which Vabu controlled the work supported

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[73] The only evidence of anyone from the Respondent giving Mr McCourt anything approaching a direction as to his work was when its Client Representative, Marshall, saw Mr McCourt wearing a harness and, knowing that Mr McCourt was not authorised to work at heights and that this represented a safety hazard, informed Mr McCourt and Hanssen accordingly: TJ[49], [82], [102] CAB21, 33, 36.

[74] Mr McCourt did not exercise that right but many others did: John van der Plas (aff) [23] RBFM 107; Marshall (aff) [22] RBFM 7269; Leon van der Plas (aff) [48] RBFM 2926; Wieske (aff) [54]-[55] RBFM 6259.

[75] *Barrett* at [404].

[76] *Eastern Van* at [95]-[98]. It is no answer to say vicarious liability may be imposed on a hirer when there is employment pro hac vice. If the general 'employer' does not have a sufficient right of control to begin with, the relationship will not be one of employment. The hirer's liability will be direct not vicarious.

a finding of employment and the imposition of vicarious liability. Secondly, unlike Vabu which created the enterprise risk, here the 'enterprise risk' was created by Hanssen. Thirdly, in *Hollis* the majority, at [40], emphasised the the absence of representation and identification with the alleged employer as indicative of a relationship of principal and independent contractor. Mr McCourt was not presented to the public or to Hanssen as an emanation of the Respondent. He was not required to wear a uniform or any of the Respondent's branding.[77] Nor was he the Respondent's representative standing in its place. Unlike Vabu (whose business it was to deliver documents and parcels), it could not be said the work which Mr McCourt did was 'the very essence of the public manifestation of [the Respondent's] business'. Unlike Vabu, the Respondent's business does not involve the 'marshalling and direction of the labour of the [workers]'.[78] The Respondent's business consists of finding and placing workers with clients. Its work is performed by its office staff and client representatives, who are its employees. The Respondent does not perform building work.[79] While the Respondent benefited from the work which Mr McCourt did (as any principal does), that is not enough.[80] Mr McCourt was not integrated into the Respondent's business. He was integrated into Hanssen's business, attending Hanssen's pre-start meetings and performing Hanssen's work to Hanssen's schedule as part of a team organized and directed by Hanssen's supervisors: TJ [104]-[105] CAB36-37. He was not identified or treated as one of the Respondent's staff: TJ[164]-[165] CAB53. The Full Court ought to have found that all of these factors - control, deterrence, enterprise risk, representation, identification and integration - contra-indicated a finding of employment: NOC[4], [5] CAB184.

Characterisation terms

36. The approach to express terms in contracts seeking to characterise the relationship as one of employment or independent contract is well established. Such terms are not of themselves determinative, as parties cannot deem the relationship between themselves to be something it is not.[81] The circumstances surrounding the making of the contract,[82] the system

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[77] The Respondent did not object to workers wearing PPE with another company's logo: Leon van der Plas (aff) [38] RBFM 272~~4~~.

[78] *Hollis* at [57]. The same distinctions can be made with Autoclenz whose business was to clean cars and whose workers were 'subject to the direction and control of [Autoclenz's] employees on site': *Autoclenz* at [1], [37(35)]. That is not this case.

[79] LHA cls 1, 4, 5; TJ [54(47)] CAB23.

[80] *Hollis* at [40].

[81] *Hollis* at [58]; *Australian Mutual Provident Society v Chaplin* (1978)18 ALR 385 (***Chaplin***) at 389 citing *Massey v Crown Life Insurance Co* (1978) 1 CR 590 at 594; *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 (***Narich***) at 601, 606; *R v Foster* (1951) 85 CLR 138 at 151; *Tattsbet* at [65]; *Re Porter; Re Transport Workers Union of Australia* [1989] FCA 226; (1989) 34 IR 179 at 184; *Ace Appeal* at [32], [36].

[82] *Connolly v Wells* (1994) 55 IR 73 at 74; *Narich* at 601; *ACT Visiting Medical Officers Association v AIRC* (2006) 153 IR 228; [2006] FCAFC 109 (***VMO Case***) at [24].

operated thereunder and the work practices all go to establishing 'the totality of the relationship'.[83] If the relationship is otherwise ambiguous, then the parties can remove that ambiguity by the agreement they have made with each other. The agreement 'then becomes the best material from which to gather the true legal relationship between them'.[84] This last proposition has been approved numerous times in Australia[85] and provides a commonsense resolution in cases where, after all of the indicia have been considered, real ambiguity remains. Where there is no reason to think that a characterisation term is a sham, or that it is not a genuine statement of the parties' intentions, it must be given its proper weight.[86] The terms and terminology of the contract may then be of considerable importance.[87] These principles strike an appropriate balance between contractual autonomy and public policy.

37. The trial judge did not err in his treatment of the characterisation terms: TJ[172], [175] CAB54-55. His conclusion (TJ [177] CAB56) that there was 'no sufficient reason not to find the parties' agreement that Mr McCourt was self-employed mean[t], and was intended to mean, what it sa[id]' was prefaced by the words 'where the question might be seen to be reasonably evenly balanced' and was arrived at only after having made an assessment of all of the circumstances.[88] In *Autoclenz* it was said if there is reason to suggest that the written terms do not reflect the parties' genuine intentions and expectations, then they will be read down or disregarded. That is not controversial and is consistent with Australian authority. Here there was no reason to suppose the terms did not reflect the parties' genuine intentions and expectations.[89] The Respondent's employee explained to Mr McCourt, both before and during his interview, the nature of the Respondent's business, that workers were engaged as self-employed independent contractors, that Mr McCourt was free to accept or reject any offer of work and how the arrangement would operate: TJ [64], [65],

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83 *Hollis* at [24]; Such an approach of characterisation from all the circumstances is not new: FC[11].

84 *Chaplin* at 409-410 citing *Massey v Crown Life Insurance Co* (1978) 1 CR 590 at 594; *Narich* at 601.

85 For example, by intermediate appeal courts: *Mary Kay* at 879-80; *Odco Appeal* at 126-7; *NM Superannuation Pty Ltd v Young* (1993) 41 FCR 182 at 199; *Australian Air Express Pty Limited v Langford* [2005] NSWCA 96 (***Langford***) at [67]-[71]; *VMO Case* at [32]-[33]*; Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312; (2004) 141 IR 31 (***Personnel Contracting***) at [24]-[26], [145]-[150]; *Cmr of State Revenue v Mortgage Force Australia Pty Ltd* [2009] WASCA 24 at [71]-[74], [109(a)]; *Tobiassen v Reilly* (2009) 178 IR 213; [2009] WASCA 26 at [102]-[103]; *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 at [38]; *Eastern Van* at [168]-[172], [176]. Most of these cases involved bilateral arrangements: cf FC[188] CAB150, Appellants' Submissions at [37].

86 *Chaplin* at 390; *Narich* at 601; *Mary Kay* at 879-80; *Odco Appeal* at 126-7; *Langford* at [67]-[71]; *VMO Case* at [32]-[33].

87 *Stevens* at 37; *VMO Case* at [33]; *Eastern Van* at [168], [172]

88 cf. FC[116] CAB128. The approach criticized by Lee J (but which the trial judge did not adopt) of starting with the contractual terms and then looking to see whether the facts are consistent with the parties' expressed intention is the approach now applied in Canada: *1392644 Ontario Inc o/a Connor Homes v The Minister of National Revenue* 2013 FCA 85 at [30]-[42].

89 *Young Trial* at [42] (intention is not preference).

[67(f)-(h), (p)] CAB25-27. That was also explained in the FAQ and Guide to Work at a Glance which Mr McCourt read.[90] Once Mr McCourt accepted an offer of work then, in accordance with the ASA, the engagement continued for as long as he wished or Hanssen required his services. The Respondent did not exercise control over him. The arrangement in practice operated as the parties expected and intended. In circumstances where sham and pretence had been disavowed (TJ[177] CAB56), there was no unconscionability or predation (TJ[179] CAB56), and the reality of the working arrangement substantially reflected the written terms, the characterisation terms in the ASA were entitled to be given significant weight. In those circumstances, if the Court considered the indicia evenly balanced, it was entitled to have regard to the characterisation terms as an expression of the parties' genuine intentions. There was no error in the trial judge doing so.[91] To the extent that the Full Court adopted a different approach to that of the trial judge, it erred: NOC[8] CAB185.[92]

Whether freedom to reject work and non-exclusivity contra-indicate employment

38. The trial judge made no express finding about the weight he gave to Mr McCourt being free to accept or reject work or to his having the right to work for others. The ASA stated Mr McCourt was free to accept or reject work as he wished.[93] That was emphasised to Mr McCourt at his interview. When it suited Mr McCourt to take days off he did so. He did not ask permission or notify the Respondent. Hanssen had no power to refuse Mr McCourt's request. It simply asked to be notified: TJ [109(9)] CAB38. No issue was taken when Mr McCourt left without notifying the Respondent after the first period of engagement.[94] The Respondent had no power to require Mr McCourt to move from one site to another and that was another indicator of a lack of control.[95] The trial judge was entitled to take those matters into account as part of his broader assessment of what control the Respondent had over Mr McCourt and what independence or control Mr McCourt had over

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90 TJ [179] CAB56 . The FAQ is set out at TJ [13] CAB13. The Guide to Work at a Glance is at TJ Annexure B CAB61.

91 Albeit the Respondent says the Trial Judge ought to have given more weight to the absence of control and representation and found, on balance, that the other indicia clearly contra-indicated employment.

92 See FC [35]-[37] CAB98 and [97]-[107] CAB122-125. Lee J referred (at [102]-[106]) to the approach taken in *Autoclenz* and *Jamsek*. But the circumstances in those cases were very different. The circumstances surrounding the making of the contract are relevant to its characterisation. In both those cases an existing and long term work force was given the 'choice' of signing new contracts or losing their jobs: *Autoclenz* at [11]-[12]; *Jamsek* at [15]-[16]. Thereafter very little changed. The workers continued to work under the company's direction and control, wore uniforms or displayed the company's branding, were integrated into the company's business and performed the company's work. In those circumstances there was reason to consider the parties' respective bargaining positions and to question whether the agreements reflected the parties' genuine intentions. That is not this case. Here there was no reason to think Mr McCourt, a backpacker holidaying around the country, who left when it suited him and returned when it suited him, was not exercising a free choice.

93 ASA, cls 4(c), 5(b) and (c) CAB12.

94 Marshall (aff) [38] RBFM 75-7672-73 and annexure TWM-9 RBFM 8077.

95 *Odco Appeal* at [125].

his work (TJ [142] CAB48). That casuals are also free to reject or accept offers of work may mean this factor carries less weight, but it was still a relevant factor which when viewed with other indicia as part of the totality of the relationship was capable of informing an assessment of whether Mr McCourt was an employee.[96] The Full Court did not find the trial judge erred in taking it into account: FC[175] CAB146. As to the ability of Mr McCourt to work for others, he was entitled under the ASA to work for others while engaged by the Respondent because the ASA did not preclude him from doing so. While Mr McCourt may not have worked for others, what is relevant is that he had that right. Other contractors exercised that right.[97] A right to work for others points to a degree of autonomy and is capable of supporting an independent contractor characterisation when viewed with other indicia.[98] The trial judge did not err in so concluding. [99] The Full Court erred in holding otherwise: FC[175] CAB146.

The decision in *Personnel Contracting*

39. Strictly, the question in this appeal is not whether *Personnel Contracting* was correctly decided or whether the Full Court correctly applied the rules of precedent in following it, but whether Mr McCourt was an employee.[100] Nonetheless *Personnel Contracting* was not distinguishable,[101] was correctly decided and the Full Court was right to follow it. The majority in *Personnel Contracting* did not err in their treatment of the characterisation terms and in any event ought to have found that the absence of control in that matter by the present Respondent strongly contra-indicated employment. The result was correct. Notwithstanding differences in reasoning and emphasis between the majority judges, the decision is authoritative in cases in which the circumstances are not reasonably distinguishable.[102] The work practices were materially the same as this case. The differences in the documents only made this a stronger case: FC[122] CAB 129-130.

Should the Court disturb a long standing line of authority or otherwise reformulate the established tests for identifying whether a worker is an employee?

40. *Personnel Contracting* does not stand alone. It is consistent with the outcomes in

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[96] See *Odco Appeal* at 125; *Eastern Van* at [134]; *JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2001) 105 IR 66; [2001] NSWCA 125 at [88]-[93]; *Windle v Secretary of State for Justice* 2016 EWCA Civ 459 at [23] per Underhill LJ 'a matter of common sense and common experience that the fact that a person supplying services is only doing so on an assignment-by-assignment basis may tend to indicate a degree of independence, or lack of subordination, in the relationship while at work which is incompatible with employee status'; approved in *Uber BV* at [91].

[97] John van der Plas (aff) [17] RBFM ~~96~~.

[98] *Jensen* at [44]; *Stevens* at 25.2, 39.6.

[99] TJ [146] CAB49.

[100] *Green v The Queen* [2011] HCA 49 at [87].

[101] The circumstances of the labourers in *Personnel Contracting* are outlined in more detail in the reasons of the Full Bench: *CFMEU v Personnel Contracting Pty Ltd* [2004] 84 WAIG 1275 at [18]-[35] and [174].

[102] *Benson v Rational Entertainment Enterprises Limited* (2018) 97 NSWLR 798 at [113]-[114].

Odco Appeal and in *Young Appeal* which the Full Court was also right to follow. In each case an intermediate appeal court, in circumstances not materially distinguishable from this case, held that labourers engaged by a labour hire company to perform work for a builder under the supervision and direction of the builder were not employees.[103] In each case, as in this case, contractors were engaged under the 'Odco model'. There is therefore a 30 year line of authority in Australia. As discussed above (at [27]), in those cases where Odco style arrangements have not been upheld and the workers have been found to be employees there has been some distinguishing feature. The Odco model has been widely replicated and has entrenched itself into modern industrial relations and employment: FC[30], [70] CAB96, 112. It extends well beyond the construction industry.[104] In deciding there was no compelling reason to depart from *Personnel Contracting* and *Young*, the Full Court had regard to the length of time for which *Personnel Contracting* had stood, the fact that the Respondent and, it was 'safe to assume', other parties around Australia had relied upon it in developing their mode of doing business, and that to decide the case contrary to that decision would throw the Respondent's whole enterprise, as well as that of any other entity that had been operating on the assumption that its arrangement was valid, into uncertainty and expose them to numerous civil penalties of some seriousness: FC [39] CAB99, [126], [129]-[130] CAB131-132, [185] CAB149.

41. The same considerations are relevant in this Court. In *Babianaris v Lutony Fashions Pty Ltd*[105] all members of the Court accepted the proposition that a decision of long-standing, on the basis of which many persons will have arranged their affairs, should not be lightly disturbed by a superior court, including an ultimate appellate court. That principle will not apply if the Court is convinced the previous decision is plainly wrong. But the principle will have force when the issue is 'highly disputable or finely balanced, involving a difficult choice between strongly competing contentions' and a reversal is likely to create serious embarrassment for those who acted on the faith of the earlier decision.

42. Similar principles apply where a Court is asked to alter or re-express the common law. Considerations which may encourage the Court to leave the law unchanged or to leave

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[103] The workers whose circumstances were examined in *Odco* included four labourers who did not provide their services through a company or partnership, did not provide tools, did not appear to have any business of their own and two of whom derived all or almost all of their work through Troubleshooters: *Re Odco Pty Ltd v Building Workers Industrial Union of Australia* [1989] FCA 483 at [143]-[148], [155], [202]-[206]; cf. FC [119] CAB 128. Approximately 40% of workers placed were labourers: at [18].

[104] A Parliamentary report which preceded the IC Act found contractors working under the Odco system included 'farm hands, doctors, secretaries, personal assistants, family day-care workers, fishermen, salespeople, cleaners, security guards and building workers': House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements,* 2005 (***Making it Work***), at [3.16].

[105] (1987) 163 CLR 1 at 13-14, 22–24, 28-33.

any re-expression to the legislature include: whether the rule reflects long standing authority and is frequently applied; the implications of any alteration and the extent to which any such change will expose persons who have arranged their affairs on the basis of established authorities to liability; the perceived undesirability of imposing retrospective liability; the enactment of legislation evidencing parliamentary attention to the subject; and the desirability, in particular cases, of not making any change until after intensive analysis of social data and public consultation, facilities unavailable to a court.[106]

43. All of those considerations apply here. Of particular relevance, is that in 2005, following an inquiry into independent contracting and labour hire arrangements, in which Odco arrangements were examined and *Odco Appeal* was referred to,[107] the Parliament responded by enacting the IC Act: NOC[8] CAB 185. The IC Act provides a remedy for contractors who consider their terms to be harsh or unfair including because their contract provides total remuneration less than that of an employee performing similar work.[108] For all of the above reasons it is submitted the Court should not depart from the established line of authority or re-express the common law tests for identifying an employee. It is a matter which ought be left to Parliament so that, if any changes are considered necessary, they can be made prospectively and after a proper examination of their likely effects.

Part VI – Notice of contention

44. All grounds in the NOC are pressed and have been dealt with above.

Part VII

45. The Respondent estimates that 3.5 hours will be required for its oral argument.

Dated 17 May 2021

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[106] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575 at [76]; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at [212]-[219].
[107] *Making it Work* at [3.15], [3.16], [3.97], [5.123]; also dissenting report at [1.33]-[1.35].
[108] IC Act 2006 (Cth), ss 3, 12(1), 15(1), 16(1). The Explanatory Memorandum stated on p 4 'Independent contractors comprise a diverse group – they can be anyone from an IT or accounting professional to a factory worker, cleaner or fruit picker' and on p 5 that labourers made up, at that time, 10.6% of self-employed contractors in the Australian workforce.

Annexure

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

Title	**Provision/Section**	**Date**
Fair Work Act 2009 (Cth)	Sections 11, 12, 13, 14(1)(a), 42, 44, 45, 60, 140(1)(b), 340-343, 345-350, 355, 483A, 483(1A)(b), 529, 535, 789AA, 789AC, 789BA(1), 789BB, 789FC(2)	27 July 2016 to 30 June 2017
Independent Contractors Act 2006 (Cth)	Sections 3, 12(1), 15(1), 16(1)	1 January 2010
Racial Discrimination Act 1975 (Cth)	Section 3(1)	1 January 2010
Sex Discrimination Act 1984 (Cth)	Section 4(1)	1 January 2010
Disability Discrimination Act 1992 (Cth)	Section 4(1)	1 January 2010
Superannuation Guarantee (Administration) Act 1992	Section 12(3)	1 January 2010
Income Tax Assessment Act 1997 (Cth)	Sections 290-65	1 January 2010
Age Discrimination Act 2004 (Cth)	Section 5	1 January 2010
Work Health and Safety Act 2011 (Cth)	Section 7(1)	1 January 2010