HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

CONSTRUCTION, FORESTRY, MARITIME,
MINING AND ENERGY UNION & ANOR APPELLANTS

AND

PERSONNEL CONTRACTING PTY LTD RESPONDENT

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd
[2022] HCA 1
Date of Hearing: 31 August 2021
Date of Judgment: 9 February 2022
P5/2021

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the order of the Full Court of the Federal Court of Australia made on 17 July 2020 and, in its place, order that:*

   (a) the appeal be allowed;

   (b) the order of the Federal Court of Australia made on 6 November 2019 be set aside;

   (c) it be declared and ordered that, between 27 July 2016 and 6 November 2016 and 14 March 2017 and 30 June 2017, the second appellant was employed by the respondent; and

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

On appeal from the Federal Court of Australia

Representation

B W Walker QC with M A Irving QC and T J Dixon for the appellants (instructed by Construction, Forestry, Maritime, Mining and Energy Union)

J B Blackburn SC with M L Felman for the respondent (instructed by Hotchkin Hanly Lawyers)

CATCHWORDS

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd

Industrial law (Cth) – Nature of employment relationship – Employee or independent contractor – Where second appellant backpacker with limited work experience sought construction work from respondent – Where respondent in business of labour-hire – Where respondent and second appellant entered written contract describing second appellant as "self-employed contractor" – Where respondent assigned second appellant to work on construction site run by respondent's client – Where second appellant agreed with respondent to co-operate with respondent and client in all respects in supply of his labour to client – Where no contract between second appellant and client – Where respondent paid second appellant for work performed for client – Whether second appellant employee of respondent.

Words and phrases – "business of supplying labour", "contract of service", "contractor", "control", "employee", "independent contractor", "label", "labour-hire", "legal rights and obligations", "multifactorial approach", "own business", "own business/employer's business dichotomy", "performance of work", "serving in the business of the employer", "subsequent conduct", "totality of the relationship", "triangular labour-hire arrangement", "written contract".

Fair Work Act 2009 (Cth), ss 13, 14.

1 KIEFEL CJ, KEANE AND EDELMAN JJ. The respondent (trading as "Construct") is a labour-hire company based in Perth, which engages workers to supply their labour to building clients. Construct's major client was Hanssen Pty Ltd ("Hanssen"), a builder of high-rise residential apartments and offices[1].

2 In 2016, Mr McCourt was a 22-year-old British backpacker who had travelled to Australia on a working holiday visa. Seeking a source of income, and with limited prior work experience as a part-time brick-layer and in hospitality, Mr McCourt obtained a "white card", which enabled him to work on construction sites. He contacted Construct and attended an interview on 25 July 2016. At the interview, Mr McCourt indicated that he was prepared to do any construction work, and was available to start work immediately. He confirmed to the Construct representative that he owned a hard hat, steel-capped boots and hi-vis clothing, having purchased them for less than $100 in the hope of finding construction work. He was offered a role and presented with paperwork to sign. Among the documents he signed was an Administrative Services Agreement ("ASA"), which described Mr McCourt as a "self-employed contractor"[2].

3 The day after Mr McCourt's interview, Construct contacted him to offer him work at Hanssen's Concerto project site beginning the following day. When he arrived on site, Mr McCourt was given the Hanssen Site Safety Induction Form and Hanssen Site Rules. He was told that he would be supervised primarily by a leading hand employed by Hanssen, Ms O'Grady[3]. Mr McCourt did not sign a contract with Hanssen.

4 Mr McCourt worked at the Concerto site between 27 July and 6 November 2016. While on site, Mr McCourt worked under the supervision and direction of Hanssen supervisors, including Ms O'Grady. Although Construct staff sometimes conducted site visits, they never directed Mr McCourt in the performance of work,

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1 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 645 [46]-[47].

2 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 644 [42], 649 [55].

3 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 649 [57]-[58], 650 [60].

except to draw his attention to workplace health and safety issues in the manner of his work[4]. Mr McCourt's primary tasks were described as follows[5]:

> "For a period of months, he engages in basic labouring tasks; he takes out the bins, cleans workspaces and moves materials. He is not an entrepreneur nor a skilled artisan; he is paid by the hour, and when at work, is told what to do and how to do it."

5 On 6 November 2016, Mr McCourt finished work at the Concerto site and left Perth. He returned the following March and, on 14 March 2017, recommenced work on the Concerto project. On 26 June 2017, he began working on Hanssen's Aire project, performing work that was substantially identical to the Concerto project. On 30 June 2017, Mr McCourt was told that he was not to continue working at the Aire project. Thereafter, Mr McCourt did not receive any work from Construct[6].

6 Mr McCourt and the Construction, Forestry, Maritime, Mining and Energy Union commenced proceedings against Construct seeking orders for compensation and penalties pursuant to ss 545, 546 and 547 of the *Fair Work Act 2009* (Cth) ("the Act"). The claims were made on the basis that Construct had not paid Mr McCourt according to his entitlement, as an employee of Construct, to payment in accordance with the Building and Construction General On-site Award 2010. Similar orders were sought against Hanssen, on the basis that it was liable as an accessory for Construct's alleged breaches.

7 The crucial question in the proceedings was whether Mr McCourt was an employee of Construct for the purposes of the Act. The primary judge (O'Callaghan J), applying a multifactorial approach to that question, treated the description of Mr McCourt in the ASA as "the Contractor" as decisive of that

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4 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 649-650 [54], [59]-[60].

5 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 644 [42].

6 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 649-650 [59].

question in circumstances where the other factors were "reasonably evenly balanced"[7]. On that basis, the proceedings were dismissed[8].

8 The primary judge's conclusion was upheld on appeal by the Full Court of the Federal Court of Australia[9]. The members of the Full Court (Allsop CJ, Jagot and Lee JJ) also approached the question by a multifactorial analysis, but made it clear[10] that had it not been for the decision of the Western Australian Industrial Appeal Court in *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers*[11] ("*Personnel (No 1)*") – which involved "essentially the same dispute between the same parties"[12] – their Honours would have held that Mr McCourt was an employee of Construct. Lee J, with whom Allsop CJ and Jagot J agreed, described the notion that Mr McCourt was an independent contractor as "somewhat less than intuitively sound"[13]. But because their Honours were not able to conclude that *Personnel (No 1)* was plainly wrong[14], they held that Mr McCourt had been engaged by Construct as an independent contractor and, therefore, was not an employee.

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7 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [176]-[178].

8 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806.

9 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631.

10 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 642-644 [31]-[40], 667-670 [125]-[134].

11 (2004) 141 IR 31.

12 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 666 [121].

13 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 682 [185]. See also 641-642 [28]-[29].

14 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 644 [40], 682 [185].

9 For the reasons that follow, Mr McCourt was employed by Construct, and so the appeal to this Court must be allowed.

The contractual arrangements between the parties

10 The relationship between Mr McCourt and Construct was governed by the ASA. The relationship between Construct and Hanssen was governed by a Labour Hire Agreement ("LHA"). There was no contractual arrangement between Mr McCourt and Hanssen.

The LHA

11 The LHA described Construct's role as "an administrative services agency, liaising between the client and self-employed contractors for the provision of labour by self-employed contractors to the client"[15]. Construct's workers were referred to Hanssen on a "daily hire basis" for which Hanssen agreed to pay Construct at an hourly rate, negotiated between Hanssen and Construct, and invoiced weekly[16]. Construct was responsible for the suitability of its workers, and agreed to replace a worker at no charge if notified of the worker's unsuitability within four hours on the first day of an assignment[17]. Hanssen agreed to comply with all workplace health and safety laws applicable to Construct's workers[18].

12 It is unnecessary, and indeed inappropriate, to refer to the terms of the LHA in any greater detail because Mr McCourt was not a party to the LHA. His contract with Construct was not affected by the terms of the LHA. Clause 4 of the LHA, however, is significant because its import was reflected in the ASA. Clause 4 was entitled "Direction", and provided as follows:

> "[Construct's] contractors are 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."

13 The bargain between Construct and Hanssen dovetailed in this respect with the bargain between Construct and Mr McCourt in that the latter arrangement facilitated Construct's performance of the former. As will be seen, under the ASA,

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15 cl 1 of the LHA.

16 cll 3, 9 of the LHA.

17 cl 1 of the LHA.

18 cl 2 of the LHA.

Construct had the right to subject Mr McCourt to the direction of Hanssen in respect of what work he was to do and how he was to do it.

The ASA and related documents

14 Given its central importance to the characterisation of Mr McCourt's relationship with Construct, it is desirable to set out the terms of the ASA in full:

"**RECITAL**

A. Construct is an administrative services agency operating essentially within the building industry, liaising between builders (or their contractors) (both described as 'builders') and self-employed contractors for the provision of labour by self-employed contractors to builders and supplying to the self-employed contractors financial administrative services.

B. The Contractor requires Construct to keep the Contractor informed of opportunities for the Contractor to provide builders with labour services and to provide the Contractor with financial administrative support to enable the Contractor to concentrate on maximising the supply of quality labour to builders.

IT IS AGREED

1. Construct's Responsibilities

Construct shall:

(a) Use reasonable endeavours to keep informed of opportunities in the building industry for the Contractor to supply labour to builders identified by Construct;

(b) Inform the Contractor when, and on what basis, an opportunity arises for the Contractor to supply labour to a builder;

(c) Liaise between builders and the Contractor regarding the means by which the Contractor shall supply labour to such builders, including the duration that the builder requires such labour, the place at which labour is to be supplied, the daily hours of work during which labour is to be supplied and any other terms and conditions upon which labour is to be supplied by the Contractor to the builder;

(d) Subject to performance by the Contractor of his or its obligations under this Agreement, underwrite payment to the Contractor, within

7 days of receipt of an invoice from the Contractor, of all payment rates payable by the builder in respect of the supply of labour to the builder by the Contractor, including payment rates negotiated by the Contractor directly with the builder;

(e) Complete administrative forms and undertake necessary correspondence with Government authorities as may be required under any law of Western Australia relating to labour supplied to builders under this agreement, other than the completion by the Contractor of his taxation returns, including any instalment activity statement or business activity statements.

2. Construct's Rights

Construct shall be entitled to:

(a) Negotiate with any builder a payment rate for the supply by the Contractor of labour to the builder, provided that the Contractor shall be at liberty to negotiate with the builder an increase in the payment rate and any other terms and conditions upon which labour is to be supplied by the Contractor to the builder, subject to the Contractor properly performing his obligations under this Agreement;

(b) Negotiate with the builder the basis upon which Construct is to be remunerated on a commission basis as a percentage of the agreed payment rate for the supply of services by the Contractor to the builder;

(c) Negotiate with the builder for remuneration in respect of any increase in the payment rate negotiated directly by the Contractor with the builder;

(d) Withhold from the Contractor payment of any monies reasonably required by Construct to compensate it for any claim made against Construct by the builder in respect of the supply of labour by the Contractor to the builder.

3. The Contractor's Warranties

The Contractor warrants that:

(a) He has provided Construct with true and accurate information regarding his work experience and capability for the supply of labour to builders;

(b) He is self-employed;

(c) He does not require Construct to guarantee the Contractor work of any type or of any duration;

(d) That he shall keep Construct fully informed of the outcome of negotiations with the builder by the Contractor in order to ensure that Construct is promptly and accurately informed of any higher rate of payment agreed by the builder and the value of any other terms and conditions agreed with the builder by the Contractor;

(e) Construct shall not be liable to pay the Contractor any amounts in respect of annual leave, sick leave, long service leave or any other statutory entitlement required in an employer-employee relationship.

4. The Contractor's Obligations

The Contractor shall:

(a) Co-operate in all respects with Construct and the builder in the supply of labour to the Builder;

(b) Ensure accurate records are maintained as to the amount of labour supplied to the builder by the Contractor;

(c) Attend at any building site as agreed with the Builder at the time required by the Builder, and shall supply labour to the Builder (subject to notification under clause 5(c)) for the duration required by the Builder in a safe, competent and diligent manner;

(d) Indemnify Construct against any breach by the Contractor of sub-paragraph 4(c) hereof;

(e) Supply such tools of trade and equipment, for safety or other reasons, as may be required by the builder, in respect of which the Contractor is solely responsible;

(f) Possess all statutory certification relevant to the supply of labour, and shall ensure that these certificates be both current and valid in Western Australia;

(g) In the event that the Contractor reasonably considers that his safety is endangered by conditions on the building site, promptly report the unsafe conditions to Worksafe if unable to have the unsafe conditions rectified by the builder promptly;

(h) Not represent himself as being an employee of Construct at any time or otherwise represent himself as authorised to act on behalf of Construct other than strictly under the terms of this Agreement.

5. The Contractor's Rights

The Contractor is entitled to:

(a) Receive payment from Construct of all amounts negotiated with the builder by Construct and the Contractor within seven (7) days of the issue by the Contractor of a valid invoice delivered to Construct by the Contractor for the supply of labour to the builder by the Contractor;

(b) Refuse to accept any offer of work from a builder;

(c) Notify the builder and Construct on 4 hours notice that he is no longer available for the supply of labour under the terms of this Agreement."

15 A number of observations may be made here about the terms of the ASA. First, Recital A might be said to suggest that Construct was engaged merely in seeking out business opportunities for Mr McCourt. But the operative terms of the ASA and the factual matrix in which it was made make it clear that Construct's business was more substantial than introducing labourers to builders. Under cl 2(a), Construct was empowered to fix Mr McCourt's remuneration, subject to the possibility that he might negotiate extra benefits from Hanssen. And under cll 1(d) and 5(a), Construct assumed the obligation to pay Mr McCourt for his work with Hanssen.

16 Once Mr McCourt accepted an offer of work, his core obligation pursuant to cl 4(a) was to "[c]o-operate in all respects with Construct and [Hanssen] in the supply of labour to [Hanssen]". This included, pursuant to cl 4(c), the obligations to attend Hanssen's worksite at the nominated time, and to supply labour to Hanssen "for the duration required by [Hanssen] in a safe, competent and diligent manner".

17 Similar obligations were contained in Construct's Contractor Safety Induction Manual signed by Mr McCourt. By that document, which was found by

the Full Court to have contractual force between Mr McCourt and Construct[19], Mr McCourt agreed, inter alia: to follow all worksite safety rules and procedures given by Construct's "host client", and to report any safety hazards, incidents or injuries to the site supervisor or administrator and to Construct[20].

18 Before both the primary judge and the Full Court, the facts surrounding the work practices of Construct and Hanssen, and the specific arrangements vis-à-vis Mr McCourt, were canvassed at length. Given there was no challenge to the validity of the ASA nor any suggestion that the contract had been varied by conduct, a review of how the parties went about discharging their obligations to each other after execution of the ASA was unwarranted. It is unnecessary and inappropriate to replicate that fact-finding exercise in this Court. To the extent that this discussion of post-contractual performance had a bearing upon the reasoning of the courts below, it is sufficiently apparent from the reasons given for their decisions.

The primary judge

19 The primary judge applied a "multifactorial approach" to the question whether Mr McCourt was an employee or an independent contractor, in which both the terms of the ASA and the work practices imposed by each of Construct and Hanssen were relevant, though neither was dispositive[21].

20 The primary judge regarded the circumstances of control as tending against the conclusion that Mr McCourt was an employee of Construct. His Honour considered that the entity that had control over the performance of work by Mr McCourt was Hanssen, not Construct[22]. The primary judge rejected an argument that Construct had either control, or a right of control, over Mr McCourt on the basis that his obedience of Hanssen's directions derived from his contractual promises to Construct under the ASA. In the primary judge's view, Mr McCourt's

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19 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 673 [151], 676 [160].

20 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [14].

21 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [115], [119].

22 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [138], [140], [147].

generally expressed obligations to cooperate with Construct's client, and to turn up for work at a time and place nominated by the client, were insufficient to vest in Construct "control" over Mr McCourt in the relevant sense[23].

21 The primary judge considered that Mr McCourt was an "unskilled labourer" and that it was "obvious that Mr McCourt did not operate a business on his own account"[24]. His Honour rejected an argument that the question whether Mr McCourt was conducting his own business ought to be determinative of his employment status. His Honour regarded that argument as inconsistent with the nature of a multifactorial assessment[25]. His Honour considered that the circumstance that Mr McCourt was not operating a business on his own account was just one factor in the analysis, and that it supported a conclusion that he was an employee.

22 The primary judge considered that the circumstance that Mr McCourt was not integrated into the business of Construct tended weakly against the conclusion that he was an employee[26]. On the other hand, the circumstance that Mr McCourt provided only limited tools and equipment of his own was an indicator in favour of the conclusion that he was an employee[27]. His Honour considered that the absence of leave and employee entitlements was inconclusive, since that circumstance merely reflected Construct's understanding of the character of its relationship with Mr McCourt[28].

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23 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [135]-[141].

24 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [156].

25 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [153], [157].

26 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [164].

27 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [163].

28 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [167]-[169].

23 Ultimately, the primary judge concluded that because relevant factors pointed "in opposite directions"[29] and were "reasonably evenly balanced"[30], it was "important to pay close regard to the way in which the parties have characterised their relationship"[31]. His Honour held that in the present circumstances, where there was a written agreement between the parties and there was no suggestion of sham or pretence[32]:

> "it seems to me that there is no sufficient reason not to find that the parties' agreement that Mr McCourt was self-employed means, and was intended to mean, what it says."

24 In his Honour's view, the various terms of the ASA wherein Mr McCourt warranted that he was a "self-employed contractor"[33] and that he would not represent himself as being an employee of Construct[34] were clear statements of intent that the relationship between Construct and Mr McCourt was not to be one of employment, but one of principal and independent contractor. On that basis, his Honour concluded that Mr McCourt was not an employee of Construct[35].

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29 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [170].

30 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [177].

31 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [172].

32 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [177].

33 See, eg, Recital A and cl 3(b) of the ASA.

34 cl 4(h) of the ASA.

35 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [177]-[178], [181].

The Full Court

25 In the Full Court, Lee J applied a multifactorial approach[36], although his Honour identified three "tensions" in the application of that approach to a case such as the present. Those were: the identification of "control" in a trilateral relationship; the extent to which the question whether the worker conducts his or her own business is determinative of the characterisation of the relationship; and the weight to be given to the contractual description of Mr McCourt in the ASA as "the Contractor".

26 As to "control", Lee J considered that the gravamen of the concept of control was not the circumstance that the putative employee was in fact in a position of subordination but rather that it is the putative employer which commands the right to subordinate the employee in a position of service to the employer[37]. However, his Honour emphasised that control, while important, was but one indicator in the characterisation inquiry[38]. Indeed, his Honour went so far as to say that the control indicium "may not be particularly helpful in the characterisation of multilateral arrangements"[39].

27 As to the "own business" test, Lee J considered that while focussing the multifactorial approach on the question whether a worker is conducting a business on his or her own account may in some cases detract attention from the central question, in other cases it may prove to be a "useful way of approaching the broader inquiry". Ultimately, his Honour considered that the weight to be afforded to the "own business" question should be assessed in light of the whole picture and on a case-by-case basis[40]. In the circumstances of the present case, Lee J was inclined to accept the submission that the primary judge did not afford sufficient weight to

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36 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 654 [73].

37 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 656-658 [81]-[86].

38 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 656 [81].

39 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 658 [87]-[88]. See also 679 [170].

40 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 660 [96].

the uncontested fact that Mr McCourt was not in business on his own account, noting that it was a "surprising result" to ascribe to a 22-year-old backpacker with Mr McCourt's limited work experience the status of "independent contractor"[41].

28 As to the description of Mr McCourt as "the Contractor", Lee J disagreed with the primary judge's use of that contractual designation as an indicator with "tie-break" effect[42]. His Honour considered that, in the context of a multifactorial approach that involved many factors weighed in the balance, there was a logical difficulty in assigning decisive weight to one factor[43].

29 Despite these differences of approach from that of the primary judge, Lee J dismissed the appeal and accepted that Mr McCourt was an independent contractor. His Honour said that, had the question been considered *tabula rasa*, he may have reached the opposite conclusion[44]. Ultimately, however, Lee J concluded that the present circumstances were "materially identical"[45] to those considered in *Personnel (No 1)*[46].

30 In that case, a majority of the Western Australian Industrial Appeal Court (Steytler and Simmonds JJ, E M Heenan J dissenting) held that two labourers who had entered into agreements with Construct to supply labour to Hanssen, on similar terms to the ASA signed by Mr McCourt, were independent contractors. Lee J suggested that some of the misgivings he expressed in relation to the primary judge's approach – including those in relation to the relevance of the "own business" question and the contractual designation terms – might apply equally to the majority's reasoning in *Personnel (No 1)*. However, Lee J could not conclude

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41 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 681 [181].

42 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 665-666 [116]-[117], 682 [183]-[184].

43 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 666 [117].

44 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 682 [185].

45 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 682 [185].

46 (2004) 141 IR 31.

that the decision was plainly wrong[47]. Lee J noted that it had stood for 16 years, during which time many entities had presumably relied on the decision in structuring their own arrangements[48]. On that basis, Lee J dismissed the appeal[49].

31 Allsop CJ, if unconstrained by authority, would also have concluded that Mr McCourt and Construct were in a relationship of employment[50] because there was no indication that Mr McCourt was carrying on a business on his own account or that he was acting in any capacity other than as a builder's labourer[51]. Nevertheless, Allsop CJ agreed with Lee J that the appeal should be dismissed because the reasons of the majority in *Personnel (No 1)* did not disclose clear error, notwithstanding what Allsop CJ considered to be an overly weighted importance on the contractual designation terms[52].

The employment relationship and the multifactorial test

32 Both the primary judge and the Full Court applied a "multifactorial test" to the determination of whether Mr McCourt was an employee of Construct. The manner in which that approach was applied by those courts, following *Personnel (No 1)*, is problematic in a number of respects.

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47 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 669-670 [128]-[132].

48 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 669 [129].

49 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 670 [133]-[134].

50 Allsop CJ would have favoured a characterisation of Mr McCourt as a casual employee: see *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 642 [31].

51 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 642 [29], [31].

52 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 643-644 [36], [38].

The "own business/employer's business" dichotomy

33 A multifactorial approach is open to the objection that it "does not provide any external test or requirement by which the materiality of the elements may be assessed"[53]. As Lee J recognised in this case, without guidance as to the relative significance of the various factors the "multifactorial test" is distinctly "amorphous"[54] in its application, is "necessarily impressionistic"[55], and thereby is "inevitably productive of inconsistency"[56]. Such a test is apt to generate considerable uncertainty, both for parties and for the courts. That uncertainty is exacerbated where it is contended that the test is to be applied in respect of the parties' conduct over the whole course of their dealings with each other.

34 In *Stevens v Brodribb Sawmilling Co Pty Ltd*[57] and *Hollis v Vabu Pty Ltd*[58], it was said that the characterisation of a relationship as being either one of employment or one of principal and independent contractor is to be determined by reference to "the totality of the relationship between the parties". It was not suggested that this assessment should proceed as if the court is running down items on a checklist in order to determine a balance of ticks and crosses. It has never been suggested that the factors identified to be relevant are of equal weight in the characterisation of the relationship. Some understanding as to the relative significance of the various factors is desirable, both to minimise the extent to which application of the test may produce an impressionistic and subjective outcome on

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53 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 597.

54 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 655 [76]; cf *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 49.

55 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 654-655 [74]-[75].

56 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 655 [76].

57 (1986) 160 CLR 16 at 29.

58 (2001) 207 CLR 21 at 33 [24].

the one hand, and to avoid the injustice of a mechanistic checklist approach on the other[59].

35 In this Court, the appellants submitted that the question whether a labourer is conducting his or her own independent business, as distinct from serving in the business of the employer, provides a more meaningful framework to guide the characterisation of the parties' relationship. There is force in that submission.

36 The value of the "own business/employer's business" dichotomy in determining whether a person engaged to undertake work for another is an employee of that other has long been recognised. In an opinion written a century ago, expressed in the language of the time, by Andrews J for a strong New York Court of Appeals in *Braxton v Mendelson*[60], his Honour said:

> "Ordinarily no one fact is decisive. The payment of wages; the right to hire or discharge; the right to direct the servant where to go, and what to do; the custody or ownership of the tools and appliances he may use in his work; the business in which the master is engaged or that of him said to be a special employer; none of these things give us an infallible test. At times any or all of them may be considered. The question remains: In whose business was the servant engaged at the time?"

37 In *Marshall v Whittaker's Building Supply Co*[61], Windeyer J said that the distinction between an employee 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."

38 In *Stevens*[62], Wilson and Dawson JJ observed that Windeyer J in *Marshall* "was really posing the ultimate question in a different way". Similarly, in *Hollis*[63], the plurality referred to the statement of Windeyer J as reflecting the

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59 *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 597-598.

60 (1922) 233 NY 122 at 124.

61 (1963) 109 CLR 210 at 217.

62 (1986) 160 CLR 16 at 35.

63 (2001) 207 CLR 21 at 39 [40].

"representation and ... identification with the alleged employer" that characterises a relationship as one of employment. In their Honours' view, it was another way of putting the proposition that an independent contractor "carries out his work, not as a representative but as a principal"[64]. It may also be noted that the Federal Court has previously recognised that viewing the totality of the relationship between the parties through the prism of this dichotomy can give useful shape and meaning to the assessment of the relative significance of the parties' rights and duties[65].

39 While the "central question"[66] is always whether or not a person is an employee, and while the "own business/employer's business" dichotomy may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs, the dichotomy usefully focusses attention upon those aspects of the relationship generally defined by the contract[67] which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise. In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services[68] than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist.

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64 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 39 [39], citing *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48.

65 *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at 389 [176]-[177], 391 [184].

66 *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at 61 [61].

67 See [40]-[54] below.

68 *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184-185.

The employment relationship and the contract of employment

40 In *Commonwealth Bank of Australia v Barker*[69], French CJ, Bell and Keane JJ said:

> "The employment relationship, in Australia, operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment."

41 An employment relationship will not always be defined exclusively by a contract between the parties[70]. Historically, the employment relationship was recognised and regulated by the law before the law of contract came to govern the relationship[71]. An employment relationship, though principally based in contract, may be affected by statutory provisions and by awards made under statutes[72]. It may also be that aspects of the way in which a relationship plays out "on the ground" are relevant for specific statutory purposes. So, for example, a statute may operate upon an expectation generated in one party by the conduct of another, even though that expectation does not give rise to a binding agreement[73].

42 A contract of employment may be partly oral and partly in writing, or there may be cases where subsequent agreement or conduct effects a variation to the terms of the original contract or gives rise to an estoppel or waiver. In such cases, it may be that the imposition by a putative employer of its work practices upon the putative employee manifests the employer's contractual right of control over the work situation; or a putative employee's acceptance of the exercise of power may show that the putative employer has been ceded the right to impose such practices[74].

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69 (2014) 253 CLR 169 at 178 [1]. See also *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 693 [56]; 392 ALR 39 at 52.

70 *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at 315-316 [17]; 176 ALR 693 at 697-698.

71 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 182-183 [16].

72 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 178 [1].

73 See s 65(2)(b)(ii) of the Act.

74 cf *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41-45 [47]-[57].

43 While there may be cases where the rights and duties of the parties are not found exclusively within a written contract, this was not such a case. In cases such as the present, where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship[75].

44 Not only is there no reason why, subject to statutory provisions or awards, established legal rights and obligations in a contract that is entirely in writing should not exclusively determine the relationship between the parties but there is every reason why they should. The "only kinds of rights with which courts of justice are concerned are legal rights"[76]. The employment relationship with which the common law is concerned must be a *legal* relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties. By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights.

45 In *Narich Pty Ltd v Commissioner of Pay-roll Tax*[77], approving the earlier decision in *Australian Mutual Provident Society v Chaplin*[78], in the course of delivering the reasons of the Privy Council dismissing the appeal from the Supreme Court of New South Wales, Lord Brandon of Oakbrook said that:

> "where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract."

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75 *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 693 [56]-[57], 694 [63]; 392 ALR 39 at 52-53.

76 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501.

77 [1983] 2 NSWLR 597 at 600-601.

78 (1978) 52 ALJR 407 at 409-410; 18 ALR 385 at 389-390.

46 The one exception to this principle was said to be the case where subsequent conduct could be shown to have varied the terms of the contract[79]. To similar effect, in *Connelly v Wells*[80], following *Narich*, Gleeson CJ said:

> "Where the relationship between two persons is founded in contract, the character of the relationship depends upon the meaning and effect of the contract. In the absence of a suggestion that a contract was varied after it was originally made, its meaning and effect must be determined as at the time it was entered into. If the contract is in writing, then the court which is considering the nature of the relationship between the parties is directed to an examination of the terms of the written agreement in the light of the circumstances surrounding its making[81]."

Numerous other Australian courts have continued to recognise as authoritative the decisions in *Chaplin* and *Narich*[82].

47 In a number of decisions[83], however, including the decision of the Full Court in this case[84] and the decision of the Western Australian Industrial Appeal Court in *Personnel (No 1)*[85], which the Full Court had reluctantly followed in this case, courts have proceeded on an understanding that the approach stated in *Chaplin* and *Narich* has been superseded by the adoption of a multifactorial test in cases where the relationship sought to be characterised is either one of employment or one of principal and independent contractor, even where the terms of the

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79 *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601.

80 (1994) 55 IR 73 at 74.

81 *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601.

82 See, eg, *TransAdelaide v Leddy* (1998) 71 SASR 413 at 426; *Tobiassen v Reilly* (2009) 178 IR 213 at 233-234 [100]-[101]; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at 379-380 [148]-[150] (reversed on other grounds: (2015) 256 CLR 137); *Mutch v ISG Management Pty Ltd* [2020] FCA 362 at [68].

83 See, eg, *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 174 [107]; *Jensen v Cultural Infusion (Int) Pty Ltd* [2020] FCA 358 at [83].

84 See *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 636 [8], 637 [11]-[12], 639-640 [21], 654 [73], 661 [98]-[99], 663 [106], 673 [150], 676 [160].

85 (2004) 141 IR 31 at 39 [33], 44 [52].

relationship are comprehensively contained within a written contract. On this approach, the terms of the written contract are only "factors" to be considered along with other circumstances. But no decision of this Court has ever adopted or endorsed such a departure from *Chaplin* and *Narich*.

48 Indeed, the decisions in *Chaplin* and *Narich* exemplified a long line of authority in Australia which took the same approach. This is, perhaps, unsurprising in circumstances in which the older authorities focussed upon whether the relation involved a contract *of* service or a contract *for* services. Of course, some of these decisions had regard to the factors involving the work practices of the parties in order to determine common law questions relating to the rights and duties of the parties: the terms of a contract which is partly written and partly oral; whether a contract is a sham; or whether the terms of the contract have been varied or waived, or are subject to an estoppel. But none of these decisions can be understood as a rejection, *sub silentio*, of the approach taken in *Chaplin* and *Narich*. To the contrary, the decisions are based upon the same principled understanding. It is necessary to descend to the detail of these cases to show why it would be a large step to reinterpret these cases to justify a departure from the settled law of *Chaplin* and *Narich*.

49 In *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd*[86], this Court considered an application for an order nisi for prohibition by an insurance company seeking to restrain proceedings in the Commonwealth Court of Conciliation and Arbitration in relation to an industrial award on the basis that "agents" who canvassed insurance policies and collected premiums were independent contractors outside the concept of an industrial dispute within s 51(xxxv) of the *Constitution*. The company relied upon a clause in a written agreement which provided that the relationship between the parties "will be strictly that of principal and agent and not in any way whatever that of employer and employee". The union alleged that the agreement was a sham and that the matter should be remitted to a single judge to determine the facts[87].

50 The Court declined to settle the issue for a trial before a single Justice to determine whether the "real relation" between the parties was one of employer and employee, although it was observed that the materials before the Court were not satisfactory. It was enough that the company had failed to exclude the possibility of an employment relationship "whatever the agreement may say"[88]. In addressing

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86 (1952) 85 CLR 138.

87 (1952) 85 CLR 138 at 144.

88 (1952) 85 CLR 138 at 155.

the submission of sham, the joint reasons of Dixon, Fullagar and Kitto JJ described the "case for the respondent union" as being that the contract "does not represent the reality of the relation in practice" and said that "if in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual"[89].

51 Perhaps because Dixon, Fullagar and Kitto JJ did not expressly use the word "sham" when addressing the submission of the union, the reference by their Honours to the "true" legal complexion of contractual obligations in *R v Foster* has also been understood to be a reference to a variation of the agreement[90]. Indeed, the language of a subsequent assumption of rights by the company and an acceptance of duties by the agents, as to the "legal" complexion of a relationship, is almost a textbook description of a variation of contract by conduct. This was the approach taken in *Ex parte Robert John Pty Ltd; Re Fostars Shoes Pty Ltd*[91], where, in the course of considering whether a deed described as a deed of "licence" created a lease, Sugerman J referred to *R v Foster* and spoke of the need to "have regard to the real character of the relationship of the parties ... as their relations worked out in fact" apart from "the deed of licence if considered alone". As Sugerman J explained in the immediately preceding paragraph[92], this was addressing the submission, set out earlier[93], that "even if it be taken that the relationship between the parties was originally that of licensor and licensee, the only reasonable construction to be placed upon subsequent events is that, by tacit consent, the character of the appellant's occupation of the premises was later changed and the relationship became one of lessor and lessee". Plainly, Sugerman J was not silently abandoning "traditional principles"[94] or established orthodoxy which requires that the character of an agreement as either a lease or a licence "can

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89 (1952) 85 CLR 138 at 151.

90 See, eg, *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346 at 379-380 [149].

91 [1963] SR (NSW) 260 at 272.

92 [1963] SR (NSW) 260 at 271.

93 [1963] SR (NSW) 260 at 267.

94 *Western Australia v Ward* (2002) 213 CLR 1 at 229 [521].

only be determined by consideration of the effect of the agreement"[95]. His Honour was describing a variation of the agreement.

52 Prior to *Chaplin* and *Narich*, examples abound of this Court focussing only upon the terms of the contract, with any consideration of subsequent conduct of the parties for the purposes only of assessing alterations of their rights such as variations of their agreement. In case after case after case, this Court can be seen to be applying basic, established principles of contract law rather than effecting a silent revolution.

53 In *Logan v Gilchrist*[96], this Court treated the question of whether a drover was an employee or an independent contractor as whether, as Isaacs J put it, the putative employer has "a *right* at the moment to control the doing of the act"[97] or, as Higgins J put it, a question which "is answered by the contents of the agreement"[98]. In *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*[99] and *Humberstone v Northern Timber Mills*[100], Dixon J spoke respectively of whether "such a contract created the relation of ... employer and employee" and whether "the contract placed the supposed servant subject to the command of the employer ... not whether in practice the work was in fact done subject to a direction and control". In *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd*[101], Latham CJ spoke of the "decisive element"

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95 *Street v Mountford* [1985] AC 809 at 819. See also *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 at 413.

96 (1927) 33 ALR 321.

97 (1927) 33 ALR 321 at 322 (emphasis added), quoting *Bain v Central Vermont Railway Company* [1921] 2 AC 412 at 416.

98 (1927) 33 ALR 321 at 322.

99 (1945) 70 CLR 539 at 551. See also 544 per Latham CJ, asking whether "the contracts created the relation of employer and employee". See further 548 per Rich J.

100 (1949) 79 CLR 389 at 404. See also *Wright v Attorney-General for the State of Tasmania* (1954) 94 CLR 409 at 418.

101 (1944) 69 CLR 227 at 233 (emphasis added), quoting in part from the American Law Institute, *Restatement of the Law, Agency*, vol 1 at 483.

in characterising a relationship of employment as being "the extent of control which, *by the agreement*, the master may exercise".

54 In other cases, members of this Court have considered subsequent conduct of the parties but only in order to ascertain the effect upon the legal rights of the parties, such as whether an agreement was a sham or whether the terms had been varied. For instance, in responding to a submission of sham in *Cam and Sons Pty Ltd v Sargent*[102], Dixon J spoke of investigating the "substance" of a written agreement that contained "elaborate provisions expressed in terms appropriate to some other relation", but emphasised that it was the *agreement* which was to be analysed[103]. Lest there be any doubt, it has been held that this decision is consistent with the focus in *Chaplin* and *Narich* upon the terms of the written contract[104]. In *Neale v Atlas Products (Vic) Pty Ltd*[105], this Court again considered a submission that the terms of a written agreement were a "sham". It was held that the written agreement, which "substantially set forth the conditions upon which each tiler was employed", was "the real measure of the relationship between the parties" and that "we should not be disposed to ignore it unless it can be said that the evidence establishes quite clearly that the conduct of the parties was inconsistent with it as the basis of their relationship"[106].

55 To the extent that it has been supposed that a departure from the long-standing approach predating, but exemplified in, *Chaplin* and *Narich* was required by this Court's decisions in *Stevens* and *Hollis*, that understanding is also not correct. In neither *Stevens* nor *Hollis* did this Court suggest that, where one person has done work for another pursuant to a comprehensive written contract, the court must perform a multifactorial balancing exercise whereby the history of all the dealings between the parties is to be exhaustively reviewed even though no party disputes the validity of the contract.

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102 (1940) 14 ALJ 162 at 163.

103 See also *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571, "the terms of the engagement fixed the character of the act"; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 215, the requirements of the contract "by its terms".

104 *TransAdelaide v Leddy* (1997) 76 IR 341 at 348-349. Not doubted on appeal on this point: *TransAdelaide v Leddy* (1998) 71 SASR 413.

105 (1955) 94 CLR 419 at 422.

106 (1955) 94 CLR 419 at 428.

56 In *Stevens*, Mason J said that "it is the totality of the relationship between the parties which must be considered". But this statement was made in the context of a discussion the point of which was to emphasise that the right of one party to control the work of another was "not ... the only relevant factor"[107]. It was not an invitation to broaden the inquiry beyond the contractual rights and duties of the parties. Importantly, *Stevens* was not a case where the parties had committed the terms of their relationship to a written contract[108]. In this respect, *Stevens* stands in obvious contrast to cases like *Chaplin* and *Narich* – and the present case.

57 In *Hollis*, the "contractual relationship" pursuant to which Vabu "imposed" its work practices upon couriers was partly oral and partly in writing[109]. The terms of the relationship between the parties had not been committed comprehensively to a written agreement. Moreover, there was no suggestion in any of the judgments in *Stevens* or *Hollis* that their Honours entertained any misgivings as to the statements of principle in *Chaplin* and *Narich*. Indeed, in *Stevens*, Mason J (with whom Brennan J agreed) and Wilson and Dawson JJ referred to *Chaplin* with evident approval[110]. It is also noteworthy that Gleeson CJ, who followed *Narich* in *Connelly v Wells*, was a party to the plurality judgment in *Hollis*. As has been correctly observed, *Hollis* "does not alter or even challenge the orthodox principle that courts are not concerned with what has 'actually occurred' in a relationship, but rather with 'the obligations by which the parties [are] bound'"[111].

58 Uncertainty in relation to whether a relationship is one of employment may sometimes be unavoidable. It is the task of the courts to promote certainty with respect to a relationship of such fundamental importance. Especially is this so where the parties have taken legitimate steps to avoid uncertainty in their relationship. The parties' legitimate freedom to agree upon the rights and duties which constitute their relationship should not be misunderstood. It does not extend

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107 (1986) 160 CLR 16 at 29.

108 See (1986) 160 CLR 16 at 39.

109 (2001) 207 CLR 21 at 33 [24].

110 (1986) 160 CLR 16 at 26, 39.

111 Stewart, "Redefining Employment? Meeting the Challenge of Contract and Agency Labour" (2002) 15 *Australian Journal of Labour Law* 235 at 250-251, quoting *Express & Echo Publications Ltd v Tanton* [1999] ICR 693 at 697. See also Bomball, "Subsequent Conduct, Construction and Characterisation in Employment Contract Law" (2015) 32 *Journal of Contract Law* 149 at 157.

to attaching a "label" to describe their relationship which is inconsistent with the rights and duties otherwise set forth. To do so would be to elevate their freedom to a power to alter the operation of statute law to suit themselves or, as is more likely, to suit the interests of the party with the greater bargaining power.

59 Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to challenge the efficacy of the contract as the charter of the parties' rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute[112], there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require[113].

60 In this respect, the principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally. The view to the contrary, which has been taken in the United Kingdom[114], cannot stand with the statements of the law in *Chaplin* and *Narich*.

61 The foregoing should not be taken to suggest that it is not appropriate, in the characterisation of a relationship as one of employment or of principal and independent contractor, to consider "the totality of the relationship between the parties"[115] by reference to the various indicia of employment that have been identified in the authorities. What must be appreciated, however, is that in a case such as the present, for a matter to bear upon the ultimate characterisation of a relationship, it must be concerned with the rights and duties established by the parties' contract, and not simply an aspect of how the parties' relationship has come

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112 See, eg, *Independent Contractors Act 2006* (Cth), Pt 3; *Contracts Review Act 1980* (NSW), Pt 2; *Industrial Relations Act 1996* (NSW), Ch 2 Pt 9; *Industrial Relations Act 2016* (Qld), Ch 11 Pt 2 Div 4 Subdiv 7.

113 *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 694 [62]-[63]; 392 ALR 39 at 53; cf *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180.

114 *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at 752-757 [20]-[35].

115 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 33 [24].

to play out in practice but bearing no necessary connection to the contractual obligations of the parties.

62 *WorkPac Pty Ltd v Rossato*[116] concerned the question whether a person who was engaged to work under what were indisputably contracts of employment was a casual employee. This Court rejected the argument that this question was to be determined by reference to all the circumstances of the employment, including disparities in the bargaining power of the parties. *Hollis*[117] had been cited in support of that argument. Kiefel CJ, Keane, Gordon, Edelman, Steward and Gleeson JJ noted that because, in *Rossato*, the Court was concerned with what was, on any view, a contract of employment, *Hollis* was not on point. Their Honours went on to say that, "[o]n one view", the resolution of the question whether a person engaged to work for another is an employee or an independent contractor "may depend upon the extent to which it can be shown that one party acts in the business of, and under the control and direction of, the other"[118]. But because the issue of present concern did not arise in *Rossato*, the plurality refrained from expressing a concluded view as to the significance of the observations in *Hollis* in relation to that issue. The occasion to express a view on that matter has now arrived: the point was squarely raised and fully argued. There is no reason in principle why the approach taken in *Rossato* should not be applied where the issue is whether the relationship in question is one of employment.

The parties' description of their relationship

63 To say that the legal character of a relationship between persons is to be determined by the rights and obligations which are established by the parties' written contract is distinctly not to say that the "label" which the parties may have chosen to describe their relationship is determinative of, or even relevant to, that characterisation.

64 Subject to statute, under the common law the parties are free to agree upon the rights and obligations by which they are to be bound. But the determination of

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116 (2021) 95 ALJR 681; 392 ALR 39.

117 (2001) 207 CLR 21 at 33 [24].

118 *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 700 [101]; 392 ALR 39 at 61, citing *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151.

the character of the relationship constituted by those rights and obligations is a matter for the court[119].

65 In *Chaplin*[120], Lord Fraser of Tullybelton said that a provision of a contract, whereby the parties sought to define their relationship as one of "Principal and Agent and not that of Master and Servant", "cannot receive effect according to its terms if they contradict the effect of the agreement as a whole". It was accepted, however, that ambiguity in the character of a relationship might be removed by a provision whereby the parties agreed on terms descriptive of their status or relationship[121].

66 As a matter of principle, however, it is difficult to see how the expression by the parties of their opinion as to the character of their relationship can assist the court, whose task it is to characterise their relationship by reference to their rights and duties. Generally speaking, the opinion of the parties on a matter of law is irrelevant. Even if it be accepted that there may be cases where descriptive language chosen by the parties can shed light on the objective understanding of the operative provisions of their contract, the cases where the parties' description of their status or relationship will be helpful to the court in ascertaining their rights and duties will be rare.

67 Having made these general observations, one may turn now to consider the relationship between the present parties.

Mr McCourt served in the business of Construct

68 In this Court, Construct was content to disavow the notion that Mr McCourt was carrying on his own business. That disavowal might be said to be no more than recognition that any suggestion to that effect was unsustainable. As both the

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119 *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151; *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407 at 409-410; 18 ALR 385 at 389-390; *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 600-601; *WorkPac Pty Ltd v Rossato* (2021) 95 ALJR 681 at 699-700 [97]; 392 ALR 39 at 60.

120 (1978) 52 ALJR 407 at 409; 18 ALR 385 at 389.

121 Citing *Massey v Crown Life Insurance Co* [1978] 1 WLR 676; [1978] 2 All ER 576.

primary judge[122] and the Full Court[123] appreciated, Mr McCourt could not sensibly be said to have been carrying on business on his own account. That was plainly correct, notwithstanding the language used in the ASA to describe Mr McCourt's occupation which suggested otherwise.

69 *Lehigh Valley Coal Co v Yensavage*[124] concerned the question whether a coal miner working on a mine site was the employer of his "helper", who had been injured in an explosion at the mine, for the purposes of a statute which imposed an obligation upon employers to provide a safe system of work. The mine owner contended that neither the coal miner nor the injured "helper" was its employee. Coxe and Learned Hand JJ ridiculed the mine owner's contention by observing that, if that contention were accepted[125]:

> "[t]he [mine owner] is therefore not in the business of coal mining at all, in so far as it uses such miners, but is only engaged in letting out contracts to independent contractors, to whom they owe as little duty as to those firms which set up the pumps in their mines. ...
>
> It is absurd to class such a miner as an independent contractor ... He has no capital, no financial responsibility. He is himself as dependent upon the conditions of his employment as the company fixes them as are his helpers. By him alone is carried on the company's only business; he is their 'hand,' if any one is. Because of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken."

70 This lampooning of the mine owner's argument focussed attention on the nature of the mine owner's business in order to highlight the absurdity of the notion that the mine owner was no more than an introduction agency and that the coal miner was carrying on a business that was separate from the business of the mine owner. That is a useful focus in this case too.

71 Construct submitted that it was "simply a finder of labour". But that ignores the complex suite of rights and obligations of Construct vis-à-vis Mr McCourt that

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122 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [150].

123 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 642 [29]. See also 681 [181].

124 (1914) 218 F 547 (2nd Cir).

125 (1914) 218 F 547 (2nd Cir) at 552-553.

had been established under the ASA. Construct was authorised: to fix Mr McCourt's reward for his work (cl 2(a)); to act as Mr McCourt's paymaster (cll 1(d), 2(d)); and to terminate Mr McCourt's engagement should he fail in any respect to obey the directions of Construct or Hanssen (see cl 4(a), (c)). And, as will be seen, by cl 4(a) Construct retained a right of control over Mr McCourt that was fundamental to its business as a labour-hire agency. There would be no reason for the existence of such obligations if Construct were not in the business of labour hire, but rather in the business of "introducing" suppliers of labour to builders and leaving those parties to sort their own affairs.

72 In terms of the test suggested by Windeyer J in *Marshall*, it is impossible to say that Mr McCourt was in business on his own account. The core of Mr McCourt's obligation to Construct under the ASA was his promise to work as directed by Construct or by its customer[126]. Mr McCourt's obligation to work was meaningful only because the benefit of that promise was ventured by Construct as an asset of its labour-hire business.

Mr McCourt worked subject to the control of Construct

73 Like the "own business/employer's business" dichotomy, the existence of a right of control by a putative employer over the activities of the putative employee serves to sensitise one to the subservient and dependent nature of the work of the employee, so as to assist in an assessment of whether a relationship is properly to be regarded as a contract of service rather than a contract for services.

74 Construct submitted that control was a necessary, though not sufficient, condition of a contract of service, citing *Zuijs v Wirth Brothers Pty Ltd*[127]. It was submitted that Hanssen alone supervised and directed every aspect of Mr McCourt's work, and it was emphasised that Construct was not entitled, under either the LHA or the ASA, to enter Hanssen's site and issue directions to Mr McCourt regarding the performance of his work. So much may be accepted. But this Court in *Stevens*[128], and indeed in *Zuijs*[129] itself, emphasised that it is the right of a person to control the work of the other, rather than the detail of the actual

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126 cl 4(a) of the ASA.

127 (1955) 93 CLR 561 at 571.

128 (1986) 160 CLR 16 at 24, 36.

129 (1955) 93 CLR 561 at 571.

exercise of control, which serves to indicate that a relationship is one of employer and employee.

75 Under the ASA, Construct was entitled to determine for whom Mr McCourt would work[130]. Once assigned to a client, Mr McCourt was obliged by cl 4(a) to "[c]o-operate in all respects with Construct and the builder in the supply of labour to the Builder". That obligation must be understood in context. It was not directed towards the carrying out of any particular task, or the effecting of any specific result, for Hanssen. There was no suggestion that the work Mr McCourt agreed to do would involve the exercise of any discretion on his part, either as to what he would do or as to how he would do it. Mr McCourt's obligation to "supply ... labour" in cooperation with Hanssen necessarily meant that he agreed, for the duration of the assignment, to work in accordance with Hanssen's directions. He was simply not permitted to do otherwise. Had Mr McCourt breached cl 4(a), Construct (not Hanssen) would have been entitled to terminate the ASA.

76 Mr McCourt's performance of that obligation was unambiguously central to Construct's business of supplying labour to builders. In referring Mr McCourt to Hanssen, Construct was exercising, and commercialising, its right to control the work that Mr McCourt would do and how he would do it. The marketability of Construct's services as a labour-hire agency turned on its ability to supply compliant labour; without that subservience, that labour would be of no use to Construct's clients. That right of control was therefore the key asset of Construct's business. Its significance was not diminished by the circumstance that the minutiae of Mr McCourt's performance of daily tasks were at the direction of Hanssen. Indeed, the right of control held by Construct over Mr McCourt explains why there was no need for any contractual relationship between Mr McCourt and Hanssen in order to support Hanssen's ability to issue day-to-day directions to Mr McCourt.

77 Mr McCourt had no right to exercise any control over what work he was to do and how that work was to be carried out. That state of affairs was attributable to the ASA, by which Mr McCourt's work was subordinated to Construct's right of control.

78 Contrary to Construct's submissions, and to the observations of Lee J[131], there is nothing in the tripartite nature of a labour-hire arrangement that precludes recognition of Construct's contractual right to control the provision of Mr McCourt's labour to its customers, and the significance of that right to the

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130 cll 1(a)-(c), 3(c) of the ASA.

131 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 658 [87]-[88], 679 [170].

relationship between Construct and Mr McCourt. As between Construct, Mr McCourt and Hanssen, it was only by reason of Mr McCourt's promise to Construct that Mr McCourt was bound to work as directed by Hanssen.

Mr McCourt's designation as "the Contractor" is of no moment

79 The ASA described Mr McCourt as "the Contractor". But the effect of the rights and duties created by the ASA was that Mr McCourt was engaged by Construct to serve Construct in its business. The rights and duties agreed between Construct and Mr McCourt leave no room for ambiguity as to the character of that relationship. For the reasons stated above, that the parties have described their relationship a certain way cannot change the character of the relationship established by their rights and obligations. Lee J was right to suggest that it was erroneous in point of principle to use the parties' description of their relationship to resolve uncertainty produced by application of the multifactorial test. There was no occasion to have recourse to the label chosen by the parties, whether as a "tie-breaker" or otherwise.

Policy considerations underpinning vicarious liability

80 Pursuant to a notice of contention, Construct argued that the Full Court ought to have found that none of the policy concerns which underpin the vicarious liability of an employer for the actions of its employees favoured a characterisation of Mr McCourt's engagement as one of employment. In this regard, Construct argued that, as a result of its absence of practical ability or legal authority to influence the actual performance by Mr McCourt of work on site, the imposition of vicarious liability on Construct would have no useful deterrent effect on its willingness to court risks to workplace health and safety. Secondly, Construct submitted that it was Hanssen, as builder, which created any enterprise risk, and therefore Construct should not bear vicarious liability for Mr McCourt's actions in furtherance of Hanssen's enterprise. Thirdly, Construct submitted that because Mr McCourt was not integrated into Construct's business – for example, by the wearing of a uniform or by acting publicly as Construct's representative – it could not be said that Mr McCourt was a public manifestation of Construct's business for whom Construct should be held responsible.

81 The simple answer to these submissions is that these broad appeals to considerations of policy cannot alter the effect of the ASA, any more than Mr McCourt's invocation of the disparity in bargaining power can alter its effect in his favour. In any event, it is important to recognise that Construct was able, by the deployment of its right of control over Mr McCourt, to determine the industrial environment in which he would work; and so there is nothing counter-intuitive about recognising both Construct's non-delegable duty to him and its vicarious liability for his acts or omissions.

82 However, given the confusion that arises from the conflation of questions of vicarious liability of an employer with questions of characterisation of a putative employment relationship, it is necessary to explain the difference. There are two conceptions of vicarious liability of an employer[132]: the traditional "agency" conception, where an employer has a primary liability for the actions of an employee or other agent[133]; and the policy-based conception, where an employer has a secondary liability for the liability of the employee[134]. On either conception, the relationship of employment is only the first step in ascertaining whether vicarious liability exists. There is a necessary second step which requires consideration of the subsequent conduct of the employee, the event for which the employer is to be held primarily or secondarily liable, and its association with the employment relationship.

83 In many cases involving issues of vicarious liability in either sense above, whether or not the relationship is one of employment, the focus is upon the second step of the inquiry[135]. It is essential in such cases to consider the conduct of the parties subsequent to the contract that establishes their relationship, especially the conduct of the person whose actions have caused the injury. *Hollis* was a case of such vicarious liability. Since the contract between the parties was not entirely in writing, the subsequent conduct of the parties was necessary to establish the terms of their agreement. But it was also separately necessary to establish satisfaction of the second step of the vicarious liability inquiry.

Non-exclusive work is consistent with casual employment

84 For the sake of completeness, it should also be said that the primary judge erred in concluding that the circumstances that Mr McCourt was free to accept or reject any offer of work[136], and that he was not precluded from working for

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132 *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136 at 147-149 [48]-[58].

133 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 60.

134 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 57.

135 See, eg, *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41.

136 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [143].

others[137], were factors which contraindicated a characterisation of his relationship with Construct as one of employment. It is commonplace that casual employees do not work exclusively for one employer. In addition, Mr McCourt's right pursuant to cl 5(b) of the ASA to accept or reject any offer of work from a builder must be understood subject to his promise to Construct in cl 4(c) of the ASA to "supply labour ... for the duration required by [Hanssen]". His right to reject an offer of work was exercisable at the level of an overall engagement with Hanssen, rather than on the basis of a new engagement each day.

Earlier decisions involving triangular labour-hire arrangements

85 Construct argued that *Personnel (No 1)*[138], when viewed alongside the decisions in *Building Workers Industrial Union of Australia v Odco Pty Ltd*[139] and *Young v Tasmanian Contracting Services Pty Ltd*[140], established a body of authority in which "*Odco*-style" triangular labour-hire arrangements have been held not to create relationships of employment. It was submitted that this Court should not overturn this long-standing position. Many persons, it was said, will have relied on these decisions in arranging their affairs.

86 In this regard, *Personnel (No 1)* was wrongly decided, the critical error of the reasoning of the majority being the attribution of decisive significance[141] to the parties' description of their relationship in a manner so as to "remove [the] ambiguity"[142] generated by other factors in the analysis pointing in opposite

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137 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 at [146].

138 (2004) 141 IR 31.

139 (1991) 29 FCR 104.

140 [2012] TASFC 1.

141 (2004) 141 IR 31 at 40-41 [38]-[42], 61-63 [139]-[150].

142 (2004) 141 IR 31 at 62 [145]. See also 40-41 [40].

directions. The same error infected the decision in *Odco*[143]. That error involves a departure from principle which should not be perpetuated.

87 Construct also placed reliance on the decision of the Court of Appeal in *Bunce v Postworth Ltd*[144]. In that case, it was held that a labour-hire agency was not in a relationship of employment with its worker because it lacked the requisite power of control, which instead was found to reside in the client to whom the worker was assigned. The Court of Appeal rejected the argument that the client's day-to-day control originated in the contract between the labour-hire agency and the worker. Keene LJ (with whom Gage LJ and Sir Martin Nourse agreed) said that[145]:

> "[t]he law has always been concerned with who *in reality* has the power to control what the worker does and how he does it." (emphasis in original)

88 The decision in *Bunce* is of little assistance in this case. The reference by Keene LJ to the "reality" of the situation does not accord with the central importance of the rights and duties established by the parties in their written contract. It suggests that the "reality" of the situation is, in some unexplained way, of a significance that transcends the rights and obligations agreed by the parties. To the extent that this involves an assumption that employment contracts are to be interpreted differently from contracts generally, that assumption is not consistent with the law in Australia. Further, the Court of Appeal's emphasis on the *exercise* of control is inconsistent with the recognition by this Court that the gravamen of the concept of control lies in the authority to exercise control and not its practical exercise[146].

Conclusion

89 Under the ASA, Mr McCourt promised Construct to work as directed by Construct and by Construct's customer, Hanssen. Mr McCourt was entitled to be paid by Construct in return for the work he performed pursuant to that promise.

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143 *Odco Pty Ltd v Building Workers' Industrial Union of Australia* (unreported, Federal Court of Australia, 24 August 1989) at 126; *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 at 126-127.

144 [2005] IRLR 557.

145 [2005] IRLR 557 at 561 [29].

146 *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24, 29, 36; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 41 [44].

That promise to work for Construct's customer, and his entitlement to be paid for that work, were at the core of Construct's business of providing labour to its customers. The right to control the provision of Mr McCourt's labour was an essential asset of that business. Mr McCourt's performance of work for, and at the direction of, Hanssen was a direct result of the deployment by Construct of this asset in the course of its ongoing relationship with its customer.

90 In these circumstances, it is impossible to conclude other than that Mr McCourt's work was dependent upon, and subservient to, Construct's business. That being so, Mr McCourt's relationship with Construct is rightly characterised as a contract of service rather than a contract for services. Mr McCourt was Construct's employee.

Orders

91 The appeal should be allowed. The respondent should pay the appellants' costs of the appeal to this Court.

92 The order of the Full Court of the Federal Court of Australia made on 17 July 2020 should be set aside and, in its place, it is ordered that:

1. The appeal be allowed.

2. The order of the Federal Court of Australia made on 6 November 2019 be set aside.

3. It be declared and ordered that, between 27 July 2016 and 6 November 2016 and 14 March 2017 and 30 June 2017, the second appellant was employed by the respondent.

4. The matter be remitted to the primary judge for determination according to law.

There should be no order as to the costs in the Full Court.

93 GAGELER AND GLEESON JJ. The *Fair Work Act 2009* (Cth) for the most part confers rights and imposes obligations on, and in respect of the relationship between, an employer and an employee[147]. The terms "employer" and "employee" are defined to "have their ordinary meanings"[148]. The "ordinary meanings" to which that foundational definition refers are not the grammatical meanings of the legislatively chosen words purposively construed in their statutory context[149]. The reference in the definition is instead to the meanings ascribed to "employer" and "employee" at common law[150].

94 The meanings ascribed to "employer" and "employee" at common law have been formulated over the past two centuries principally in the context of drawing, for the purpose of tortious liability, "the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable)"[151]. The common law distinction which has been drawn for that purpose has been said in this century in this country to be "too deeply rooted to be pulled out"[152].

95 Around the beginning of the twentieth century, the common law distinction "came somewhat deviously and indirectly into the early law of workmen's compensation"[153]. The common law distinction came in the course of the twentieth century to be imported more directly into a range of other areas of statute law, including industrial relations, taxation and superannuation. The *Fair Work Act* continued that trend when, early in this century, its elaborate statutory edifice was erected on the foundation of precisely the same common law distinction.

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147 Section 12 (definitions of "employee" and "national system employee") and ss 13-14, 15 of the *Fair Work Act*.

148 Section 11 of the *Fair Work Act*.

149 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

150 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 5. See *C v The Commonwealth* (2015) 234 FCR 81 at 87 [34]-[36].

151 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [12].

152 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 173 [33].

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

96 Professor Patrick Atiyah once noted that[154]:

> "In attempting an answer to the question, 'Who is a servant?' two approaches are possible. The first is based on the assumption that a contract of service is a legal concept known to the law in a variety of contexts, and that the first enquiry in any case involving vicarious liability should be directed to the question whether a contract of service exists. ...
>
> The alternative approach emphasises that the classification of a particular factual situation must always be considered in the light of the purpose for which the classification is being made."

97 The common law in and of Australia has steadfastly adhered to the first of those two approaches, and the Australian legislative references to employment or service have generally adopted the common law. Curial adherence to, and legislative adoption of, the same approach has not been quite so consistent in some other common law jurisdictions. In the United Kingdom, the common law distinction seems of late largely to have been abandoned[155]. In the United States, the common law distinction has been maintained, but different approaches have been taken in different statutes at different times[156].

98 So we have it that, like the *National Labor Relations Act 1935* (US) as amended from 1947[157] and like the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) as also amended from 1947[158], but unlike the *Fair Labor Standards*

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154 Atiyah, *Vicarious Liability in the Law of Torts* (1967) at 31.

155 Gray, *Vicarious Liability* (2018) at 197-199.

156 See Carlson, "Why the Law Still Can't Tell an Employee When It Sees One And How It Ought to Stop Trying" (2001) 22 *Berkeley Journal of Employment and Labor Law* 295 at Pts II-IV.

157 *Labor Management Relations Act 1947* (US). See *National Labor Relations Board v United Insurance Co of America* (1968) 390 US 254 at 256.

158 *Commonwealth Conciliation and Arbitration Act 1947* (Cth). See *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 150. See now also *Superannuation Guarantee (Administration) Act 1992* (Cth); *Independent Contractors Act 2006* (Cth).

Act 1938 (US)[159] and the *National Minimum Wage Act 1998* (UK)[160], the *Fair Work Act* postulates the existence of employment at common law as a precondition to its operation. Subject to presently immaterial exceptions, unless two persons are or have been in a relationship of employment at common law independently of the operation of the *Fair Work Act*, one of those persons cannot be an "employer" and the other cannot be an "employee" within the meaning of the *Fair Work Act*.

99 Although the context is statutory, the outcome of this appeal therefore turns on a question which arises at common law. The question is as to how the existence of a relationship of employment is to be determined. The question has not squarely arisen in this Court for 20 years. The answer is of far-reaching importance.

100 The question now arises for the consideration of this Court in a procedural context fully described by Kiefel CJ, Keane and Edelman JJ. Their Honours' explanation of the facts and abbreviations can conveniently be adopted. Some additional facts will be mentioned in due course.

101 The ultimate issue in the appeal is whether Mr McCourt was employed by Construct under the ASA during the two discrete periods during which Construct made the labour of Mr McCourt available to Hanssen under the LHA. The first period was from 27 July 2016 to 6 November 2016. The second period was from 14 March 2017 to 30 June 2017.

102 Our conclusion on the ultimate issue is that, whilst Mr McCourt was not employed by Construct merely by reason of having entered into the ASA, Mr McCourt was employed by Construct during each of those periods by reason of what then occurred in the performance of the ASA.

103 The pathway of analysis leading to that conclusion proceeds in three stages. The first stage involves examining the nature of a relationship of employment at common law – the critical point being that it is a relationship which exists in fact. The second stage involves identifying the scope of the inquiry to be undertaken to determine whether a relationship that exists in fact is a relationship of that nature – the critical point being that it involves looking beyond contractual terms to contractual performance. The final stage involves examining the relationship that existed in fact between Mr McCourt and Construct during the periods during which Construct made the labour of Mr McCourt available to Hanssen. That examination illuminates points of distinction between their relationship and some

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159 *Rutherford Food Corp v McComb* (1947) 331 US 722 at 727-728; *Nationwide Mutual Insurance Co v Darden* (1992) 503 US 318 at 326.

160 *Uber BV v Aslam* [2021] 4 All ER 209 at 226 [68], 227 [71], explaining *Autoclenz Ltd v Belcher* [2011] 4 All ER 745.

other "triangular" labour hire relationships which have been found in the past not to be relationships of employment.

The nature of a relationship of employment at common law

104 Employment at common law has its roots in the relationship of service which the common law recognised between master and servant. Employment is a voluntary relationship between an individual, the employee, and another person, the employer, within which the employee performs a genus of work for the employer – what was traditionally called "service" – in exchange for some form of remuneration.

105 Typically, although not universally[161], the relationship of employment is established and maintained under a contract between the employer and the employee. Throughout the nineteenth century, a contract under which a relationship of master and servant was established was routinely referred to as a contract of service. Moving into the twentieth century, a contract under which a relationship of employer and employee was established and maintained came more commonly to be referred to as a contract of employment[162].

106 The terminology remains apt so long as two things are recognised. One is that a contract under which a relationship of employment is established and maintained need not be a contract that deals solely with the subject-matter of employment: a relationship of employment can be established and maintained under a contract that has contractual purposes broader than, and contractual consequences additional to, simply establishing a relationship within which an individual performs work of the requisite genus for another person. The other is that it is the character of the relationship that is established and maintained under a contract that gives character to the contract. Expressed using other prepositional terms, a contract "of" employment is a contract "for" a relationship of employment[163]. The employment relationship is established and maintained "within" the contractual relationship, the employment relationship does not subsist simply "in" the contractual relationship.

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161 *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 250.

162 *Amalgamated Society of Carpenters and Joiners v Haberfield Pty Ltd* (1907) 5 CLR 33 at 39.

163 cf Gardner, "The Contractualisation of Labour Law", in Collins, Lester and Mantouvalou (eds), *Philosophical Foundations of Labour Law* (2018) 33 at 42, referring to *Emmens v Elderton* (1853) 13 CB 495 at 506.

107 In *Dare v Dietrich*[164], Lockhart J, in addressing the question of whether a contract under which one person does work for another is a contract of service, pointed out that "[t]he question is answered by examining all the various elements which constitute the relationship between the parties"[165]. In the same case Deane J said[166]:

> "A contract of service is that form of contract which embodies the social relationship of employer and employee. It cannot be identified by reference to the presence of any one or more static characteristics. The relationship is a dynamic one which needs to be accommodated to a variety of different and changing social and economic circumstances. It is, however, of the essence of a contract of service that it is a bilateral contract involving executory obligations on behalf of both employer and employee".

On the appeal to this Court, the substance of the reasoning of both Lockhart J and Deane J was endorsed by Gibbs, Mason and Wilson JJ, with whom Aickin J agreed[167]. In finding that the arrangement between the parties in that case did not give rise to a contract of service, the plurality observed that the arrangement "lacked the element of mutuality of obligation that is essential to the formation of such a contract"[168].

108 The centrality of the concern of the common law with the identification and characterisation of the relationship established and maintained between employer and employee under a contract has been emphasised in the description of a contract of employment as having "a two-tiered structure"[169]:

> "At the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance. The second level – the promises to employ and be employed – provides the arrangement with its stability and with its continuity as a

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164 (1979) 26 ALR 18.

165 (1979) 26 ALR 18 at 40.

166 (1979) 26 ALR 18 at 36.

167 *Dietrich v Dare* (1980) 54 ALJR 388 at 391, 392; 30 ALR 407 at 412, 414.

168 *Dietrich v Dare* (1980) 54 ALJR 388 at 390; 30 ALR 407 at 411.

169 Freedland, *The Contract of Employment* (1976) at 20, quoted in *Commonwealth Bank of Australia v Barker* (2013) 214 FCR 450 at 513 [291].

> contract. The promises to employ and to be employed may be of short duration, or may be terminable at short notice; but they still form an integral and most important part of the structure of the contract. They are the mutual undertakings to maintain the employment relationship in being which are inherent in any contract of employment properly so called."

109 That description is consistent with the recent holding in *WorkPac Pty Ltd v Rossato*[170] that the distinction between a casual employee and another employee, according to the ordinary meaning of "casual employee", lay in the absence of a "firm advance commitment" as to the duration of the employee's employment to be found, if at all, in the terms of the contract of employment. There, six consecutive relationships of casual employment were found to have been created pursuant to six consecutive contracts of employment, each incorporating standard terms and conditions[171]. Here, for reasons that will eventually be explained, Mr McCourt entered into two consecutive relationships of casual employment with Construct in the performance by him and Construct of a single overarching contract: the ASA.

110 The relationship of employment is, however, not to be conflated with the contract under which the relationship is established and maintained. The two are "distinct"[172]. "The employment is the continual relationship, not the engagement or contracting to employ and to serve."[173] "It is the service ... carried on."[174]

111 Whether a continual relationship for which a contract might make provision actually exists at any given time is a question of fact[175]. Whatever the contract might say about the obligations of the parties, a relationship of employment does not exist until the relationship is in fact formed, and the relationship of employment ceases to exist when the relationship is in fact broken. Thus, "[i]t does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation constituted by the wrongful

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170 (2021) 95 ALJR 681; 392 ALR 39.

171 (2021) 95 ALJR 681 at 687 [13], 696-697 [76]-[80]; 392 ALR 39 at 43, 55-56.

172 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427.

173 *Mynott v Barnard* (1939) 62 CLR 68 at 91 (cleaned up).

174 *Mynott v Barnard* (1939) 62 CLR 68 at 91 (cleaned up).

175 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 428.

dismissal and puts an end to the contract"[176]. One consequence is that a wrongfully dismissed employee can refuse to accept the dismissal and can "[keep] the contract open" by remaining ready and willing to work[177]. If the employer can then be induced to retract the dismissal, the employment relationship can be re-established without need for a new contract[178].

112 Here, again for reasons that will eventually be explained, Mr McCourt and Construct in fact established and maintained continual relationships for the doing of work by Mr McCourt throughout each of the two periods during which Construct made his labour available to Hanssen under the LHA. They did not establish a relationship of the requisite kind merely by entering into the ASA and they did not maintain a relationship of the requisite kind throughout the entirety of the term of the ASA.

113 Where a continual relationship under which work is done by an individual in exchange for remuneration in fact exists, the characterisation of that relationship as one of employment or service, on the one hand, or as one of hirer and independent contractor, on the other hand, has long been understood to turn on one or other or both of two main overlapping considerations. The first is the extent of the control that the putative employer can be seen to have over how, where and when the putative employee does the work[179]. The second is the extent to which the putative employee can be seen to work in his or her own business as distinct

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176 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 427, applying *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 469. See also *Visscher v Giudice* (2009) 239 CLR 361 at 379-380 [53]-[55].

177 *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 454, 465-466, 469.

178 *Visscher v Giudice* (2009) 239 CLR 361 at 382 [59].

179 *Laugher v Pointer* (1826) 5 B & C 547 [108 ER 204]; *Quarman v Burnett* (1840) 6 M & W 499 [151 ER 509]; *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* (1944) 69 CLR 227 at 232-233; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 545, 548-549, 550-552; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 396; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571-573; *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 426, 428; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 400-401; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24, 27-29.

from the business of the putative employer[180]. Factors relevant to that second consideration have been said to include, but not to be limited to, "the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee"[181]. A third consideration sometimes identified is perhaps little more than a variation of the second consideration: it is the extent to which the work done by the putative employee can be seen to be integrated into the business of the putative employer[182].

114 Each consideration is a matter of degree. None is complete in itself. Each can fairly be said to be "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"[183].

115 These considerations are compositely reflected in most standard descriptions of a relationship of employment, or of a contract of employment, at common law. In its first restatement of the law of agency, published in 1933, for example, the American Law Institute ("ALI") defined a "servant" as "a person employed to perform service for another in his affairs and who, with respect to his physical conduct in the performance of the service, is subject to the other's control or right to control"[184]. The ALI then went on to enumerate "matters of fact", to be considered, "among others", "[i]n determining whether one acting for another is a

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180 *Milligan v Wedge* (1840) 12 Ad & E 737 [113 ER 993]; *Allen v Hayward* (1845) 7 QB 960 at 975 [115 ER 749 at 755]; *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 at 169; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 39 [40]; *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at 61-62 [61]-[62].

181 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24.

182 *Stevenson Jordan and Harrison Ltd v Macdonald and Evans* [1952] 1 TLR 101 at 111; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 295; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 402; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 26-27, 35-36.

183 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 35.

184 *Restatement of the Law of Agency* §220.

servant or an independent contractor". The ALI definition was restated in almost identical terms in 1958 and in substantially similar terms in 2006[185].

116 The ALI definition was adopted and applied by Latham CJ in *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd*[186]. His Honour there said that the definition, including its enumeration of "matters of fact which are considered in determining whether one acting for another is a servant or an independent contractor", was "in accordance with our law"[187]. The definition remains in accordance with our law, notwithstanding the taxonomical shift that has since occurred through which, as a result of our preference to confine the term "agency" to its narrower sense of connoting "an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties"[188], the vicarious liability of an employer for wrongs of an employee committed in the course of employment is here no longer "commonly regarded as part of the law of agency"[189].

117 Consistently with the definition it first formulated in 1933, in its more recent restatement of the law of employment, published in 2015, the ALI has sought to distil from the case law three conditions for the existence of a relationship of employment. They are that: "(1) the individual acts, at least in part, to serve the interests of the employer; (2) the employer consents to receive the individual's services; and (3) the employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the

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185 *Restatement (Second) of the Law of Agency* §220; *Restatement (Third) of the Law of Agency* §7.07, Comment f.

186 (1944) 69 CLR 227.

187 (1944) 69 CLR 227 at 233. See also *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 299; *Commissioner of Taxation v De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd* (1998) 82 FCR 507 at 520-521.

188 *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644 at 652; *Scott v Davis* (2000) 204 CLR 333 at 408 [227]. See earlier *Wilson v Darling Island Stevedoring and Lighterage Co Ltd* (1956) 95 CLR 43 at 70.

189 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 49. See *Scott v Davis* (2000) 204 CLR 333 at 408-413 [227]-[239], 435 [299] (cf at 345-373 [31]-[121]); *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 168-172 [14]-[28].

individual from rendering those services as an independent businessperson"[190]. In respect of the third of those identified conditions, the ALI has elaborated[191]:

> "An individual renders services as an independent businessperson and not as an employee when the individual in his or her own interest exercises entrepreneurial control over important business decisions, including whether to hire and where to assign assistants, whether to purchase and where to deploy equipment, and whether and when to provide service to other customers."

118 To similar effect, Professor Joellen Riley has proffered the following definition of a contract of employment or of service[192]:

> "The concept of a contract 'of service' captures the notion that the employed worker is subservient to the employer – as a servant to a master in past times – and works under their control and direction, and within an organizational structure determined by the demands of the business interests of the employer. This notion 'of service' is intended to distinguish the employee who is an integral part of the employer's enterprise from entrepreneurial workers who provide their labour as a consequence of some other commercial arrangement. The independent contractor provides labour to others while in pursuit of gains for his or her own discrete enterprise."

119 Those definitions are useful. But an important lesson of the experience of the common law would be lost if any of them were elevated to be any more than a description of the frequently identified features of a contract of employment or a relationship of employment. The overall experience of the common law has taught "respect for the humble particular against the pretentious rational formula"[193]. The peculiar experience of the common law in drawing the distinction between employees and independent contractors has taught more specifically that "there is no shorthand formula or magic phrase that can be applied to find the answer, but

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190 *Restatement of Employment Law* §1.01(a).

191 *Restatement of Employment Law* §1.01(b).

192 Riley, "The Definition of the Contract of Employment and Its Differentiation from Other Contracts and Other Work Relations", in Freedland et al (eds), *The Contract of Employment* (2016) 321 at 324.

193 Sunstein, *One Case at a Time* (1999) at 24, citing Dewey, *How We Think and Selected Essays 1910-1911*, in *The Middle Works of John Dewey* (1985), vol 6 at 93.

all of the incidents of the relationship must be assessed and weighed with no one factor being decisive"[194].

120 Through that case-by-case – "multi-factor"[195], "multi-factorial"[196] or multiple "indicia"[197] – approach, the common law has shown itself to be "sufficiently flexible to adapt to changing social conditions"[198]. To adapt a remark of an English commentator, it may not be entirely unfair to observe that "[t]he accumulation of case law has added weight rather than wisdom"[199], but it is fairer to observe that "the emphasis on various matters has shifted in response to the changing way work, and society in general, is organised" and that the "fundamental tests" have remained "more or less constant"[200]. Undoubtedly, the approach the common law has up till now developed will admit of results that are contestable in a marginal case. That is in the nature of any legal criterion application of which turns on evaluative judgment. Here, it is a tolerable incident of the common law's sensitivity to the diversity and vagaries of lived experience.

121 The reality is that, for so long as employment at common law is to be understood as a category of relationship that exists in fact, "it is the totality of the relationship between the parties which must be considered"[201]. "The ultimate question will always be whether a person is acting as the [employee] of another or on [his or her] own behalf and the answer to that question may be indicated in ways

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194 *National Labor Relations Board v United Insurance Co of America* (1968) 390 US 254 at 258. See also *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

195 Stewart et al, *Creighton and Stewart's Labour Law*, 6th ed (2016) at 204 [8.21], 206 [8.23]; Sappideen et al, *Macken's Law of Employment*, 8th ed (2016) at 36 [2.160].

196 Sappideen and Vines (eds), *Fleming's The Law of Torts*, 10th ed (2011) at 446 [19.70].

197 Neil and Chin, *The Modern Contract of Employment*, 2nd ed (2017) at 23-24 [1.110].

198 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

199 Freedland, *The Personal Employment Contract* (2003) at 20.

200 *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 153 [38].

201 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

which are not always the same and which do not always have the same significance."[202]

122 Here, and again for reasons that will eventually be explained, the most significant indication that the relationships between Mr McCourt and Construct during the two relevant periods were relationships of employment was the degree of control that Construct ultimately had over how Mr McCourt physically performed his labour. Construct had that control through the combined operation of Mr McCourt's contractual obligations to it under the ASA and its relationship with Hanssen under the LHA.

Determining the existence of a relationship of employment at common law

123 Turning from the nature of a relationship of employment at common law to the inquiry that must be undertaken to determine whether a relationship of that nature exists, it must be frankly acknowledged that uncertainty has arisen as to the scope of the inquiry that is permissible where the contract of employment is wholly in writing.

124 The proposition that a written contract of employment must be interpreted according to ordinary contractual principles is not in doubt. Gleeson CJ referred to the application of those ordinary principles of interpretation to a written contract of employment, and no more, when he succinctly stated in *Connelly v Wells*[203]:

> "Where the relationship between two persons is founded in contract, the character of the relationship depends upon the meaning and effect of the contract. In the absence of a suggestion that a contract was varied after it was originally made, its meaning and effect must be determined as at the time it was entered into. If the contract is in writing, then the court which is considering the nature of the relationship between the parties is directed to an examination of the terms of the written agreement in the light of the circumstances surrounding its making."

125 The uncertainty that has arisen is rather as to whether the inquiry into the nature of a relationship that has been established and maintained under a written contract is limited to consideration of the terms of the contract to the exclusion of consideration of the manner of performance of the contract.

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202 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 37.

203 (1994) 55 IR 73 at 74, citing *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601.

126 The source of the uncertainty can be traced to the decision of the Privy Council in *Narich Pty Ltd v Commissioner of Pay-roll Tax*[204]. There, just three years before the ultimate abolition of appeals to it[205] and without reference to any authority other than its own decision five years earlier in *Australian Mutual Provident Society v Chaplin*[206], the Privy Council stated three "governing principles"[207]:

> "The first principle is that, subject to one exception, where there is a written contract between the parties whose relationship is in issue, a court is *confined*, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; *and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract*. The one exception to that rule is that, where the subsequent conduct of the parties can be shown to have amounted to an agreed addition to, or modification of, the original written contract, such conduct may be considered and taken into account by the court.
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> The second principle is that, while all relevant terms of the contract must be regarded, the most important, and in most cases the decisive, criterion for determining the relationship between the parties is the extent to which the person, whose status as employee or independent contractor is in issue, is under the direction and control of the other party to the contract with regard to the manner in which he does his work under it.
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> The third principle relates to cases where the parties have ... included in their written contract an express provision purporting to define the status of the party engaged under it, either as that of employee on the one hand, or as that of independent contractor on the other. ... 'The law ... is this: if the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label upon it … On the other hand, if their relationship is ambiguous ..., then the parties can remove that ambiguity, by the very

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204 [1983] 2 NSWLR 597.

205 Section 11 of the *Australia Act 1986* (Cth).

206 (1978) 52 ALJR 407; 18 ALR 385.

207 *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601 (emphasis added), quoting *Massey v Crown Life Insurance Co* [1978] 1 WLR 676; [1978] 2 All ER 576 (cleaned up).

> agreement itself which they make with one another. The agreement itself then becomes the best material from which to gather the true legal relationship between them.'"

127 The third of those principles, although stated by means of a quotation from an earlier English decision, was entirely in accordance with the common law as then understood in Australia. Legal characterisation of a relationship into which parties have entered under a written contract has never been thought to be controlled by the contractual language chosen to describe the relationship. The characterisation must turn on the substantial relations between the parties, which might be informed but cannot be altered by the presence in the contract of "elaborate provisions expressed in terms appropriate to some other relation"[208]. Michael Black QC pithily encapsulated that understanding in an employment context in the submission that "the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck"[209].

128 The second principle stated by the Privy Council amounted to an adequate, albeit incomplete, exposition of the nature of a relationship of employment at common law. That topic need not be further addressed.

129 The first principle stated by the Privy Council, in so far as it contained the italicised words, in our opinion, was wrong as a matter of common law principle and was contrary to the authority of this Court in two earlier decisions. The first was *Cam & Sons Pty Ltd v Sargent*[210], where the primary judge was said to have been "perfectly right" in finding the relationship subsisting between parties to a written contract to have been in fact that of employer and employees in circumstances we explain in *ZG Operations Australia Pty Ltd v Jamsek*[211]. The second was *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd*[212], to which we will momentarily turn.

130 The error of common law principle in *Narich* lay in conflation of the distinction between the relationship of employment and the contract under which

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208 *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163.

209 See *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184.

210 (1940) 14 ALJ 162 at 163.

211 [2022] HCA 2.

212 (1952) 85 CLR 138.

the relationship is established and maintained. Focusing exclusively on the terms of the contract loses sight of the purpose for which the characterisation is undertaken. That purpose is to characterise the relationship.

131 The importance of keeping, and the danger of losing, sight of the purpose for which the characterisation is undertaken being the characterisation of the relationship were highlighted by Allsop CJ in the decision under appeal. His Honour said (the emphasis being his)[213]:

> "The relationship is founded on, but not defined by, the contract's terms. Hence the importance of standing back and examining the detail *as a whole* … This perspective is essential to view the circumstances as a practical matter ... This perspective and proper approach to the characterisation of the whole is likely to be distorted, not advanced, by an overly weighted importance being given to emphatic language crafted by lawyers in the interests of the dominant contracting party. The distortion will likely see formal legalism of the chosen language of such party supplant a practical and intuitively sound assessment of the whole of a relationship by reference to the elements of the informing conceptions."

132 There will be cases, of which *Narich* and *Chaplin* may well have been examples, in which an examination of the manner of performance of a written contract will reveal nothing of significance about a relationship in fact established and maintained by the parties under the contract that cannot be gleaned from an examination of the contractual terms. But there will be cases where, without any variation to the terms of a written contract, the true character of a relationship in fact established and maintained under the contract will be revealed through the manner of the performance of the contract. That will be so where the terms of the written contract are sufficiently opaque or obscure to admit of different manners of performance. And it will be especially so where such a contract is a standard form written contract couched in language that might arguably have been chosen by the putative employer to dress up the relationship to be established and maintained as something somewhat different from what it might turn out to be.

133 That was precisely the scenario considered in *Foster*. There an insurance company applied in the original jurisdiction of this Court under s 75(v) of the *Constitution* for a writ of prohibition directed to the Commonwealth Court of Conciliation and Arbitration to restrain further proceedings in relation to an industrial award. The award had been made in respect of insurance salesmen engaged by the company under standard form written contracts which described them as agents and not employees and which stipulated that they were not subject

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213 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 639-640 [21].

to the will of the company as to the manner in which they performed the duties specified in the agreement. The ground on which the company sought the writ was that the award had not arisen from an "industrial dispute" within the meaning of the *Conciliation and Arbitration Act* because the company and its agents did not stand in the relationship of employer and employees. The writ of prohibition was refused for the reason that, notwithstanding the terms of the written contracts, the absence of the relationship of employer and employees was not established on the evidence before the Court.

134 Having summarised a number of the terms of the standard form written contracts, Dixon, Fullagar and Kitto JJ said[214]:

> "Provisions of this character are perhaps more likely to arouse misgivings as to what the practical situation of the agent may be in fact than to prevent a relation of master and servant being formed.
>
> For, if in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual."

Their Honours concluded[215]:

> "The materials ... before [the] Court ... fail to exclude ... the possibility that the real relation between some or all of the agents and the ... company in their actual work, week in week out, is in fact that of employer and employee, whatever the agreement may say."

135 *Foster* was applied by the Full Court of the Supreme Court of New South Wales in *Ex parte Robert John Pty Ltd; Re Fostars Shoes Pty Ltd*[216] to hold that a "deed of licence", in the performance of which a shopkeeper was in fact given exclusive possession of shop premises, gave rise to a relationship of landlord and tenant within the jurisdiction of the fair rents board under the *Landlord and Tenant (Amendment) Act 1948* (NSW), as amended. The reasoning of Sugerman J, with

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214 (1952) 85 CLR 138 at 151.

215 (1952) 85 CLR 138 at 155 (note the corrigendum).

216 [1963] SR (NSW) 260.

whom the other members of the Full Court agreed, is instructive[217]. His Honour said[218]:

> "It is not necessary to go so far as to find the document a sham. It is simply a matter of finding the true relationship of the parties."

His Honour went on[219]:

> "In determining whether the fair rents board had jurisdiction to determine the fair rent of the subject premises it is necessary to have regard to the real character of the relationship of the parties if this be found, as their relations worked out in fact, to have differed from the relationship which might be taken as intended to be constituted by the deed of licence if considered alone."

136 Since *Narich*, the existence of a relationship of employment at common law has been squarely considered by this Court only in *Stevens v Brodribb Sawmilling Co Pty Ltd*[220] and *Hollis v Vabu Pty Ltd*[221]. It may be conceded that neither of those cases concerned a relationship formed under a contract wholly in writing. But it is impossible to understand the detailed factual reasoning actually engaged in by this Court in either *Stevens* or *Hollis* as confined to the identification and interpretation of contractual terms. With the possible exception of one Justice responding to the argument put in one case[222], the same may be said of the reasoning in every case before *Stevens* and *Hollis* in which the existence of a relationship of employment

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217 See Handley, "Sham Self-Employment" (2011) 127 *Law Quarterly Review* 171 at 173; Bomball, "Subsequent Conduct, Construction and Characterisation in Employment Contract Law" (2015) 32 *Journal of Contract Law* 149 at 167-168.

218 [1963] SR (NSW) 260 at 269. See also *Pitcher v Langford* (1991) 23 NSWLR 142 at 161-162.

219 [1963] SR (NSW) 260 at 272.

220 (1986) 160 CLR 16.

221 (2001) 207 CLR 21.

222 *Logan v Gilchrist* (1927) 33 ALR 321 at 322 (Higgins J), but see at 322 (Isaacs J).

had been in issue in this Court: contractual terms had always been examined, but never to the exclusion of contractual performance[223].

137 The explanation given by Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ of the overarching purpose of the factual inquiry in which they engaged in *Hollis* also contradicts any notion that the factual inquiry in which their Honours were engaged in that case was confined to the identification and interpretation of contractual terms. Having noted a number of oral and written contractual terms, their Honours said[224]:

> "It should be added that the relationship between the parties, for the purposes of this litigation, is to be found not merely from these contractual terms. The system which was operated thereunder and the work practices imposed by Vabu go to establishing 'the totality of the relationship' between the parties; it is this which is to be considered."

Later, their Honours said[225]:

> "The concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees."

The work practices identified as bearing on that characterisation included that the couriers "were not providing skilled labour or labour which required special

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223 *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41; *Cam & Sons Pty Ltd v Sargent* (1940) 14 ALJ 162; *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* (1944) 69 CLR 227; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389; *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138; *Wright v Attorney-General for the State of Tasmania* (1954) 94 CLR 409; *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395; *Dietrich v Dare* (1980) 54 ALJR 388; 30 ALR 407.

224 (2001) 207 CLR 21 at 33 [24], quoting from *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

225 (2001) 207 CLR 21 at 42 [47].

qualifications"[226], that they "had little control over the manner of performing their work"[227], that they "were presented to the public and to those using the courier service as emanations of Vabu"[228], that "Vabu superintended the couriers' finances"[229] and that "there was considerable scope for the actual exercise of control" over the couriers in the running of Vabu's business[230].

138 Faced with contracts wholly in writing, some trial and intermediate appellate courts in Australia have done their best to limit their analysis to the identification and interpretation of contractual terms in conformity with the approach indicated in *Narich*. In so doing, they have sometimes been driven to engage in the rather artificial exercise of treating conduct engaged in by the parties in the performance of the contract as a "course of dealing" from which then to infer a mutual intention to supplement the written contract with further contractual terms making more specific provision for the conduct found in fact to have occurred[231].

139 Mostly, however, trial and intermediate appellate courts have taken their cue from *Stevens* and *Hollis* in assuming that, despite what was said in *Narich*, "the nature of the relationship may be legitimately examined by reference to the actual way in which work was carried out"[232]. The assumption was explicit in the reasoning of the Full Court of the Federal Court in the decision here under appeal[233]. It was also explicit in the reasoning of the Full Court of that Court in the decision under appeal in *ZG Operations Australia Pty Ltd v Jamsek*[234].

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226 (2001) 207 CLR 21 at 42 [48].

227 (2001) 207 CLR 21 at 42 [49].

228 (2001) 207 CLR 21 at 42 [50].

229 (2001) 207 CLR 21 at 43 [54].

230 (2001) 207 CLR 21 at 44 [57].

231 eg *Lenzoot Haulage Pty Ltd v Sinclair* (1986) 42 SASR 506 at 515.

232 *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at 168-169 [91].

233 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 637 [11], 661 [98].

234 [2022] HCA 2, on appeal from *Jamsek v ZG Operations Australia Pty Ltd* (2020) 279 FCR 114 at 118 [9], 119 [14], 147-148 [182]-[184].

140 No doubt inspired by aspects of the reasoning in *WorkPac*, the focus of the arguments on the hearing of the appeal in this Court was on a close examination of the terms of the ASA. That said, it is not insignificant that no party was able to avoid making reference to the manner of performance of the ASA and to its interaction with the manner of performance of the LHA.

141 The reticence of the parties to engage with the manner of the performance of the ASA and its interaction with the manner of the performance of the LHA was, in our opinion, unwarranted. As has already been noted, *WorkPac* held only that the distinction between a casual employee and another employee was to be found in the terms of the contract of employment. The plurality was not laying down any principle directed to the distinction between an employee and an independent contractor[235].

142 The assumption on which lower courts have mostly proceeded is, in our opinion, correct. The italicised words in the first of the three principles stated by the Privy Council in *Narich* did not accord with the prevailing understanding of the common law in Australia when *Narich* was decided. To the extent of the inclusion of those words, that first principle was wrong when *Narich* was decided. That principle has not grown to be either correct or workable with age: it should not be accepted to be part of the common law of Australia.

143 The true principle, in accordance with what we understand to have been the consistent doctrine of this Court until now, is that a court is not limited to considering the terms of a contract and any subsequent variation in determining whether a relationship established and maintained under that contract is a relationship of employment. The court can also consider the manner of performance of the contract. That has been and should remain true for a relationship established and maintained under a contract that is wholly in writing, just as it has been and should remain true for a relationship established and maintained under a contract expressed or implied in some other form or in multiple forms.

The relationships of employment at common law in this case

144 Having to this stage established that the inquiry at common law is into the legal character of the relationship that existed in fact between Mr McCourt and Construct during the two relevant periods and that the scope of the inquiry informing the legal characterisation of the relationship legitimately extends to the manner of the performance of the ASA, including its interaction with the manner

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235 See (2021) 95 ALJR 681 at 700 [101]; 392 ALR 39 at 61.

of the performance of the LHA, it is now necessary to undertake that characterisation.

145 The first point to be made is that Mr McCourt and Construct did not establish a continual relationship under which Mr McCourt was to perform work merely by entering into the ASA. The ASA obliged Construct to use reasonable endeavours to keep itself informed of opportunities in the building industry for Mr McCourt to supply labour to builders identified by Construct[236], obliged Construct to inform Mr McCourt of opportunities to supply his labour to builders[237], and entitled Construct to negotiate a payment rate for the supply of Mr McCourt's labour to a builder[238]. The ASA equally entitled Mr McCourt to refuse to take up an opportunity to supply his labour to any builder[239].

146 No continual relationship under which Mr McCourt was to perform work was established under the terms of the ASA until Construct informed Mr McCourt of an opportunity to supply his labour to a builder and Mr McCourt chose to take up that opportunity. The continual relationship under which Mr McCourt was to perform work was then one which the ASA contemplated would be maintained for so long as Mr McCourt's labour was required by the builder[240] subject to an ability of Mr McCourt to terminate the relationship at any time on four hours' notice to Construct[241].

147 Only on the two occasions when Mr McCourt in fact took up an opportunity to supply his labour to Hanssen was a continual relationship of that nature in fact established. Following the exchange that occurred between Mr McCourt and Construct on 26 July 2016, the first relationship of that nature was established and maintained during the period from 27 July 2016 to 6 November 2016. Mr McCourt then went travelling around Australia. Following his return to Perth, the second relationship of that nature was established and maintained during the period from

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236 Clause 1(a) of the ASA.

237 Clause 1(b) of the ASA.

238 Clause 2(a) of the ASA.

239 Clause 5(b) of the ASA.

240 Clause 4(c) of the ASA.

241 Clause 5(c) of the ASA.

14 March 2017 to 30 June 2017, after which Hanssen appears no longer to have required Mr McCourt's labour.

148 During each of those two periods in which a continual relationship under which Mr McCourt was to perform work existed, Mr McCourt was obliged under the ASA to attend Hanssen's building site and there to supply his labour to Hanssen in a "safe, competent and diligent manner"[242]. He was obliged to ensure that accurate records were maintained of his hours of labour[243]. Construct was in turn obliged, on presentation of an invoice by Mr McCourt, to "underwrite" payment to Mr McCourt of the rate Construct had negotiated with Hanssen[244].

149 Of course, Mr McCourt never in fact kept any record and Construct never in fact insisted on him presenting any invoice before paying him. Whether acquiescence of the parties in that practice might be analysed in terms of contractual variation or waiver or estoppel by convention is of no present significance.

150 What is of significance is that, in the performance of each relationship between Mr McCourt and Construct that was in fact established and maintained under the ASA, Mr McCourt turned up at Hanssen's building site each morning, where he clocked on. During the day, he did whatever he was told to do in the way he was told to do it by Hanssen's site managers and leading hands. He then clocked off at the end of the day. Each week, he received from Construct, by direct debit into his bank account, an amount which represented the hourly rate of pay Construct had negotiated for his labour with Hanssen. The hours he had worked and the amount he was paid were recorded on a "payment advice" which Construct then gave to him.

151 That pattern of work and that method of payment were explained by the terms and manner of the performance of the LHA. Under the terms of the LHA, Hanssen was able to place an order with Construct for labour. Construct was then to arrange for workers to present themselves at Hanssen's building site. The workers were there to be "under [Hanssen's] direction and supervision from the time they report[ed] to [Hanssen] and for the duration of each day on the assignment"[245]. Hanssen was to pay Construct, and Construct was to pay the

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242 Clause 4(c) of the ASA.

243 Clause 4(b) of the ASA.

244 Clause 1(d) of the ASA.

245 Clause 4 of the LHA.

workers, for their hours worked[246]. That was essentially what occurred in practice in respect of the provision by Construct to Hanssen of the labour of Mr McCourt.

152 Although there are salient distinctions which will be noted in due course, the back-to-back operation of the contract between Mr McCourt and Construct (the ASA) and the contract between Construct and Hanssen (the LHA) was in important respects not dissimilar to the triangular labour hire arrangement considered by this Court in *Accident Compensation Commission v Odco Pty Ltd* ("*Odco [No 1]*")[247]. Adapting language used by this Court to describe the arrangement in that case to the circumstances of this case, it can be seen that Mr McCourt worked under the ASA for the benefit of Construct, in the sense that his work was done for the purposes of Construct's business and enabled Construct to obtain payment from Hanssen under the LHA, which in turn enabled Construct to pay Mr McCourt under the ASA[248]. By supplying his labour to Hanssen for the purposes of Hanssen's business, Mr McCourt was at the same time supplying his labour to Construct for the purposes of Construct's business[249].

153 The issue in *Odco [No 1]* was whether a labour hire company was liable to pay a levy under an extended statutory definition of "employer" in the *Accident Compensation Act 1985* (Vic). No issue was raised in the appeal to this Court in *Odco [No 1]* about whether the labour hire arrangement considered in that case gave rise to any relationship of employment at common law. The assumption on which the appeal was conducted was that it did not[250]. Issues about whether the labour hire arrangement considered in *Odco [No 1]* gave rise to a relationship of employment at common law were addressed in separate proceedings before the Federal Court, both at first instance[251] and on appeal in *Building Workers' Industrial Union of Australia v Odco Pty Ltd* ("*Odco [No 2]*")[252]. The resolution

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246 Clause 9 of the LHA.

247 (1990) 64 ALJR 606; 95 ALR 641.

248 (1990) 64 ALJR 606 at 610; 95 ALR 641 at 647.

249 (1990) 64 ALJR 606 at 613; 95 ALR 641 at 652.

250 (1990) 64 ALJR 606 at 609; 95 ALR 641 at 646.

251 *Odco Pty Ltd v Building Workers' Industrial Union of Australia* (unreported, Federal Court of Australia, 24 August 1989).

252 (1991) 29 FCR 104.

of those issues was that the arrangement did not give rise to a relationship of employment at all[253].

154 Not very long afterwards, *Odco [No 2]* was distinguished by the Victorian Court of Appeal in *Drake Personnel Ltd v Commissioner of State Revenue*[254]. There the putative employer was an employment agency described as being in the business of supplying "temporary workers" to its clients, who were entitled to and did exercise day-to-day control over the work of those temporary workers. The submission accepted by the Victorian Court of Appeal was to the effect that the exercise by the client of day-to-day control over the work of a temporary worker was properly "referred back" to the contract between the agency and the temporary worker for the purpose of characterising the relationship between them at common law. Working for the purposes of the agency's business, being paid by the agency, and being subject to day-to-day control by reference to the contractual arrangement between the agency and the client, a temporary worker was an employee of the agency[255].

155 The approach taken by the Victorian Court of Appeal in *Drake Personnel* – attributing significance to the back-to-back contracts, between the temporary workers and the employment agency and between the agency and its client, in assessing the control that the agency had over the manner in which the temporary workers performed their work – was sound in principle. The approach is preferable to the rival approach taken five years later by the English Court of Appeal in *Bunce v Postworth Ltd*[256], on which Construct sought to rely in argument for its persuasive value. The reasoning in *Bunce* is conspicuously unpersuasive. Out of a professed and entirely proper concern to establish "who *in reality* [had] the power to control what the worker [did] and how he [did] it"[257], *Bunce* actually produced the result that a worker over whose day-to-day work a power of control was *in reality* exercised through the operation of back-to-back contracts between him and an employment agency and between the agency and its client was treated as the employee of neither the agency nor its client. Of the rival approaches, *Drake Personnel* produces a result that accords with reality; *Bunce* does not.

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253 (1991) 29 FCR 104 at 127.

254 (2000) 2 VR 635.

255 (2000) 2 VR 635 at 638-639 [4], 657-658 [55]-[56], 665 [78].

256 [2005] IRLR 557.

257 [2005] IRLR 557 at 561 [29] (emphasis in original).

156 The *Drake Personnel* approach was correctly applied by E M Heenan J in dissent in *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers*[258] to find that labour hire arrangements into which Construct had entered of a kind similar to the arrangement in the present case gave rise to relationships of employment between Construct and workers. The dissent is to be preferred to the decision of the majority in that case.

157 That is not to cast doubt on the correctness of *Odco [No 2]*. There are three important distinctions between the triangular labour hire arrangements considered in *Odco [No 1]* and *Odco [No 2]* and the arrangements in *Drake Personnel*, *Personnel Contracting* and the present case. First, the subject-matter of the back-to-back standard form contracts in *Odco [No 1]* and *Odco [No 2]* was not unambiguously hourly labour. The subject-matter was described contractually not just as "hourly" labour but also in terms of a "job" or "work done"[259]. The way in which the issue about employment at common law was joined between the parties in *Odco [No 2]* did not engage the Full Court of the Federal Court in any examination of potential differences in the performance of the contracts. Second, the contracts between the putative employees and the labour hire company in those cases did not oblige, as here, the putative employees to supply labour in a "safe, competent and diligent manner" but rather to "carry out all work" which the putative employees agreed with the clients of the labour hire company to do and which the putative employees "guaranteed against faulty workmanship"[260]. Third, and most importantly, nothing in the contracts between the labour hire company and its clients purported to place the putative employees under the direction and control of the clients[261].

158 The aspects of the relationship that existed in fact between Mr McCourt and Construct during each of the two relevant periods most pertinent to the legal characterisation of the relationship can be summarised as follows. First, Mr McCourt was engaged by Construct under the ASA to supply nothing but his labour to Hanssen, which he in fact did and for which he was paid an agreed hourly rate by Construct. Second, by supplying his labour to Hanssen, Mr McCourt was at the same time supplying his labour to Construct for the purposes of Construct's business. He was not in any meaningful sense in business for himself. Third, and most importantly, when supplying his labour to Hanssen, Mr McCourt was subject to the direction and control of Hanssen through the back-to-back operation of his

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258 (2004) 141 IR 31 at 44 [52].

259 (1991) 29 FCR 104 at 110.

260 (1991) 29 FCR 104 at 110.

261 (1991) 29 FCR 104 at 110-113.

obligation to Construct under the ASA and Construct's obligation to Hanssen under the LHA. Those aspects of the relationship made it a relationship of employment.

Conclusion

159 The conclusion that Mr McCourt was an employee of Construct during the two relevant periods is the conclusion to which the Full Court would have come in the decision under appeal were it not for the Full Court's inability to assess *Personnel Contracting* to have been "plainly wrong". That is clear from its reasoning[262]. In adopting the approach that it did, the Full Court conducted itself in a manner befitting its position as an intermediate appellate court within an integrated national legal system. The error in its conclusion is entirely without fault on its part.

160 The appeal must be allowed. The orders proposed by Kiefel CJ, Keane and Edelman JJ must be made.

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262 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 642 [31], 643-644 [33]-[40], 644 [41], 669-670 [128]-[134], 682 [185].

161 GORDON J. The central question is whether Mr McCourt was "employed, or usually employed" by a "national system employer" (Personnel Contracting Pty Ltd, trading as "Construct") so as to be a "national system employee" for the purposes of ss 13 and 14 of the *Fair Work Act 2009* (Cth) ("the Act"). In Pt 1-2 of the Act, which contains ss 13 and 14, "employee" and "employer" have their "ordinary meanings"[263]. There was no dispute that the "ordinary meanings" of employee and employer in the Act are the common law meanings of those terms[264]. The Act makes minor statutory amendments to the common law meanings[265], none of which were at issue in this appeal.

162 The resolution of the central question requires consideration of the totality of the relationship between Construct and Mr McCourt, which must be determined by reference to the legal rights and obligations that constitute that relationship. Where the parties have entered a wholly written employment contract, as in this case, the totality of the relationship which must be considered is the totality of the legal rights and obligations provided for in the contract, construed according to the established principles of contractual interpretation. In such a case, the central question neither permits nor requires consideration of subsequent conduct and is not assisted by seeing the question as involving a binary choice between employment and own business. The totality of the relationship between Construct and Mr McCourt was that of employer and employee.

Background

163 Mr McCourt arrived in Australia in June 2016 on a working holiday visa, having previously worked in the United Kingdom as a part-time brick-layer and in hospitality jobs. While looking for work in Western Australia, Mr McCourt obtained a "white card", which he needed to work on construction sites.

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263 Act, s 11.

264 Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 5 [28]. See *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 549 [23].

265 Section 15(1)(a) provides that a reference in the Act to an employee with its ordinary meaning "includes a reference to a person who is usually such an employee". See Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at 11 [67]. Section 14(1) limits the meaning of "national system employer" to, among other things, constitutional corporations, the Commonwealth and Commonwealth authorities, so far as they employ or usually employ an individual; and also persons, so far as they, in connection with constitutional trade or commerce, employ or usually employ an individual as a flight crew officer, maritime employee or waterside worker.

164 Mr McCourt contacted Construct, which described itself as a labour hire company, to express interest in obtaining work. During an interview at Construct's office on 25 July 2016, Mr McCourt indicated that he was prepared to do any construction labouring that he was capable of and to work on weekends; that he had his own means of transport to get to jobs; that he was available to start work immediately; and that he had a hard hat, steel-capped boots and hi-vis clothing. Mr McCourt was informed of the rate at which he would be paid and was given an "Administrative Services Agreement" ("the ASA"), a "Most Frequently Asked Questions" document, a "Contractor Safety Induction Manual" and a document entitled "Guide to Work at a Glance".

165 The contract between Construct and Mr McCourt was wholly in writing. The terms of the contract were set out in the ASA, supplemented by the Contractor Safety Induction Manual, which was found by the Full Court of the Federal Court of Australia to be "contractual in nature". Mr McCourt signed the ASA on the day of his interview. The terms of the ASA are addressed later in these reasons. The ASA made separate provision for the rights and obligations of each party.

166 No one suggested that the written contract between Mr McCourt and Construct was subsequently varied or that it was a sham.

167 On 26 July 2016, the day after the interview, Construct informed Mr McCourt that there was work at a site run by Hanssen Pty Ltd ("Hanssen"), "the Concerto Project", and that the work would start the following day and would likely run until at least Christmas. Mr McCourt confirmed that he was happy to commence work the next day.

168 Construct's relationship with Hanssen was governed by a "Labour Hire Agreement" ("the LHA"). The LHA described Construct as "an administrative services agency, liaising between the *client* [ie, Hanssen] and self-employed *contractors* for the provision of labour by self-employed *contractors* to the *client*"[266]. Under the LHA, among other things:

(1) Construct's "contractors" were "referred on a daily hire basis" and charged out "on flat hourly rates" negotiated between Hanssen and Construct[267], the minimum period of hire was four hours on any given day (subject to specified exceptions)[268], and the contractors were subject to Hanssen's

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266 LHA, cl 1.

267 LHA, cl 3.

268 LHA, cl 6.

"direction and supervision from the time they report[ed] to [Hanssen] and for the duration of each day on the assignment"[269].

(2) Construct agreed to invoice Hanssen on a weekly basis (including amounts due, with regard to the agreed charge-out rate and the hours or pieces completed)[270] and, if notified by Hanssen of the unsuitability of a "contractor" within four hours on the first day of an assignment, to not charge for the contractor and to replace them as soon as practicable[271].

(3) Hanssen agreed to "comply with all applicable workplace health and safety laws, codes and standards applicable to self-employed *contractors*"[272]; "not to employ or contract" any contractor referred by Construct, "either directly or indirectly through an interposed entity, within twelve months of their commencement of work" with Hanssen[273]; to ensure that a weekly schedule of units (with hours or pieces completed by each Construct contractor per week) was accurately compiled and sent to Construct in a specified manner and by a specified time[274]; and to pay invoices received from Construct within seven days[275].

169 On 27 July 2016, Mr McCourt arrived at the Concerto Project and participated in a site induction. During the induction, he was given a Hanssen site safety induction form and the Hanssen site rules. No contract existed between Mr McCourt and Hanssen. Mr McCourt worked at the Concerto Project from 27 July 2016 to 6 November 2016. After finishing work at the Concerto Project in November 2016, Mr McCourt left Perth temporarily. He returned in March 2017. On 9 March 2017, Mr McCourt contacted Ms O'Grady, the "Finishing Foreman" at the Concerto Project, to ask if there was any work available. He resumed work at the Concerto Project on 14 March 2017 and continued until 24 June 2017. Mr McCourt subsequently worked at another Hanssen site, "the Aire Project", from 26 June 2017 to 30 June 2017. On 30 June 2017, Mr McCourt was informed

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269 LHA, cl 4.

270 LHA, cl 9.

271 LHA, cl 1.

272 LHA, cl 2.

273 LHA, cl 7.

274 LHA, cl 8.

275 LHA, cl 9.

that he was not to go back to the Aire Project to work. Mr McCourt did not receive any further work from Construct.

170 Mr McCourt and the Construction, Forestry, Maritime, Mining and Energy Union ("the CFMMEU") brought claims against Construct and Hanssen under ss 545, 546 and 547 of the Act for orders for compensation and penalties. They alleged that Mr McCourt was not paid or treated according to the Building and Construction General On-Site Award 2010 ("the Award"). Mr McCourt was only entitled to be paid under the Award if he was an "employee" of Construct under the Act.

The meaning of employee and employer

171 As we have seen, there was no dispute that the "ordinary meanings" of employee and employer in the Act are the common law meanings of those terms and that the Act recognises that those terms have legal content.

172 In deciding whether a relationship between two parties is one of employment, it is the "totality of the relationship" which must be considered[276]. That approach must be understood in light of the view, recently re-affirmed by six judges of this Court in *WorkPac Pty Ltd v Rossato*[277], that "[a] court can determine the character of a legal relationship between the parties *only* by reference to the legal rights and obligations which constitute that relationship" (emphasis added). In modern times, those legal rights and obligations derive from a contract of employment. That is because "[t]he employment relationship, in Australia, operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment"[278]. Indeed, the evolution of the employment relationship is "a classic

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276 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at 33 [24], 41 [44]; *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at 123-124 [81]. See also *Logan v Gilchrist* (1927) 33 ALR 321 at 322; *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539 at 552; *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561; *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 218; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 401.

277 (2021) 95 ALJR 681 at 693 [57]; 392 ALR 39 at 52; see also 95 ALJR 681 at 699 [97]; 392 ALR 39 at 60, citing *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd* (1952) 85 CLR 138 at 151.

278 *WorkPac* (2021) 95 ALJR 681 at 693 [56]; 392 ALR 39 at 52, quoting *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 178 [1]. The idea that the character of a legal relationship between parties depends entirely or

illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)"[279].

173 It follows that, in the case of a wholly written employment contract, the "totality of the relationship" which must be considered is the totality of the legal rights and obligations provided for in the contract[280]. To ascertain those legal rights and obligations the contract in issue must be construed according to the established principles of contractual interpretation[281]. The statutory command to give "employee" and "employer" their ordinary meanings requires no less and permits no more[282].

174 The task is to construe and characterise the contract made between the parties at the time it was entered into[283]. The nature of the contracting parties, such as where a contracting party is a separate entity or a partnership, rather than an individual, may suggest that the relationship between the parties is not that of employer and employee[284]. The way that the contractual terms address the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the delegation of work, and

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substantially on the practical assumption of direction and control does not reflect the law in Australia: cf *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48; *Attorney-General for NSW v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 249, 299; *Foster* (1952) 85 CLR 138 at 151, 155; *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 392-393, 397; see also *Bunce v Postworth Ltd* [2005] IRLR 557 at 561 [29].

279 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 436; *Barker* (2014) 253 CLR 169 at 182-183 [16]; *WorkPac* (2021) 95 ALJR 681 at 693 [58]; 392 ALR 39 at 52.

280 See fn 276 above.

281 *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 352; *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601; *Connelly v Wells* (1994) 55 IR 73 at 74; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116-117 [46]-[52].

282 Act, s 11 read with ss 13 and 14.

283 See, eg, *Connelly* (1994) 55 IR 73 at 74.

284 See, eg, *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407 at 410; 18 ALR 385 at 391; *Hollis* (2001) 207 CLR 21 at 48-49 [68].

where the right to exercise direction and control resides may together show that the relationship is not one of employer and employee[285].

175 Recourse may be had to events, circumstances and things external to the contract which are objective, which are known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract[286]. The nature of the specific job that the purported employee applied for as well as the nature and extent of the equipment to be supplied by that purported employee for that particular job may well be relevant to the question of characterisation of the contract[287]. Indeed, it is often relevant, but not determinative, to observe that the purported employee must supply some uniform, tools or equipment[288]. But again that observation must be made in context. The context is the nature and extent of what is required to be provided under the contract. In many forms of employment, employees provide their own uniform and bring their own tools to work.

176 One "general principle" of construction of contracts is that "it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made"[289] (what might be described as "subsequent

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285 cf *Stevens* (1986) 160 CLR 16 at 24. See, eg, *Queensland Stations* (1945) 70 CLR 539 at 548, 550, 551-552.

286 *Codelfa* (1982) 149 CLR 337 at 350, 352; *Mount Bruce Mining* (2015) 256 CLR 104 at 117 [50]. See also *Prenn v Simmonds* [1971] 1 WLR 1381 at 1385; [1971] 3 All ER 237 at 241; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 996; [1976] 3 All ER 570 at 574-575, citing *Lewis v Great Western Railway Co* (1877) 3 QBD 195 at 208; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 606.

287 See, eg, *Federal Commissioner of Taxation v J Walter Thompson (Aust) Pty Ltd* (1944) 69 CLR 227 at 231-232.

288 See, eg, *Stevens* (1986) 160 CLR 16 at 24, 25, 37; *Hollis* (2001) 207 CLR 21 at 41 [47], 42 [50], 44 [56].

289 *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at 582 [35], quoting *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 at 603, repeated in *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 446. See also *Chaplin* (1978) 52 ALJR 407 at 411; 18 ALR 385 at 392; *Codelfa* (1982) 149 CLR 337 at 348, quoting *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 261.

conduct"[290]). The rationale of the general principle, identified by Lord Reid in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*[291], is to avoid the result "that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later". The general principle may permit exceptions[292]. No party contended that any exception should be recognised in this appeal.

177 Of course, the general principle against the use of subsequent conduct in construing a contract wholly in writing says nothing against the admissibility of conduct for purposes *unrelated* to construction, including in relation to: (1) *formation* – to establish whether a contract was actually formed and when it was formed[293]; (2) *contractual terms* – where a contract is not wholly in writing, to establish the existence of a contractual term or terms[294]; (3) *discharge or variation* – to demonstrate that a subsequent agreement has been made varying one

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290 See Seddon and Bigwood, *Cheshire and Fifoot Law of Contract*, 11th Aust ed (2017) at 448 [10.16]; Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 601 [29.150]. This is also sometimes referred to as "post-contractual conduct" or "extrinsic evidence".

291 [1970] AC 583 at 603. See also *Bacchus Marsh Concentrated Milk Co Ltd (In liq) v Joseph Nathan & Co Ltd* (1919) 26 CLR 410 at 451-452, cited in Seddon and Bigwood, *Cheshire and Fifoot Law of Contract*, 11th Aust ed (2017) at 424 [10.4]. See also *Codelfa* (1982) 149 CLR 337 at 347-348; *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471 at 483-484 [35].

292 *Daera Guba* (1973) 130 CLR 353 at 446; *L Schuler* [1974] AC 235 at 261; *Equuscorp* (2004) 218 CLR 471 at 483-484 [35]. See also Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 601 [29.150].

293 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at 163-164 [25], citing, among other cases, *Howard Smith & Co Ltd v Varawa* (1907) 5 CLR 68 at 77 and *Barrier Wharfs Ltd v W Scott Fell & Co Ltd* (1908) 5 CLR 647 at 668, 669, 672; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 616 [13]; *GC NSW Pty Ltd v Galati* [2020] NSWCA 326 at [92]. See, eg, *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 398, 403; *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 426-428; *Zuijs* (1955) 93 CLR 561 at 567-568, 575.

294 *Byrne* (1995) 185 CLR 410 at 442. See, eg, *Humberstone* (1949) 79 CLR 389 at 398, 403; *Humberstone v Northern Timber Mills* [1949] VLR 351 at 357-358; *Neale* (1955) 94 CLR 419 at 426-428; *Zuijs* (1955) 93 CLR 561 at 567-568, 575; *Marshall* (1963) 109 CLR 210 at 212, 218; *Barrett* (1973) 129 CLR 395 at 400 but see also *Barrett v Federal Commissioner of Taxation* 72 ATC 457 at 460-461.

or more terms of the original contract[295]; (4) *sham* – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement[296]; and (5) *other* – to reveal "probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract"[297]. The relevance of subsequent conduct for the purposes of a particular statutory provision, legislative instrument or award was not in issue in this appeal.

178 It is necessary to say something further about the admissibility of conduct. Where a wholly written contract has expired but the parties' conduct suggests that there was an agreement to continue dealing on the same terms, a contract may be implied *on those terms* (save as to duration and termination)[298]. The parties' conduct may also demonstrate "a tacit understanding or agreement" sufficient to show that there was a contract in the absence of an earlier express contract[299]. In a dynamic relationship where "new terms [may] be added or [may] supersede older

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295 *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 at 243-244; *Humberstone* (1949) 79 CLR 389 at 398; *Humberstone* [1949] VLR 351 at 357-358; *Zuijs* (1955) 93 CLR 561 at 567-568; *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 112-113; *Chaplin* (1978) 52 ALJR 407 at 411; 18 ALR 385 at 392-393; *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2012) 245 CLR 338 at 350-351 [31]-[32]. See also *Chitty on Contracts*, 33rd ed (2018), vol 1 at 1087 [13-124], citing *Goss v Lord Nugent* (1833) 5 B & Ad 58 at 64 [110 ER 713 at 716] and *Morris v Baron and Company* [1918] AC 1.

296 *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at 531 [34]-[35]. See also *Cam and Sons Pty Ltd v Sargent* (1940) 14 ALJ 162 at 163; *Foster* (1952) 85 CLR 138 at 144, 153-154.

297 *Franklins* (2009) 76 NSWLR 603 at 616 [13]. See also Herzfeld and Prince, *Interpretation*, 2nd ed (2020) at 601 [29.160].

298 *Brambles Ltd v Wail* (2002) 5 VR 169 at 184-189 [54]-[62]; *CSR Ltd v Adecco (Australia) Pty Ltd* [2017] NSWCA 121 at [88]-[118]. A majority of the High Court allowed an appeal from *Brambles* on a different point and considered that it was not necessary to address the question whether the contractual terms relied on continued in force after their formal expiry: *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424 at 438 [29].

299 *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117, quoted in *Brambles Holdings* (2001) 53 NSWLR 153 at 178 [77].

terms", it may also be necessary "to look at the whole relationship and not only at what was said and done when the relationship was first formed"[300]. The reference to the "whole relationship" should not be misunderstood. The inquiry remains an objective inquiry[301] the purpose of which is to ascertain the terms the parties can be taken to have agreed[302]. It is not an approach directed to inquiring into the conduct of parties which is not adduced to establish the formation of the contract or the terms on which the parties contracted.

179 The decision in *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Ltd*[303] is instructive. It was an application for an order nisi for a writ of prohibition directed to three judges of the Commonwealth Court of Conciliation and Arbitration ("the Arbitration Court") to restrain further proceedings in relation to an industrial award[304]. The award had been made in respect of adults engaged by an insurance company to sell insurance under a standard form agreement. This Court refused relief. It refused relief because there was a live issue that the standard form agreement was a sham[305]. The Court expressly decided not to determine that issue[306]. Whether a particular adult engaged by the insurance company was or was not an employee was a matter to be determined by the Arbitration Court. In particular, references to what was happening "in practice"[307] were provoked by and addressing the allegation of sham and, no less significantly, seeking to explain why the High Court could not resolve that issue. *Foster* illustrates the necessity of identifying the precise question being

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300 *Integrated Computer Services* (1988) 5 BPR 11,110 at 11,118, quoted in *PRA Electrical Pty Ltd v Perseverance Exploration Pty Ltd* (2007) 20 VR 487 at 489 [5].

301 See, eg, *Meates v Attorney-General* [1983] NZLR 308 at 377, quoted in *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 82. See also *Codelfa* (1982) 149 CLR 337 at 353; *PRA* (2007) 20 VR 487 at 489 [6].

302 *Integrated Computer Services* (1988) 5 BPR 11,110 at 11,117-11,118, quoted in *Brambles Holdings* (2001) 53 NSWLR 153 at 177 [74], 178 [77].

303 (1952) 85 CLR 138.

304 *Foster* (1952) 85 CLR 138 at 149.

305 *Foster* (1952) 85 CLR 138 at 144, 153-154, 155.

306 *Foster* (1952) 85 CLR 138 at 144, 155.

307 *Foster* (1952) 85 CLR 138 at 151.

addressed – there, a question of sham – and the relevance of evidence and statements of judicial principle to that question.

180 In construction of an employment contract it is not necessary to ask whether the purported *employee* conducts their own business[308]. That is, the inquiry is not to be reduced to a binary choice between employment or own business. The question must always focus on the nature of the relationship created by the contract between the parties.

181 Asking whether a person is working in their own business may not always be a suitable inquiry for modern working relationships. It may not take very much for a person, be they low-skilled or otherwise, to be carrying on their own business[309]. The reality of modern working arrangements, the gig economy, and the possibility that workers might work in their own business as well as one or more other businesses in the same week, suggest that focusing the analysis on "own business" considerations distracts attention from the relevant analysis – whether the totality of the relationship created by contract between the person and a purported employer is one of employee and employer[310]. The parties to, and the terms of, the contract *may* show that the purported employee entered into the contract as part of their own business.

182 Another reason for not asking whether a person is carrying on a business of their own is that that inquiry will ordinarily direct attention to matters which are not recorded in the contract, such as what "the parties said or did after it was made"[311]. For instance, in *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*[312], North and Bromberg JJ said that some of the "hallmarks of a business"

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308 *Stevens* (1986) 160 CLR 16 at 27-28; *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626 at 639. See also *Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 at 169.

309 See, eg, *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 305 [55]. See also *G v Commissioner of Inland Revenue* [1961] NZLR 994 at 999.

310 See *Tattsbet Ltd v Morrow* (2015) 233 FCR 46 at 61 [61].

311 *Gardiner* (2008) 238 CLR 570 at 582 [35], quoting *James Miller & Partners* [1970] AC 583 at 603, repeated in *Daera Guba* (1973) 130 CLR 353 at 446. See, eg, *United States v Silk* (1947) 331 US 704 at 713; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 185.

312 (2015) 228 FCR 346 at 390 [179], quoting *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation [No 3]* (2011) 214 FCR 82 at

are conducting a commercial enterprise "as a going concern", the "acquisition and use of both tangible and intangible assets in the pursuit of profit", the "notion of system, repetition and continuity", and "operat[ing] in a business-like way". But, unless those matters are provided for in the contract, they are not relevant and should be put to one side.

183 The better question to ask is whether, by construction of the terms of the contract, the person is *contracted to work in the business or enterprise of* the purported employer[313]. That question is focused on the contract, the nature of the relationship disclosed by the contract and, in this context, whether the contract discloses that the person is working in the business of the purported employer. It invites no inquiry into subsequent conduct[314]. A consequence of a negative answer to that alternative question may be that the person is not an employee. Another consequence may be, but does not have to be, that they have their own business. As five judges of this Court said in *Hollis v Vabu Pty Ltd*[315], both employees *and* contractors can work "for the benefit of" their employers and principals respectively, and so that, "*by itself*", cannot be a sufficient indication that a person is an employee (emphasis added). That does not detract from the fact that where the contract is oral, or partly oral and partly in writing, subsequent conduct may be admissible in specific circumstances for specific purposes – to objectively determine the point at which the contract was formed, the contractual terms that were agreed or whether the contract has been varied or discharged[316].

184 This Court has previously cautioned against ascribing too much weight to "labels" used by parties to describe their relationship[317]. The whole of the contract

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123 [210]. See also *Stevens* (1986) 160 CLR 16 at 37; *Hollis* (2001) 207 CLR 21 at 42 [48]; *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 at 543 [29].

313 See *Hollis* (2001) 207 CLR 21 at 39 [40]. See also *Barrett* (1973) 129 CLR 395 at 401, citing *Zuijs* (1955) 93 CLR 561.

314 cf *Silk* (1947) 331 US 704 at 713; *Bank voor Handel en Scheepvaart NV v Slatford* [1953] 1 QB 248 at 295; *Market Investigations* [1969] 2 QB 173 at 185.

315 (2001) 207 CLR 21 at 39 [40].

316 See [177] above and [188] below.

317 *Curtis v Perth and Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17 at 25-26, citing *Weiner v Harris* [1910] 1 KB 285 at 292; *Scott v Davis* (2000) 204 CLR 333 at 341 [14], 411 [235], 422-423 [268], 435 [299]; *Hollis* (2001) 207 CLR 21 at 38 [36], 45 [58]; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 at 167 [13], 169 [19], 172 [29]. See, more generally, *Re Porter; Re Transport Workers Union of*

is to be construed including whatever labels the parties have used to describe their relationship, but those labels are not determinative: "parties cannot deem the relationship between themselves to be something it is not"[318]. Adopting and adapting what was said by Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ in *Bluebottle UK Ltd v Deputy Commissioner of Taxation*[319] in relation to a clause of deeds of assignment headed "Equitable and Legal Assignments": the classification adopted by the parties in the contract is not determinative. The classification turns upon the identification of the nature and content of the rights created by the contract and the identity of those parties which enjoyed those rights. The contract can have no greater efficacy than that given by the rights which provided its subject matter.

185 Two further matters remain to be addressed: rejection of the "multifactorial approach" applied by the Courts below; and the authorities which have considered the employment relationship in the context of vicarious liability.

186 The primary judge and the Full Court (following *Personnel Contracting Pty Ltd v Construction, Forestry, Mining and Energy Union of Workers*[320]) approached the question of whether Mr McCourt was an employee of Construct for the purposes of the Act by applying a "multifactorial approach" that had been developed by lower courts following this Court's decisions in *Stevens v Brodribb*

Australia (1989) 34 IR 179 at 184, where Gray J rightly adopted the submission of Mr M E J Black QC, who said "the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck"; *Bluebottle UK Ltd v Deputy Commissioner of Taxation* (2007) 232 CLR 598 at 618 [52]. See also *Kennedy v De Trafford* [1897] AC 180 at 188; *Colonial Mutual* (1931) 46 CLR 41 at 50; *Foster* (1952) 85 CLR 138 at 151.

318 *Hollis* (2001) 207 CLR 21 at 45 [58], citing *Ex parte Delhasse; In re Megevand* (1878) 7 Ch D 511 at 526, 528, 532, *Adam v Newbigging* (1888) 13 App Cas 308 at 315, *Foster* (1952) 85 CLR 138 at 150-151 and *TNT Worldwide Express (NZ) Ltd v Cunningham* [1993] 3 NZLR 681 at 699.

319 (2007) 232 CLR 598 at 618 [52].

320 (2004) 141 IR 31.

Sawmilling Co Pty Ltd[321] and *Hollis*[322]. It has been the subject of criticism[323], including on the basis that it "is somewhat empty"[324] and "does not provide any external test or requirement by which the materiality of the elements may be assessed"[325]. The indicia that might be regarded as relevant are unconfined and "[t]here are no consistent rules about the weight that should be given to the different indicia"[326]. This creates considerable uncertainty.

187 Moreover, that multifactorial approach directs attention to subsequent conduct, and potentially to matters which are peculiarly within the knowledge of one party. For reasons explained, this is contrary to principles of contractual interpretation, namely, that recourse may be had to events, circumstances and things external to the contract which are *objective*, which are *known to the parties at the time of contracting* and which assist in identifying the purpose or object of

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321 (1986) 160 CLR 16 at 24, 29, citing *Queensland Stations* (1945) 70 CLR 539 at 552, *Zuijs* (1955) 93 CLR 561, *Marshall* (1963) 109 CLR 210 at 218 and *Barrett* (1973) 129 CLR 395 at 401.

322 (2001) 207 CLR 21. See, eg, *Personnel* (2004) 141 IR 31 at 38-39 [29]-[33], 44 [51]-[52], 54 [106]; *On Call Interpreters* (2011) 214 FCR 82 at 121-127 [204]-[220]; *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1 at [3]-[5], [17]-[18], [43]-[44]; *ACE Insurance v Trifunovski* (2013) 209 FCR 146.

323 See, eg, *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 at 597; *On Call Interpreters* (2011) 214 FCR 82 at 122 [206]; Roles and Stewart, "The Reach of Labour Regulation: Tackling Sham Contracting" (2012) 25 *Australian Journal of Labour Law* 258 at 267; Irving, *The Contract of Employment*, 2nd ed (2019) at 68-72 [2.15]-[2.18]; Stewart and McCrystal, "Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?" (2019) 32 *Australian Journal of Labour Law* 4 at 8.

324 Irving, *The Contract of Employment*, 2nd ed (2019) at 69 [2.16].

325 *Ellis* (1989) 17 NSWLR 553 at 597. See also Neil and Chin, *The Modern Contract of Employment*, 2nd ed (2017) at 7 [1.30]; Irving, *The Contract of Employment*, 2nd ed (2019) at 71 [2.18].

326 Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (June 2020) at 105 [732]. See also *Ellis* (1989) 17 NSWLR 553 at 597; *On Call Interpreters* (2011) 214 FCR 82 at 121-122 [204]-[205]; Neil and Chin, *The Modern Contract of Employment*, 2nd ed (2017) at 16 [1.60]; Irving, *The Contract of Employment*, 2nd ed (2019) at 67 [2.14].

the contract[327] and, relatedly, that it is not legitimate to have regard to subsequent conduct to construe a contract[328]. There are good reasons for adhering to those principles. Otherwise, contrary to those principles, consideration of subsequent conduct might in some cases result in the nature of an employment relationship changing over time[329] – on the day after a contract is formed, the parties may be in an employer/employee relationship, but six months or a year later, having regard to the parties' subsequent conduct, their relationship may have changed to one of principal/independent contractor, without any suggestion that there was any variation to the terms of their contractual agreement. Matters such as the degree of control or direction *in fact* exercised by an alleged employer in relation to the way an alleged employee performs their work, the extent to which an alleged employee provides their own equipment and tools, and whether uniforms are worn[330] may change over the course of an employment relationship. The potential for the legal character of a relationship between two parties to be affected by "unilateral" conduct of one party that may be unknown to the other party (for example, how one party administers their tax affairs; the extent to which an alleged employee operates in a "business-like" manner, with systems and manuals[331]; how significant an alleged employee's investment in capital equipment is[332]; or the extent to which an alleged employee is financially self-reliant[333]) is equally problematic.

188 The multifactorial approach was applied not merely without any central principle to guide it but also by reference to a roaming inquiry beyond the contract. It allowed consideration of what had happened after the entry into the contract to

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327 *Codelfa* (1982) 149 CLR 337 at 352; *Mount Bruce Mining* (2015) 256 CLR 104 at 117 [50]. See also *Prenn* [1971] 1 WLR 1381 at 1385; [1971] 3 All ER 237 at 241; *Reardon Smith* [1976] 1 WLR 989 at 996; [1976] 3 All ER 570 at 574-575, citing *Lewis* (1877) 3 QBD 195 at 208; *DTR Nominees* (1978) 138 CLR 423 at 429; *Secured Income Real Estate* (1979) 144 CLR 596 at 606.

328 *Gardiner* (2008) 238 CLR 570 at 582 [35], quoting *James Miller & Partners* [1970] AC 583 at 603, repeated in *Daera Guba* (1973) 130 CLR 353 at 446.

329 *James Miller & Partners* [1970] AC 583 at 603.

330 *On Call Interpreters* (2011) 214 FCR 82 at 126 [218]; *ACE Insurance* (2011) 200 FCR 532 at 543 [29]; *Eastern Van Services Pty Ltd v Victorian WorkCover Authority* (2020) 296 IR 391 at 400 [36].

331 *ACE Insurance* (2011) 200 FCR 532 at 543 [29].

332 cf *Hollis* (2001) 207 CLR 21 at 41 [47].

333 *On Call Interpreters* (2011) 214 FCR 82 at 126 [218].

characterise the nature of "the status or relationship of parties"[334]. That is not appropriate. Such an inquiry slips away from – slips over – the critical consideration that the relationship between the parties is the relationship established by contract[335]. Conduct may be looked at to establish the formation[336], variation[337] or discharge by agreement and the remaking of a contract[338]. But evidence that is relevant to inquiries of those kinds is limited by the purpose of the inquiry. The evidence of what was done is relevant only if and to the extent that it shows or tends to show that a contract was made between the parties or a contract previously made between the parties was varied or discharged.

189 Following *WorkPac*[339], the multifactorial approach applied in previous authorities must be put to one side when characterising a relationship as one of employment under a contract. The approach in *WorkPac* seeks to avoid the difficulties just identified with the multifactorial approach and, in particular, seeks to avoid "employee" and "employer" becoming legal terms of meaningless reference. It focuses the task of characterisation by reference to established doctrine, rather than inviting an assessment of the relationship between two parties which is "amorphous" and "inevitably productive of inconsistency"[340]. The need for judgment is unavoidable, but this approach promotes certainty by providing

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334 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 636 [8] ("*Personnel (No 2)*"). See *On Call Interpreters* (2011) 214 FCR 82 at 121-122 [204]; *ACE Insurance* (2011) 200 FCR 532 at 543 [29]; *Quest* (2015) 228 FCR 346 at 389-390 [176]-[181].

335 *WorkPac* (2021) 95 ALJR 681 at 693 [57]-[58]; 392 ALR 39 at 52; see also 95 ALJR 681 at 699 [97]; 392 ALR 39 at 60, citing *Foster* (1952) 85 CLR 138 at 151.

336 *Brambles Holdings* (2001) 53 NSWLR 153 at 163-164 [25], citing, among other cases, *Howard Smith* (1907) 5 CLR 68 at 77 and *Barrier Wharfs* (1908) 5 CLR 647 at 668, 669, 672; *Franklins* (2009) 76 NSWLR 603 at 616 [13].

337 *Phillips* (1941) 65 CLR 221 at 243-244; *Tallerman* (1957) 98 CLR 93 at 112-113; *Chaplin* (1978) 52 ALJR 407 at 411; 18 ALR 385 at 392-393.

338 *Tallerman* (1957) 98 CLR 93 at 112-113; *ALH* (2012) 245 CLR 338 at 350-351 [31]-[32]. See, generally, *Olsson v Dyson* (1969) 120 CLR 365 at 388-389, quoting *Scarf v Jardine* (1882) 7 App Cas 345 at 351. See also *Chitty on Contracts*, 33rd ed (2018), vol 1 at 1087 [13-124], citing *Goss* (1833) 5 B & Ad 58 at 64 [110 ER 713 at 716] and *Morris* [1918] AC 1.

339 (2021) 95 ALJR 681; 392 ALR 39.

340 *Personnel (No 2)* (2020) 279 FCR 631 at 655 [76].

identified and well-established limits: admissible evidence to identify the formation and the terms of the contract and the established principles of contractual interpretation.

190 It is necessary to address other aspects of *Hollis* and *Stevens*. Unlike the present case, the contract in issue in *Hollis* was partly oral and partly in writing[341] and the relevant contractual arrangements in *Stevens* were not "formalized"[342]. As explained, when an oral contract or a partly oral, partly written contract is in issue, recourse to conduct may be necessary to identify the point at which the contract was formed and the contractual terms that were agreed. In relation to the latter, "[s]ome terms may be inferred from the evidence of a course of dealing between the parties", "[s]ome terms may be implied by established custom or usage", and "[o]ther terms may satisfy the criterion of being so obvious that they go without saying"[343]. But in each of these cases, the question is whether the particular term "is necessary for the reasonable or effective operation of the contract in the circumstances of the case"[344]. In this way, even where the contract has not been reduced to a complete written form, the admissible evidence is limited to identifying those matters – formation and terms – objectively and for those limited purposes[345]. Further, it must be recalled that *Hollis* and *Stevens* concerned vicarious liability.

191 Whatever might be the principles upon which vicarious liability operates[346], there is an important distinction between whether there is an employer/employee relationship and whether what was done was done in "the course of [that]

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341 (2001) 207 CLR 21 at 33 [24].

342 (1986) 160 CLR 16 at 39. See also *Marshall* (1963) 109 CLR 210 at 212, 218; *Barrett* (1973) 129 CLR 395 at 400; *Barrett* 72 ATC 457 at 460-461.

343 *Byrne* (1995) 185 CLR 410 at 442. See *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283; *Hawkins v Clayton* (1988) 164 CLR 539 at 573; *Chattis Nominees Pty Ltd v Norman Ross Homeworks Pty Ltd (In liq)* (1992) 28 NSWLR 338 at 343.

344 *Byrne* (1995) 185 CLR 410 at 442. See *BP Refinery* (1977) 180 CLR 266 at 283; *Hawkins* (1988) 164 CLR 539 at 573.

345 *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 at 104, quoting *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 at 134; [1964] 1 All ER 430 at 437; *Chattis Nominees* (1992) 28 NSWLR 338 at 343.

346 See *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136 at 147-149 [48]-[58] and the authorities cited there.

employment"[347]. The relevant inquiry is not only about whether an alleged tortfeasor was an employee. There is a separate question about whether the relevant act or omission of the alleged employee took place in the course of that employment[348]. That second question necessarily directs attention to the state of affairs at the time the cause of action accrues. The second question is asked for a different purpose and at a different point in time. The state of affairs relevant to that inquiry necessarily includes facts and matters, including subsequent conduct, that are not relevant to answering the first question. To the extent that a fact or matter may be considered relevant to both questions, not only is that fact or matter considered for a different purpose in answering each question but the weight to be attached to that consideration is likely to be different.

Mr McCourt and Construct

192 Mr McCourt worked at the Concerto Project over two separate periods – 27 July 2016 to 6 November 2016 and 14 March 2017 to 24 June 2017 – and he briefly worked at the Aire Project from 26 June 2017 to 30 June 2017. Each of those periods was a period in which Mr McCourt and Construct were in an employment relationship. The legal rights and obligations which constituted the employment relationship for each period derived from the same written contract of employment.

193 The contract between Construct and Mr McCourt was wholly in writing and the relevant provisions were set out in the ASA. Under the heading "Construct's Responsibilities", cl 1(c) provided that Construct was obliged to "[l]iaise between builders and the Contractor [ie, Mr McCourt] regarding the means by which the Contractor shall supply labour to such builders, including the *duration* that the builder requires such labour, the *place* at which labour is to be supplied, the *daily hours of work* during which labour is to be supplied and *any other terms and conditions* upon which labour is to be supplied by the Contractor to the builder" (emphasis added). This clause is significant. It gave Construct the central role in relation to, and control over, key aspects of the work to be performed by

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347 *Sweeney* (2006) 226 CLR 161 at 167 [12]; see also 171 [23]. See Atiyah, *Vicarious Liability in the Law of Torts* (1967) at 31.

348 See *Stevens* (1986) 160 CLR 16 at 43; *New South Wales v Lepore* (2003) 212 CLR 511 at 535 [40], 588 [221], 594 [242]; see also 582 [202]; *Sweeney* (2006) 226 CLR 161 at 167 [12]; *Prince Alfred College Inc v ADC* (2016) 258 CLR 134 at 159-160 [80]-[81]. See also *Colonial Mutual* (1931) 46 CLR 41 at 48-49; *Wright v Attorney-General for the State of Tasmania* (1954) 94 CLR 409 at 414.

Mr McCourt – when, where and how. There was no contract between Mr McCourt and the builder, Hanssen.

194 Clause 1(d) then relevantly provided that Construct was obliged, "*[s]ubject to performance by the Contractor of his or its obligations* under [the ASA] ... [to] underwrite payment to the Contractor" (emphasis added). Despite the ASA using the word "underwrite", only Construct was responsible for paying Mr McCourt[349]. No party suggested that Hanssen (or any entity other than Construct) was bound to pay Mr McCourt. Clause 1(d) tied Mr McCourt's performance of his *obligations* under the ASA to his entitlement to payment from Construct. It is necessary to address those two tied aspects – obligations and entitlement to payment – in turn.

195 First, Mr McCourt's obligations. Mr McCourt's obligations – set out in cl 4 of the ASA – were owed to Construct to enable Construct to carry on its business as described in Recital A – supplying labour to builders. Mr McCourt owed no relevant obligations to Hanssen. Under cl 4(a), he was obliged to "[c]o-operate in all respects *with Construct* and the builder in the supply of labour to the Builder" (emphasis added). Next, under cl 4(c), Mr McCourt was obliged to "[a]ttend at any building site as agreed with the Builder at the time required by the Builder, and ... supply labour to the Builder (subject to notification under [cl] 5(c)) for the duration required by the Builder in a safe, competent and diligent manner".

196 While cll 4(a) and 4(c) were expressed in terms of Mr McCourt's obligation to co-operate with and to perform work as agreed with and as required by the "Builder", these obligations were owed to Construct in a contract with Construct. That is, in the event that Mr McCourt did not co-operate with the builder, Hanssen, or perform work as agreed with and as required by Hanssen, Construct would be entitled, in appropriate circumstances, to terminate the contract or to bring a claim against Mr McCourt for breach of contract under the terms of the ASA. Clause 4(d) was related to cl 4(c). It provided that the "Contractor" was obliged to "[i]ndemnify Construct against any breach by the Contractor of [cl] 4(c)". This clause was directed to ensuring that Construct did not suffer loss caused by the non-performance of work by the Contractor. And, finally, under cl 5(c), if Mr McCourt was no longer available to supply labour under the terms of the ASA, he was entitled to notify the builder *and Construct* on four hours' notice. The fact that Mr McCourt could give such notice may be indicative of a relationship of casual employment (so too might the fact that, under cl 3(c) of the

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349 See ASA, cl 5(a).

ASA, Mr McCourt warranted that he did not require Construct to guarantee work of any duration)[350].

197 The second aspect to be addressed is payment. As explained above, Construct, not the builder, was obliged to pay Mr McCourt for work undertaken by him under the ASA[351]. Pursuant to cl 2(a), under the heading "Construct's Rights", Construct was entitled to "[n]egotiate with any builder a payment rate for the supply by the Contractor of labour to the builder", provided that the "Contractor" was also at liberty to negotiate the payment rate and other terms and conditions with the builder. Other clauses are relevant. Clause 2(c) provided that Construct had a right to "[n]egotiate with the builder for remuneration in respect of any increase in the payment rate negotiated directly by the Contractor with the builder". Although cll 2(a) and 3(d) contemplated that Mr McCourt was able to independently negotiate an increase to his salary with Hanssen, cl 5(a) provided that the "Contractor" was entitled to receive payment from Construct, not Hanssen. Moreover, cl 2(d) provided that Construct could "[w]ithhold from the Contractor payment of any monies reasonably required by Construct to compensate it for any claim made against Construct by the builder in respect of the supply of labour by the Contractor to the builder".

198 As is apparent, Construct was owed obligations by Mr McCourt which enabled it to carry on its labour hire business, and the discharge of those obligations by Mr McCourt was a necessary condition of Mr McCourt receiving payment for his work. The contractual terms also reveal that the contract was for Mr McCourt's personal performance of work and his mode of remuneration was consistent with that of an employment relationship[352].

199 There are some aspects of the ASA which suggest that Mr McCourt was not Construct's employee. In the Recitals and various terms of the ASA, Mr McCourt was expressly identified as an independent contractor, or as not an employee of Construct: Recital A referred to Construct liaising between builders and "self-employed contractors for the provision of labour by self-employed contractors to builders and supplying to the self-employed contractors financial administrative services"; under cl 3(b) the "Contractor" warranted that "[h]e [was] self-employed"; under cl 3(e) the "Contractor" warranted that "Construct [was not] liable to pay the Contractor any amounts in respect of annual leave, sick leave, long service leave or any other statutory entitlement required in an employer-employee relationship"; and under cl 4(h) the "Contractor" was obliged

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350 See *WorkPac* (2021) 95 ALJR 681 at 698 [88]-[90]; 392 ALR 39 at 58-59.

351 ASA, cll 1(d) and 5(a).

352 See *Stevens* (1986) 160 CLR 16 at 24, 36-37.

to "[n]ot represent himself as being an employee of Construct at any time or otherwise represent himself as authorised to act on behalf of Construct other than strictly under the terms of [the ASA]". As has been observed, those matters are relevant but not determinative[353].

200 The totality of the relationship between Construct and Mr McCourt provided for by the ASA was that of employer and employee. The totality of that relationship can be contrasted with the description of an independent contractor given by Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd*[354], namely: "[t]he work ... is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place". Under the ASA, Mr McCourt agreed to work in the business or enterprise of Construct. Construct's business was labour hire and Mr McCourt agreed with Construct that in return for Construct paying him for the work he would do, he would provide his labour to Hanssen (the entity to which Construct had agreed it would provide labour). Put in different terms, under the ASA Mr McCourt contracted with Construct and promised Construct that he would work at its direction for the benefit of Construct's business of supplying labour to Construct's customers and, in return, he was paid by Construct.

201 Nothing in the context objectively known to the parties at the time of making the ASA detracts from that characterisation of that relationship as one of employer and employee. Rather, the context of an individual on a working holiday visa being contracted to perform labouring work as directed by Construct and required to provide nothing but basic personal protective equipment reinforces that characterisation. Given that both parties accepted that the contract between Construct and Mr McCourt was wholly in writing (relevantly, in the ASA), it is neither necessary nor appropriate to look at how the ASA was performed. In this appeal, subsequent conduct is irrelevant.

Conclusion and orders

202 For these reasons, I agree with the orders proposed by Kiefel CJ, Keane and Edelman JJ. The appeal should be allowed and the matter should be remitted to the primary judge to determine the application made by the CFMMEU and Mr McCourt for compensation for contraventions of the Award according to law.

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353 See [184] above.

354 (1931) 46 CLR 41 at 48, quoted in *Hollis* (2001) 207 CLR 21 at 39 [39].

203 STEWARD J. I respectfully agree with Gordon J's expression of the test to determine whether a person is an employee. Subject to three observations, I would nonetheless dismiss the appeal, confined to the reasons expressed below.

The three observations

204 First, care should be taken before concluding that even very unskilled or simple activities are not capable of constituting a business. A business can arise from limited activities which are passive in nature[355] and can exist in the absence of any entrepreneurial skill[356]. It can also exist where a profit motive is entirely lacking[357]. Secondly, it is arguable that cl 4(a) of the Administrative Services Agreement ("the ASA") did not confer on the respondent significant control over the second appellant ("Mr McCourt"). In a contractual context in which the respondent specifically sought to avoid a legal conclusion whereby Mr McCourt became its employee – an objective acknowledged by Mr McCourt[358] – the use of the word "co-operate" in cl 4(a) may be significant. It suggests that the parties intended to reserve to Mr McCourt a degree of independence and wished to avoid a relationship of subservience. Thirdly, it is also arguable that the ASA did not give the respondent a right to terminate its arrangement with Mr McCourt following any breach by him of cl 4(a) (or (c)) of the ASA. The ASA conferred no express right of termination[359]. It would otherwise depend on the facts whether Mr McCourt's hypothetical conduct in breaching the ASA would permit the respondent to terminate that agreement.

Reasons for dismissing the appeal

205 In 1989, Woodward J handed down his decision in *Odco Pty Ltd v Building Workers' Industrial Union of Australia*[360]. His Honour decided that workers

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355 *Ferguson v Federal Commissioner of Taxation* (1979) 37 FLR 310; *Puzey v Commissioner of Taxation* (2003) 131 FCR 244.

356 *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289.

357 *Federal Commissioner of Taxation v Stone* (2005) 222 CLR 289 at 305 [55] per Gleeson CJ, Gummow, Hayne and Heydon JJ. See also *G v Commissioner of Inland Revenue* [1961] NZLR 994.

358 See Recital A and cl 3(b) of the ASA.

359 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 667 [122] per Lee J.

360 Unreported, Federal Court of Australia, 24 August 1989.

supplied by a business, trading as "Troubleshooters Available", to participants in the building industry were not employees of that business, but were instead independent contractors. The arrangement considered by Woodward J is materially the same as the one used here by the respondent, whereby the labour of Mr McCourt was supplied to a building company in Perth. The essence of these arrangements is the supply of labour rather than some product or result.

206 Woodward J's decision was upheld on appeal by a unanimous decision of the Full Court of the Federal Court of Australia in *Building Workers' Industrial Union of Australia v Odco Pty Ltd*[361]. A subsequent application for special leave to this Court was unsuccessful on the ground that the proposition, amongst others, that there was no contract of employment between the worker and Troubleshooters Available was not attended with sufficient doubt[362].

207 In the years which followed, many businesses sought to implement the same arrangement upheld in *Odco* – they became known as "Odco" arrangements. When businesses conformed materially to that arrangement, the workers they supplied were found to be independent contractors; it did not matter what type of labour was to be supplied. An example is found in the Industrial Appeal Court of Western Australia's decision in *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers*[363]. As Allsop CJ observed below, that case concerned an "earlier version" of the contract entered into here between Mr McCourt and the respondent[364]. Another example is the decision of the Full Court of the Supreme Court of Tasmania in *Young v Tasmanian Contracting Services Pty Ltd*[365].

208 On occasion, arrangements which differed in some respects from "Odco" arrangements led to a conclusion being drawn that the worker was an employee of the labour hire company. An example of this is found in the decision of the Court of Appeal of the Supreme Court of Victoria in *Drake Personnel Ltd v*

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361 (1991) 29 FCR 104.

362 Transcript of Proceedings, *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (High Court of Australia, No M13 of 1991, Mason CJ, Dawson and McHugh JJ, 7 June 1991).

363 (2004) 141 IR 31.

364 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 642 [31] (Jagot J agreeing), see also at 666-667 [121] per Lee J.

365 [2012] TASFC 1.

Commissioner of State Revenue[366]. In that case, Phillips JA observed that the labour hire company had taken on more obligations of responsibility for the worker[367] and, as a result, the worker was found to be a casual employee. On another occasion, the labour hire company that was party to the original decision of Woodward J was found to be an employer of labourers working under a contract of service by reason of specific statutory deeming provisions. This occurred in relation to certain workers in this Court's decision in *Accident Compensation Commission v Odco Pty Ltd*[368], which concerned the *Accident Compensation Act 1985* (Vic). The arrangement considered by the Court was described as follows[369]:

> "When a builder needs a tradesman [she or he] contacts [Troubleshooters Available ('TSA')] and places an order. An employee of TSA then completes an order sheet recording the builder's name, the person to whom the tradesman should report at the building site, the type of tradesman required and the duration of the work. The employee of TSA then contacts an appropriate tradesman and advises the tradesman of the builder's requirements. If the proposal is acceptable to the tradesman, [she or he] attends at the building site and performs the necessary work at the direction of the builder. Subsequently, the tradesman telephones TSA to advise details of hours worked during the previous seven days. TSA raises an invoice to the builder charging the hours worked by the tradesman at a previously agreed hourly rate (which includes remuneration to TSA for its services to the builder). The tradesman is paid by TSA at the hourly rate or set price agreed between TSA and the tradesman. The tradesman makes no payment to TSA for having placed [her or him]. TSA's reward comes from the difference between the amount it charges the builder and the amount it pays the tradesman."

209 It was not then suggested that the tradesmen under the foregoing arrangement were casual employees at common law.

210 In 2005, the House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation published the result of its inquiry into "independent contracting and labour hire arrangements".

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366 (2000) 2 VR 635.

367 *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635 at 655 [52] (Buchanan JA agreeing), see also at 639 [5] per Ormiston JA.

368 (1990) 64 ALJR 606; 95 ALR 641.

369 *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606 at 607-608 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ; 95 ALR 641 at 644.

The Standing Committee noted that the growth in "independent contracting and labour hire employment" had "clearly" indicated that it had "become a preferred employment choice for many Australians"[370]. It also observed that "over 10 per cent of the workforce" at that time identified themselves as being "independent contractors across a wide variety of industries"[371]. The Committee specifically referred to the use of "Odco" arrangements. The report thus stated[372]:

> "3.14 Labour hire of contractor services involves the labour hire agency hiring contractors (that is workers with their own Australian Business Numbers (ABNs), as determined by taxation legislation) to host businesses to meet the client's production or service requirements.
>
> 3.15 The contractor services model is based on 'Odco' arrangements, which are independent contracting arrangements in the labour hire industry. 'Odco' arrangements create an independent contracting arrangement where the workers are neither employees of the labour hire agency nor the host business. These kinds of arrangements were upheld in a full Federal Court decision, *Building Workers[']Industrial Union of Australia v Odco Pty Ltd*. On other occasions, courts have found that contractual arrangements did not conf[o]rm to 'Odco' arrangements, and have held on the facts that the workers in question were 'employees', notwithstanding having been described in contractual documents as 'contractors'.
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> 3.16 'Odco' arrangements operate in a range of industries. Independent contractors working under this system include farm hands, doctors, secretaries, personal assistants, family

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370 Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into independent contracting and labour hire arrangements*, 17 August 2005 at ix.

371 Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into independent contracting and labour hire arrangements*, 17 August 2005 at ix.

372 Australia, House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into independent contracting and labour hire arrangements*, 17 August 2005 at 34.

> day-care workers, fishermen, salespeople, cleaners, security guards and building workers." (footnotes omitted)

211 Following the publication of that report, the Federal Parliament passed the *Independent Contractors Act 2006* (Cth). The relevant Explanatory Memorandum referred to the foregoing report, as well as to a discussion paper prepared by the Department of Employment and Workplace Relations entitled "Proposals for Legislative Reform in Independent Contracting and Labour Hire Arrangements"[373]. That discussion paper also referred to industry use of "Odco" arrangements, which were described as follows[374]:

> "The contractor services model is based on 'Odco' arrangements which are independent contracting arrangements in the labour hire industry. These kinds of arrangements were upheld in a Full Federal Court decision, *Building Workers['] Industrial Union of Australia v Odco Pty Ltd*. Odco arrangements create independent contracting arrangement[s] where the workers are neither employees of the labour hire company nor of that company's clients." (footnote omitted)

212 Section 3 of the *Independent Contractors Act* states that the objects of the Act include protecting "the freedom of independent contractors to enter into services contracts"; the recognition of "independent contracting as a legitimate form of work arrangement that is primarily commercial"; and the prevention of "interference with the terms of genuine independent contracting arrangements". The term "independent contractor" is not defined in this Act, but the Explanatory Memorandum describes such a contractor as someone who might work for a labour hire firm and states as follows[375]:

> "An 'independent contractor' is a person who contracts to perform services for others without having the legal status of an employee. The term is generally used to refer to a person who is engaged by a principal, rather than an employer, on a labour only contract. Under such a contract, the principal pays the independent contractor a one-off flat rate. There are generally no legislatively prescribed minimum entitlements or other

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373 Australia, House of Representatives, *Independent Contractors Bill 2006*, Explanatory Memorandum at 26.

374 Australia, Department of Employment and Workplace Relations, *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire Arrangements* (2005) at 25.

375 Australia, House of Representatives, *Independent Contractors Bill 2006*, Explanatory Memorandum at 3.

> employee-style benefits and the independent contractor is responsible for a number of aspects of the relationship that would usually be the responsibility of an employer (for instance, remitting income tax to the Australian Tax Office and contributing to a superannuation fund). Independent contractors' work arrangements take a variety of forms, for example, they may have a direct relationship with another enterprise or work through an intermediary (such as a labour hire firm), and they may or may not employ staff."

213 The *Independent Contractors Act* permits, amongst other things, an application to be made to a federal court to review a "services contract" (as defined)[376] on the grounds that it is unfair or harsh[377]. An "unfairness ground" is defined to include being paid "less than the rate of remuneration for an employee performing similar work"[378].

214 Mr Peter Wieske is a director of the respondent. He gave evidence before the Federal Court that he had discovered "ODCO" and had "learned much from their website and precedent court cases". His unchallenged evidence was that the arrangement used in this case was "modelled on the ODCO system".

215 In the Full Court's decision below, Lee J observed that "[w]hatever else may be unclear, what is pellucid is that [the respondent] sought to replicate an 'Odco' style arrangement"[379]. Lee J also observed that the "'Odco' style arrangement [had] been replicated on a multitude of occasions, with courts then tasked with adjudicating upon whether such arrangement [had] been successfully implemented"[380]. Lee J concluded that the respondent had, if anything, sought to

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376 *Independent Contractors Act 2006* (Cth), s 5.

377 *Independent Contractors Act 2006* (Cth), s 12.

378 *Independent Contractors Act 2006* (Cth), s 9(1)(f).

379 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 666 [118] (Allsop CJ and Jagot J agreeing).

380 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 666 [120] (Allsop CJ and Jagot J agreeing).

buttress further its contention that it was not the employer of its workers after its success in the Industrial Appeal Court of Western Australia. Lee J said[381]:

> "To simplify an exercise in semantics, which is neither productive nor helpful, what has in effect happened, is that [the respondent], following its success in 2004, has sought to make assurance doubly sure by backfilling any gaps in the written agreement which could be construed as contra-indicating an independent contractor relationship. These include factors such as: the removal of an express right to terminate the arrangement on the part of [the respondent]; the removal of a non-compete clause; the introduction of an express right to negotiate rate increases; the removal of the express incorporation of occupational health and safety, discrimination and equal opportunity guides in the agreement; the removal of the term that stated the engagement commences on the day of this agreement and expires when either terminated by the company or contractor (implying instead that a contract arises only in relation to a particular offer of work and only for a duration that is required by the builder). Indeed, as senior counsel for the [appellants] engagingly conceded, 'the situation has got worse for us'." (citations omitted)

216 Before this Court, senior counsel for the appellants described some of the language contained in the ASA as "weasel" words, although he did not allege that any part of the ASA was a "sham". Given that concession, the brandishing of such adjectives adds little to the necessary legal analysis. The law, generally speaking, has always recognised the right of free women and men to choose the form of their arrangements[382]; the choice of that form may well have particular legal consequences. As Windeyer J said in *Federal Commissioner of Taxation v Casuarina Pty Ltd*[383]:

> "A proprietary company may well seem to be, in reality, merely the trade-name in which a [woman or man] carries on some part of [her or his] affairs. But by a following of correct legal forms the name becomes in law a thing. Formalism produces a legal substance, and its 'owner' can by careful bookkeeping get all the advantages, be they limited liability, relief from

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381 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 667 [122] (Allsop CJ and Jagot J agreeing).

382 See, eg, *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 at 465 per Jessel MR.

383 (1971) 127 CLR 62 at 77.

> taxation or other benefit, which the law annexes to [her or his] sedulous use of the corporate name."

217 Ultimately, Lee J was of the view that "if approached *tabula rasa*", he would have thought it "somewhat less than intuitively sound" to consider Mr McCourt to have been an independent contractor[384]. However, Lee J considered himself bound by the "Odco" authorities[385], in particular by the decision of the Industrial Appeal Court of Western Australia[386]. In deciding that these decisions were not plainly wrong, Lee J was influenced by the fact that a number of entities, in the past, must have relied upon the "Odco" authorities in developing their "mode of doing business", and that to overturn those authorities now would throw the respondent's "whole enterprise", and that of those other entities, into "uncertainty"[387]. In addition, it would expose the respondent and those entities to "numerous civil penalties of some seriousness" for contravening the *Fair Work Act 2009* (Cth)[388]. Allsop CJ expressed a very similar opinion[389]. With respect, their Honours were both correct.

218 Longstanding authorities that have had important legislative and/or very significant commercial impact should not be overruled unless it is clear that they

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384 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 682 [185] (Allsop CJ and Jagot J agreeing).

385 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 682 [185] (Allsop CJ and Jagot J agreeing).

386 *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers* (2004) 141 IR 31.

387 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 669 [129] (Allsop CJ and Jagot J agreeing).

388 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 669 [130] (Allsop CJ and Jagot J agreeing).

389 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 644 [39] (Jagot J agreeing).

are plainly wrong[390]. That is especially the case where parties have ordered their affairs in reliance, over a long period of time, on the effect of the authority in question. In that respect, one of the reasons given by Lord Buckmaster in *Bourne v Keane* for this judicial restraint is especially apt and should be repeated[391]:

> "[D]ecisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue."

219 In *Babaniaris v Lutony Fashions Pty Ltd*, Brennan and Deane JJ declined to overturn a longstanding decision of the Victorian Workers' Compensation Board[392], because to have done so would have created "serious embarrassment" for workers who, because of that decision, considered themselves to be independent contractors[393].

220 In *Dow Jones & Co Inc v Gutnick*, Kirby J helpfully summarised the applicable principles as follows[394]:

> "Sometimes, asked to reformulate an established principle of the common law, this Court will decline the invitation, considering that any alteration of the law should be left to the legislature. Factors relevant to such decisions have included the effect on competing interests that should be consulted before any alteration of the law; the existence of significant economic implications of any change; the enactment of legislation evidencing parliamentary attention to the subject; the perceived undesirability of imposing retrospective liability, especially criminal liability, on persons; and the desirability, in particular cases, of not making any change until after intensive analysis of social data and public consultation, facilities typically unavailable to a court. The fundamental restraint upon substantial judicial innovation in the expression of the law is imposed by the character of a court's functions as such and an acceptance that, under the Constitution, major legal changes in the Australian

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390 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 28-29 per Brennan and Deane JJ.

391 [1919] AC 815 at 874.

392 *Little v Levin Cuttings Pty Ltd* (1953) 3 WCBD (Vic) 71.

393 (1987) 163 CLR 1 at 30.

394 (2002) 210 CLR 575 at 614-615 [76].

> Commonwealth are the responsibility of the other branches of government, not of the courts." (footnotes omitted)

221 More recently, a majority of this Court declined to overrule a decision of the Victorian Court of Appeal[395] concerning the concept of recklessness in criminal law, even though doubts arose concerning its correctness[396]. Edelman J observed that the principle of judicial reluctance to overthrow a longstanding decision applied "a fortiori" to criminal law cases[397]. Gageler, Gordon and Steward JJ also referred to the same type of "unfairness", noting that[398]:

> "unfairness would follow if the meaning of recklessness was changed retrospectively by this Court with the result that potentially criminal conduct which occurred before this Court's decision – if that conduct has not yet been charged, or if it has been charged but not tried – would attract the lower standard of recklessness contended for by the DPP and where the DPP conceded that the decision of this Court on s 17 of the *Crimes Act* would have a 'flow-on effect' for other offence provisions in Victoria." (footnote omitted)

222 Whilst this is not a criminal law case, overturning the Full Court's decision in *Odco*[399] would expose the respondent to significant penalties on a retrospective basis. That is unfair. It will also, as Lee J observed, greatly damage the respondent's business and the businesses of many others[400]. That is undesirable. It will also potentially deny to workers a choice they may wish to make to supply their labour as independent contractors, thus possibly undermining one of the objects of the *Independent Contractors Act*. Given the severity of these potential

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395 *R v Campbell* [1997] 2 VR 585.

396 *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741; 392 ALR 413.

397 *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741 at 765 [96]; 392 ALR 413 at 440.

398 *Director of Public Prosecutions Reference No 1 of 2019* (2021) 95 ALJR 741 at 756 [59]; 392 ALR 413 at 429.

399 *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104.

400 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2020) 279 FCR 631 at 669 [129] (Allsop CJ and Jagot J agreeing).

consequences, which will apply retrospectively[401], the fate of the Full Court's decision in *Odco*[402] should be a matter left for the legislative branch of government to consider[403]. The decision, and those that have followed it, are not plainly wrong. The cogency of the reasons of the learned primary judge in this case is a sufficient basis for that conclusion.

223 I would dismiss the appeal.

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401 *Giannarelli v Wraith* (1988) 165 CLR 543 at 584-586 per Brennan J; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 358-359 per Lord Browne-Wilkinson.

402 *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104.

403 cf *Nelson v Nelson* (1995) 184 CLR 538 at 602 per McHugh J.