FEDERAL COURT OF AUSTRALIA

Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd [2020] FCAFC 122

Appeal from:	*Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806
File number:	WAD 584 of 2019
Judges:	**ALLSOP CJ, JAGOT AND LEE JJ**
Date of judgment:	17 July 2020
Catchwords:	**INDUSTRIAL LAW** – employee-independent contractor dichotomy – too deeply rooted to be pulled out – labour hire agency – "Odco" style arrangement – multi-factorial approach to characterisation – an intuitive exercise – evaluative assessment – need make an informed, considered qualitative appreciation of the whole – not a checklist exercise – proper role of contract – tensions in the application of the multi-factorial approach to new and novel labour arrangements – application of the control indicium to trilateral relationships – weight to be given to whether the putative employee is carrying on a business on their own account – preference for substance over form – employment as a relationship particularly susceptible to contractual obfuscation – need to ascertain the *status* of the worker – standard form contract provided to the worker on a take-it-or-leave-it basis – potential to revisit the legitimacy of the "Odco" style arrangement **HIGH COURT AND FEDERAL COURT –** the need for coherence in Australia's single common law – comity to be given to the decision of another intermediate appellate Court – *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22; (2007) 230 CLR 89 – circumstances where a materially identical arrangement was found to be valid by the Western Australian Industrial Appeals Court in 2004 – Court should not depart from earlier decision in circumstances – to distinguish current arrangement would also be artificial **CONTRACT –** impact of a contract incorporating statutory health and safety obligations – unsound to deconstruct a contract and render non-contractual any term which substantially encapsulates a statutory obligation – need to look to the totality of the relationship, which includes

documents which are not contractual in nature

Legislation:

Building and Construction General On-Site Award 2010

Employment Rights Act 1996 (UK) s 230

Fair Work Act 2009 (Cth) ss 15, 545, 546, 547

Industrial Relations Act 1979 (WA) ss 85, 90, 96K

Occupational Safety and Health Act 1984 (WA) ss 19, 20, 23F

Cases cited:

ACE Insurance Ltd v Trifunovski [2011] FCA 1204; (2011) 200 FCR 532

ACE Insurance Ltd v Trifunovski [2013] FCAFC 3; (2013) 209 FCR 146

Aldi Foods Pty Ltd v Moroccanoil Israel Ltd [2018] FCAFC 93; (2018) 261 FCR 301

Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats [2020] FWCFB 1698

Articulate Restorations and Development Pty Limited v Crawford (1994) 57 IR 371

Attorney-General for New South Wales v Perpetual Trustee Company (Limited) [1952] HCA 2; (1952) 85 CLR 237

Australian Mutual Provident Society v Chaplin (1978) 18 ALR 385

Autoclenz Ltd v Belcher [2011] UKSC 41; [2011] 4 All ER 745

Bain v Central Vermont Railway Co [1921] 2 AC 412

Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd [2001] FCA 1833; (2001) 117 FCR 424

Building Workers' Industrial Union of Australia v Odco Pty Ltd [1991] FCA 96; (1991) 29 FCR 104

C v Commonwealth [2015] FCAFC 113; (2015) 234 FCR 81

Cameron v Nystrom [1893] AC 308

Capital Aircraft Services Pty Ltd v Brolin [2007] ACTCA 8

Century Insurance Co v Northern Ireland Road Transport Board [1942] AC 509

Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales [1982] HCA 24; (1982) 149 CLR 337

Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-operative Assurance Company of Australia Limited [1931] HCA 53; (1931) 46 CLR 41

Commissioner of Taxation of the Commonwealth of Australia v Barrett [1973] HCA 49; (1973) 129 CLR 395

Connelly v Wells (1994) 55 IR 73

Consistent Group Ltd v Kalwak [2007] IRLR 560

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

Construction, Forestry, Mining and Energy Union of Workers v Personnel Contracting Pty Ltd trading as Tricord Personnel [2004] WAIRComm 11445; [2004] 84 WAIG 1275

Country Metropolitan Agency Contracting Services Pty Ltd v Slater [2003] SAWCT 57; (2003) 124 IR 293

Crown Resorts Ltd v Zantran Pty Ltd [2020] FCAFC 1; (2020) 374 ALR 739

Damevski v Giudice [2003] FCAFC 252; (2003) 133 FCR 438

Day v Ocean Beach Hotel Shellharbour Pty Ltd [2013] NSWCA 250; (2013) 85 NSWLR 335

Deatons Proprietary Limited v Flew [1949] HCA 60; (1949) 79 CLR 370

Denham v Midland Employers Mutual Assurance Ltd [1955] 2 QB 437

Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118

Deputy Commissioner of Taxation v Bolwell (1967) 1 ATR 862

Drake Personnel Ltd v Commissioner of State Revenue [2000] VSCA 112; (2000) 2 VR 635

Ellis v Wallsend District Hospital (1989) 17 NSWLR 553

Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd [2013] FCA 7

Fair Work Ombudsman v Ecosway Pty Ltd [2016] FCA 296

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37; (2015) 228 FCR 346

Fair Work Ombudsman v Ramsey Food Processing Pty Ltd [2011] FCA 1176; (2011) 198 FCR 174

Fajloun v Khoury [2016] NSWCA 101

Farah Constructions Pty Limited v Say-Dee Pty Limited [2007] HCA 22; (2007) 230 CLR 89

Forstaff Pty Ltd v Chief Commissioner of State Revenue [2004] NSWSC 573; (2004) 144 IR 1

Gett v Tabet [2009] NSWCA 76; (2009) 254 ALR 504

Goldman Sachs JBWere Services Pty Ltd v Nikolich [2007] FCAFC 120

Gramotnev v Queensland University of Technology [2015] QCA 127; (2015) 251 IR 448

Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939

Hasler v Singtel Optus Pty Ltd [2014] NSWCA 226; (2014) 311 ALR 494

Hollis v Vabu Pty Ltd [2001] HCA 4; (2001) 207 CLR 21

Humberstone v Northern Timber Mills [1949] HCA 49; (1949) 79 CLR 389

J A & B M Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue [2001] NSWCA 125; (2001) 105 IR 66

Jamsek v ZG Operations Australia Pty Ltd [2020] FCAFC 1934

Jensen v Cultural Infusion (Int) Pty Ltd [2020] FCA 358

Johnson v Lindsay & Co [1891] AC 371

Johnson v MNG Investments t/as Australian Temporary Fencing [2011] ACTSC 124

Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239 CLR 531

Lancaster v Greaves (1829) 9 B & C 627

Lange v Australian Broadcasting Corporation [1997] HCA 25; (1997) 189 CLR 520

Lipohar v The Queen [1999] HCA 65; (1999) 200 CLR 485

Lopez v Commissioner of Taxation [2005] FCAFC 157; (2005) 143 FCR 574

Marshall v Whittaker's Building Supply Company [1963] HCA 26; (1963) 109 CLR 210

Massey v Crown Life Insurance Co [1978] 1 WLR 678

McDonald v Commonwealth (1945) 46 SR (NSW) 129

Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd [1947] AC 1

Narich Pty Ltd v Commissioner of Pay-Roll Tax [1983] 2 NSWLR 597

National Tertiary Education Industry Union v Swinburne University of Technology [2015] FCAFC 98; (2015) 232 FCR 246

NM Superannuation Pty Ltd v Young [1993] FCA 91; (1993) 41 FCR 182

Odco Pty Ltd v Building Workers' Industrial Union of Australia [1989] FCA 483

On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3) [2011] FCA 366; (2011) 214 FCR 82

Performing Rights Society Ltd v Mitchell and Brooker (Palais de Danse) Limited [1924] 1 KB 762

Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers [2004] WASCA 312; (2004) 141 IR 31

Prince Alfred College Incorporated v ADC [2016] HCA 37; (2016) 258 CLR 134

R v Allan; Ex parte Australian Mutual Provident Society

(1977) 16 SASR 237

R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Limited [1952] HCA 10; (1952) 85 CLR 138

Re Porter; Re Transport Workers Union of Australia [1989] FCA 226; (1989) 34 IR 179

RJE v Secretary to Department of Justice [2008] VSCA 265; (2008) 21 VR 526

Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177; (2014) 231 FCR 403

Rowe v Capital Territory Health Commission [1982] FCA 106; (1982) 2 IR 27

Roy Morgan Research Centre Pty Ltd v Commission of State Revenue (Vic) (1997) 37 ATR 528

Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation [2010] FCAFC 52; (2010) 184 FCR 448

Scott v Davis [2000] HCA 52; (2000) 204 CLR 333

Staff Aid Services v Bianchi (2000) 133 IR 29

State of New South Wales v Lepore [2003] HCA 4; (2003) 212 CLR 511

State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq) [1999] HCA 3; (1999) 73 ALJR 306

Stevens v Brodribb Sawmilling Company Proprietary Limited [1986] HCA 1; (1986) 160 CLR 16

Sweeney v Boylan Nominees Pty Limited [2006] HCA 19; (2006) 226 CLR 161

Swift Placements Pty Limited v WorkCover Authority of New South Wales [2000] NSWIRComm 9; (2000) 96 IR 69

Tasmanian Contracting Services v Young [2011] TASSC 29

Tattsbet Ltd v Morrow [2015] FCAFC 62; (2015) 233 FCR 46

Taylor v Johnson [1983] HCA 5; (1983) 151 CLR 422

Toll (FGCT) Pty Limited v Alphapharm Pty Limited [2004] HCA 52; (2004) 219 CLR 165

Trade Practices Commission v Abbco Iceworks Pty Limited [1994] FCA 1279; (1994) 52 FCR 96

Undershaft (No 1) Ltd v Federal Commissioner of Taxation [2009] FCA 41; (2009) 175 FCR 150

Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531

Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing [2008] NSWCA 186

WorkPac Pty Ltd v Rossato [2020] FCAFC 84

WorkPac Pty Ltd v Skene [2018] FCAFC 131; (2018) 264 FCR 536

Yewens v Noakes (1880) 6 QBD 530

Young v Tasmanian Contracting Services Pty Ltd [2012] TASFC 1

Zuijs v Wirth Bros Pty Ltd [1955] HCA 73; (1955) 93 CLR 561

Bomball P, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *University of Melbourne Law Review* 372

Freeland M, *The Personal Employment Contract* (Oxford University Press, 2003)

Glass H H and McHugh M H, *The Liability of Employers in Damages for Personal Injury* (Law Book Co, 1966)

Holmes O W, 'Agency' (1891) 4 *Harvard Law Review* 345

Maine H S, *Ancient Law* (1861)

Owens R, Riley J and Murray J, *The Law of Work* (2nd ed, Oxford University Press, 2011)

Stewart A and McCrystal S, 'Labour Regulation and the Great Divide: Does the Gig Economy Require a New Category of Worker?' (2019) 32 *Australian Journal of Labour Law* 4

Stewart A, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235

Stewart A, Forsyth A, Irving M, Johnstone R and McCrystal S, *Creigton & Stewart's Labour Law* (6th ed, The Federation Press, 2016)

Stone J, *The Province and Function of Law* (rev ed, Harvard University Press, 1950)

Lord Wedderburn, *The Worker and the Law* (3rd ed, Penguin Books Ltd, 1986)

Wigmore J H, 'Responsibility for Tortious Acts: Its History' (1894) 7 *Harvard Law Review* 315 (Pt 1), 383 (Pt 2)

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Division:	General Division
National Practice Area:	Employment and Industrial Relations
Category:	Catchwords
Number of paragraphs:	189
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ORDERS

WAD 584 of 2019

BETWEEN:	**CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION** First Appellant
	DANIEL MCCOURT Second Appellant
AND:	**PERSONNEL CONTRACTING PTY LTD** Respondent
JUDGES:	**ALLSOP CJ, JAGOT AND LEE JJ**
DATE OF ORDER:	**17 JULY 2020**

THE COURT ORDERS THAT:

1. The appeal be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1 I have read the reasons of Lee J to be published. I agree with them. I wish, however, to express, shortly, my own reasons.

2 The appeal concerns the employment status of Mr Daniel McCourt, the second appellant, who for some months in 2016 and 2017 worked as a general labourer on two construction sites in Perth under the supervision and control of workers of a builder, **Hanssen** Pty Ltd, the second respondent, the proceedings against which were discontinued before the hearing of the appeal. No one contended that Hanssen was the employer of Mr McCourt; it did not pay him; his services as a labourer were supplied to Hanssen by a labour hire company, **Personnel** Contracting Pty Ltd, the first respondent; Personnel paid Mr McCourt; Hanssen paid Personnel.

3 The question at issue before the primary judge, and on appeal was whether Mr McCourt was an employee of Personnel or an independent contractor retained by Personnel and supplied as such to Hanssen. If Mr McCourt was an employee his status was a casual employee.

4 The context of the enquiry was the claims brought by Mr McCourt and his union, the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), against Personnel and Hanssen under ss 545, 546 and 547 of the *Fair Work Act 2009* (Cth) for orders for compensation and penalties based on the allegation that Mr McCourt was not paid or treated according to the relevant award, the Building and Construction General On-Site Award 2010. He was entitled to be paid under the award only if he was an employee, but not if he was an independent contractor. There is no issue about the fact that Personnel paid Mr McCourt what he was due under the terms of the contract with it and that such payments were approximately 75% of that which Mr McCourt was entitled under the award for the work he did over the time he did it, if he was an employee.

5 The case and the appeal raise important questions as to the approach to tripartite labour hire arrangements in which companies such as Hanssen, requiring labour, both skilled and unskilled, outsource the provision of their labour force, or at least some of it, to labour hire companies, such as Personnel. In such arrangements it is usual, as occurred here, for there to be no contractual arrangement between the worker and the requirer of the labour (here, the builder, Hanssen); rather the contractual relationship involving the worker is between the worker and the labour hire agency or provider. Such contractual arrangement is complemented

by a contractual arrangement between the labour hire company and the requirer of the labour (here Personnel and Hanssen, respectively) regulating their mutual rights and obligations.

6 The legal framework for the question is the *Fair Work Act*, but it was common ground that the question was to be answered by reference to common law principles. That said, the statutory context is relevant to how the common law approaches the question at hand: *Tattsbet Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46 at 50 [5]. One aspect of the statutory context is that the enquiry has a binary character: either Mr McCourt was an employee of Personnel (in this case necessarily casual) or he was an independent contractor. Another aspect of the statutory context is the recognition in the *Fair Work Act* of casual employment.

7 Importantly also, the question of employment arises in the context of a statute of social, economic or industrial regulation with the consequences referred to by Bray CJ in *R v Allan; Ex parte Australian Mutual Provident Society* (1977) 16 SASR 237 at 247 referred to with approval by Northrop, Deane and Fisher JJ in *Rowe v Capital Territory Health Commission* [1982] FCA 106; 2 IR 27 at 28. This assists in reinforcing the caution with which one must approach self-categorising or self-characterising terms of a contract which seek to determine contractually the nature of the relationship.

8 As the authorities referred to by Lee J and in the discussion below reveal, the answer to the question of Mr McCourt's status by reference to his relationship with Personnel is provided by the process of characterisation of the facts involved in the whole relationship, including, but not limited to, the terms and proper objective construction of the underlying constituent contract. A contract (express or implied or a mixture of the two) is essential to found the employment relationship, but its terms are not definitive of the character of the relationship, nor are they exhaustive of the considerations relevant to its ascertainment. The question is one of characterisation of the status or relationship of parties as independent contractor or employee in the infinite variety of factual circumstances that the provision of labour for reward may take place in society. No doubt, statute can create a status that provides for consequences different to the application of common law principles: ample examples can be readily identified as the foundation for responsibilities connected with workers' compensation, superannuation, taxation, occupational health and safety and other matters.

9 We are concerned, however, with a binary question: was Mr McCourt an employee or an independent contractor, at common law. The distinction between the two is "too deeply rooted to be pulled out": *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; 226 CLR 161 at 173

[33]. The principles applicable are to be found in decisions of binding authority for this Court: in particular *Hollis v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21; and *Stevens v Brodribb Sawmilling Co Proprietary Limited* [1986] HCA 1; 160 CLR 16; and in decisions of intermediate courts of appeal of persuasive authority.

10 The valuable, if I may respectfully say, review of many aspects of the issue of the relationships between employer/principal and employee/contractor by Buchanan J in *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; 209 FCR 146 (with which judgment Lander and Robertson JJ agreed), together with the reasons of Lee J, relieve me of the necessity to undertake any detailed review of the cases. I agree with the reasons of Buchanan J and they assist significantly in ordering the analysis for this case.

11 As Buchanan J observed, the contract-centred focus of cases such as *Connelly v Wells* (1994) 55 IR 73, *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385, and *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 appears to have given way to an approach where all circumstances should be taken into account: *ACE Insurance* 209 FCR at 174 [107]. Such an approach of characterisation from all the circumstances was not new: *Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-operative Assurance Co of Australia Limited* [1931] HCA 53; 46 CLR 41 at 46 and 48; *Marshall v Whittaker's Building Supply Co* [1963] HCA 26; 109 CLR 210 at 214–215; and *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Limited* [1952] HCA 10; 85 CLR 138 at 150–151 and 153–154. The correct approach is revealed by the passage in *Hollis v Vabu* 207 CLR at 33 [24] (referred to by Buchanan J in *Ace Insurance* 209 FCR at 174 [107]):

> [T]he relationship between the parties … is to be found not merely from [the] contractual terms. The system that 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.

12 This passage echoed (and took the quoted words ("totality of the relationship") from) *Stevens v Brodribb Sawmilling* 160 CLR at 29 (Mason J).

13 It is important to recognise that the process is one of characterisation of the facts by reference to the whole arrangement to reach a conclusion as to the nature of the relationship. For its coherent undertaking, that process of characterisation must have principles or organising conceptions that inform the relevant binary distinction in order that the task is not one to determine a legal category of meaningless reference: cf Stone J, *The Province and Function of Law* (rev ed, Harvard University Press, 1950) at 171. The guiding principles or informing

conceptions are illuminated by description and articulation, and not definition or some form of logical deduction. The guiding principles or informing conceptions were explained timelessly by Dixon J in *Colonial Mutual Life* 46 CLR at 48 and by Windeyer J in *Marshall* 109 CLR at 217 which explanations were at the heart of the plurality's reasons in *Hollis v Vabu* 207 CLR at 38–39 [38]–[40]. In *Colonial Mutual Life*, Dixon J was concerned with the question in the context of ascertaining vicarious liability or not, as was the Court in *Hollis v Vabu* 207 CLR 21. Windeyer J in *Marshall* 109 CLR 210 was concerned with injury and workers' compensation. In that latter context, Windeyer J said at 217:

> [The] distinction between a servant and an independent contractor … is rooted fundamentally in the difference between a person who serves his employer in his, the employer's, business, and a person who carries on a trade or business of his own.

14 In his concurring reasons in *Hollis v Vabu* 207 CLR at 48 [68], McHugh J expressed the conception of an independent contractor as "someone who acts as an independent principal, exercising an independent discretion in carrying out a task for his own business interest and who is retained simply to produce a result."

15 Attention to these expressions of the underlying conceptions involved does not lead one to a simple formula or definition, but rather it illuminates the need for characterisation of a human, social, legal and commercial relationship embodying such relational conceptions, to which process the rights and obligations sourced in contract and the practical realities of execution, performance and relationship are relevant. Thus, the finely worked language of the lawyer's craft, designed to do everything possible to lead to one conclusion or another in the interests of one party or another (in reality, the party with the dominant bargaining position), is unlikely to be definitive of a whole relationship. Indeed the repeated and emphatic language that a person is not an employee, but an independent contractor or agent, may often draw the comment (not a conclusion, but a comment) of the kind that fell from Dixon, Fullagar and Kitto JJ in *R v Foster* 85 CLR at 151:

> 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.

16 As the reasons of Lee J reveal, it is necessary to be both more comprehensive and precise as to the applicable governing principles. Those principles involve both bipartite relationships of employer or principal, and employee or independent contractor, as well as the tripartite relationships involved in labour hire and supply which is now a feature of the modern industrial and employment landscape.

17 Here, there was no dispute about the primary facts. The dispute lay in their characterisation, and in the appropriate application of legal principle. It is helpful to say something of the judicial technique in this process of characterisation.

18 In a passage approved by a Full Court of this Court (Keane CJ, Sundberg and Kenny JJ) in *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* [2010] FCAFC 52; 184 FCR 448 at 460 [31] and by the Victorian Court of Appeal (Winneke P, with whom Phillips and Kenny JJA agreed) in *Roy Morgan Research Centre Pty Ltd v Commission of State Revenue (Vic)* (1997) 37 ATR 528 at 533, Mummery J in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944 described the judicial technique of characterisation involved in determining whether a person was a servant or an independent contractor as follows:

> It is clear from these cases that there is no single satisfactory test governing the question whether a person is an employee or is self-employed. As Lord Griffiths observed in the last, most recent and authoritative case the question has never been better put than by Cooke J. in the *Market Investigations* case, at p. 184G. The question is: does the taxpayer perform his services as a person in business on his own account? If he does, his work as a vision mixer for the various television production companies must be regarded as performed under a series of contracts for services, entered into by him in the course of carrying on his own business. If he does not, his work must be regarded as performed under a series of contracts of employment with those companies.
>
> In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can be only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.
>
> The process involves painting a picture in each individual case. As Vinelott J. said in *Walls v. Sinnett* (1986) 60 T.C. 150, 164:
>
> > It is, in my judgment, quite impossible in a field where a very large number of factors have to be weighed to gain any real assistance by looking at the facts of another case and comparing them one by one to see what facts are common, what are different and what particular weight is given by another tribunal to the common facts. The facts as a whole must be looked at, and what may be compelling in one case in the light of all the facts may not be compelling in the context of another case.

19 In *Roy Morgan Research Centre* 37 ATR at 533, after approving this passage, Winneke P added the following about the process of characterisation (with which comments the Court in *Roy Morgan v FCT* 184 FCR at 460 [32] also agreed):

> Although technically it remains true that the question whether a person is engaged on a contract of service or for services is one of mixed law and fact, in reality the task of the trial judge in determining that question, in a case like the present one, involves an assessment and evaluation of evidence for the purpose of identification and isolating factors or indicia which are capable of pointing in one direction or the other, and then weighing or balancing those factors in accordance with established principles, none of which is conclusive, in order to reach a conclusion.

20 The expression of the task by Mummery J is valuable because it illuminates, in language of metaphor, the relevance of intuitive appreciation and assessment of the whole, rather than a process of mechanically disaggregating and deconstructing different parts of the relationship by tests drawn from other cases. This role of intuitive appreciation of the whole can also, to an important degree, be seen in *Hollis v Vabu* 207 CLR at 42 [48].

21 The process of characterisation is not the process of construction or interpretation of the written contract. The decision or conclusion as to the character of the relationship is affected by the terms, meaning and content of the contract in particular by the clauses that give rise to rights and obligations, rather than those that simply seek to place a contractual label on the relationship. It is essential to recall, however, that it is not the contract that is to be characterised, but the relationship. 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*, by reference to the guiding underlying conceptions discussed at [13]–[15] above which distinguish the two relationships: employee and independent contractor or principal. This perspective is essential to view the circumstances as a practical matter (cf *Hollis v Vabu* 207 CLR at 41–42 [47]). 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.

22 It is necessary to say something about the nature of the appeal in these circumstances. This is not an exercise in, or akin to, discretionary decision-making. There may be evaluation involved but the person is either an employee or an independent contractor. The conclusion here is one drawn from largely uncontested facts without any assessment of demeanour or veracity of witnesses intruding. The case was not exceptionally long, five days including careful and detailed submissions. There is no call for the kind of consideration in *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* [1999] HCA 3; 73 ALJR 306 of an advantage

in the primary judge having the evidence fall out in sequence over a period of time permitting absorption, contemplation and reflection of the whole of the evidence, including its complexities as it unfolded over time. This Court has had the advantage of skilled and carefully put submissions of senior counsel, not to mention the advantage of a carefully expressed and clear judgment of the learned primary judge. There is no particular advantage of the trial judge to call up the need for deference or full weight to be given to the impressions of the primary judge as in such contexts described in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* [2001] FCA 1833; 117 FCR 424 at 437–438 [29]. This Court is in as good a position as the primary judge to assess and characterise the relationship between Mr McCourt and Personnel. The conclusion here is an example of what was said in *Branir* at 436 [25]: "where, by the nature of the fact or conclusion, only one view is (at least legally) possible … the preference of the appeal court for one view would carry with it the conclusion of error."

23 The description of the judicial technique in the task of characterisation of the relationship can be compared to the approach to the question were it to be decided in a jury trial. As Mr Glass QC and Mr McHugh (as they then were) said in *The Liability of Employers in Damages for Personal Injury* (Law Book Co, 1966) at 78–79, if the only evidence relating to the nature of the relationship is to be found in a written document a question of law is involved and the matter would be for the judge: *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Limited* [1924] 1 KB 762. If there is, however, other evidence of the circumstances attending the relationship it will be a matter for the jury to consider the written document and to decide, by reference to the instructions of the judge. As the authors said at 79:

> It [the jury] will be entitled to disregard the written document if this does not correspond to the real arrangement between them.

24 The tripartite arrangement of two organisations and one worker is not new. Problems of responsibility and vicarious liability arose in the 19th and 20th centuries. See the discussion in *ACE Insurance* 209 FCR at 153–156 [39]–[51]. In *Johnson v Lindsay & Co* [1891] AC 371, the context of the dispute was the operation of the doctrine of common employment, and the question was for whom an employee worked. Lord Herschell said at 377–378:

> The general servant of A may for a time or on a particular occasion be the servant of B., and a person who is not under any paid contract of service may nevertheless have put himself under the control of an employer to act in the capacity of a servant, so as to be regarded as such. This, as has been pointed out, is the position of a volunteer.

25 In such circumstances, the question is who is liable for the negligence of the employee: the general employer who lends or hires the employee or the hirer of the employee who might be

called the particular employer, *pro hac vice*. Cases such as *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Ltd* [1947] AC 1; *Bain v Central Vermont Railway Co* [1921] 2 AC 412 at 416; *McDonald v Commonwealth* (1945) 46 SR (NSW) 129 at 132; *Cameron v Nystrom* [1893] AC 308 at 312; and *Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509 at 517 focus attention on control. See generally *ACE Insurance* 209 FCR at 153–156 [39]–[51].

26 The question here, however, is not whether Hanssen would be liable to someone injured by Mr McCourt's negligence in the performance of his work; it is whether the company which paid him for the time he worked on Hanssen's sites and which provided him to Hanssen was his employer. A conclusion that it was would not prevent Hanssen being found to be the particular employer for the purposes of common law vicarious liability. It is difficult to see why the nature of the contractual terms or contractual relationship between Mr McCourt and Personnel should make any difference to that.

27 What are the facts here, stripped of the detail of the precise and closely-worded terms of the documentation? A young tourist looking for work approaches Personnel. He has no specialist skills, though he has experience working as a barman in a hotel and as a labourer on building sites back home in England. He has no business. He is not attempting to commence a business. He wishes to obtain labouring work on a building site to sustain him while in this country. He is prepared to sign relevant documentation to enable him to work. Personnel carries on the business of supplying workers to companies such as Hanssen who may need them. It is prepared to pay the worker by reference to time spent working at the premises of the person, in this case a builder, Hanssen, who needs the labour. Upon acceptance of the opportunity to work at Hanssen's site Mr McCourt spends regular working hours on Hanssen's site taking instruction from, and being under the control of, supervisors at Hanssen in respect of basic building work such as cleaning the site, removing rubbish and preparing the site for the work of others. This is the kind of work that both Personnel and Mr McCourt expect that he will be doing. All aspects of how he works at the site, including how he is under direction, supervision and control at the site by Hanssen employees and officers conform with the character of a relationship of employment, or the status of being an employee. There is no exercise of any independent discretion by Mr McCourt in carrying out a task either for his own business or to produce a result which he has been retained to produce; nor does anyone expect this of him. He can leave the site on short notice; but then so could any employee, casual or not. He is paid by the hour for the time he works.

28 The notion that Mr McCourt was an independent contractor when working on the building site and that Hanssen was not liable for his negligence would defy any rational legal principle and common sense. The liability of Hanssen as such cannot turn upon the intricacies of the documentation that Personnel place before people such as Mr McCourt for signing: cf *Denham v Midland Employers Mutual Assurance Ltd* [1955] 2 QB 437 at 443–444; and *Ace Insurance* 209 FCR at 151 [28]–[29].

29 The day-to-day reality of the arrangement between Personnel and Mr McCourt was as I have described at [27] above. The arrangement had within it a right in Personnel to require an unskilled builder's labourer, such as Mr McCourt, to comply with all reasonable and lawful directions and supervision by Hanssen. A contract purported to regulate their arrangement by which Mr McCourt would be given the opportunity to earn money working as a supervised and directed labourer on a building site. He remained under contract with Personnel which paid him for his supervised and directed (by Hanssen) labour. Whilst controlled by Hanssen, Mr McCourt was nevertheless paid by Personnel for working in the business of Personnel (as a provider of labour) by dutifully performing the tasks of a labourer for Hanssen in circumstances that would undoubtedly render Hanssen liable for his negligence. No aspect of the relationship of Mr McCourt or Personnel evinced any incident of Mr McCourt carrying or wanting to carry on any business of any kind: he merely sought payment for working as a builder's labourer.

30 The particular circumstances of parties involved in disputes over so-called *Odco* contracts may lead to different conclusions about the characterisation of the relationship between the labour hire company and the would-be worker. The model has entrenched itself into modern industrial relations and employment.

31 Unconstrained by authority I would favour an approach which viewed the relationship between Mr McCourt and Personnel as that of casual employment. I would see my preference being entirely in accord with the application of principle reflected in the decision of the Supreme Court in *Autoclenz Limited v Belcher* [2011] UKSC 41; 4 All ER 745, especially [23]–[37]. This characterisation is in circumstances where Mr McCourt had no aspect of a business or intended business, no expressed desire to act in any capacity other than as a builder's labourer, and merely sought remuneration for the deployment of his labour on a building site supervised, directed and controlled by the builder; where Personnel retained him to supply him to Hanssen to work as such and in that manner, requiring him, by express or implied contractual term, to obey the reasonable and lawful directions of the builder; where he does work as a labourer

under the supervision, direction and control of Hanssen; and where the expectations of the parties were that the relationship would operate as I have described at [27] above. In this conclusion, I would prefer the approach of the Full Bench of the Western Australian Industrial Relations Commission in *Construction Forestry Mining and Energy Union of Workers v Personnel Contracting Pty Ltd trading as Tricord Personnel* [2004] WAIRC 11445 and of EM Heenan J (in dissent) in the decision of the Western Australian Industrial Appeal Court (effectively the Full Court of the Supreme Court of Western Australia, the Court of Appeal coming into existence a month later) reviewing the decision of the Commission: *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction Forestry Mining and Energy Union of Workers* [2004] WASCA 312; 141 IR 31. That litigation, as explained by Lee J, concerned an earlier version of this very contract, and, although not involving Mr McCourt, involved the CFMEU and Personnel. A majority of the Court (Steytler J and Simmonds J) found the contractual relationships between Personnel and two men in relevantly similar circumstances as Mr McCourt to be that of principal and independent contractor. As explained by Lee J, their Honours gave significant weight to the relevant contractual terms. That the contract is real and not a sham may not, however, permit significant weight to be given to carefully crafted terms that bear little practical connection to the simple and straightforward expectations of the parties, reflected in the reality of the situation, as to the undertaking of paid labouring work by a working man or woman.

32 The decision in *Personnel v CFMEU* was after *Hollis v Vabu*. In 2012, the Full Court of the Supreme Court of Tasmania in *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1 held that a worker hired out as an unskilled labourer was a contractor.

33 Notwithstanding the approach to characterisation in this matter which I would favour, I agree with the orders proposed by Lee J. I do so for a number of reasons. First, at least two intermediate courts of appeal have, by application of principle since *Hollis v Vabu*, characterised the relationship between an unskilled worker and a labour hire company as one of principal and independent contractor, by reference substantially to the terms of the contract of retainer with the labour hire company: *Personnel v CFMEU* and *Young v Tasmanian Contracting*.

34 Secondly, one of those cases concerned, effectively, this very contract, with workers in the same position as Mr McCourt.

35 Thirdly, whilst what might be seen as a contract-centred or dominated approach in *Connelly v Wells*, *Chaplin* and *Narich* is difficult to reconcile with *Hollis v Vabu* and other cases that emphasise the analysis of the whole relationship, they cannot be dismissed as irrelevant, being judgments of the New South Wales Court of Appeal, authored by Gleeson CJ, and of the Privy Council. These cases, and others that have followed them (as set out by Lee J), raise the question of the residual weight to be given to the contract, especially when the other factors affecting the characterisation process are seen to be evenly weighted. This tendency to default to the contractual terms may in any given case place emphasis on the contractual terms beyond their appropriate weight. That consideration of the appropriate weight to be given to the contractual terms explains the difference in my preferred approach and that of Steytler J and Simmonds J in *Personnel v CFMEU* in 2004 and that of the primary judge. That such a default weight might be given to the contractual terms can be easily understood if weight and deference is to be given to the customarily succinct words of Gleeson CJ in *Connelly v Wells* 55 IR at 74 as some form of default rule:

> Where the relationship between two persons is founded in contract the character of the relationship depends upon the meaning and effect of the contract.

36 Embedded in my difference with the majority in *Personnel v CFMEU* is the approach to the contract. In some circumstances it would be perfectly legitimate to give significant weight to its negotiated terms. By way of example only, such circumstances may include where the working man or woman wanted to work as an independent contractor, perhaps with a family trust arrangement, and made that clear in negotiations. There may be countless other circumstances of a relationship intended and expected by both parties in creation and operation to exhibit the distinguishing features of independent contracting to which I have referred. Here, however, the standard form documentation is provided by Personnel, to be signed by Mr McCourt. The documentation provided by the dominant party is not of any particular interest to Mr McCourt, other than being necessary to sign if he were to be given the work he wanted. There is no unconscionability or predation; the contract is real, not a sham, but in the light of the whole relationship, including the expectations of the parties, it is difficult to see why it should have influential or tie-breaking effect. This question of the circumstantial weight of contractual terms is sufficiently varied in application by different courts, but potentially so crucial, that it is not for an intermediate court of appeal to seek to state a binding expression of approach where that is the point of distinction with another, here *Personnel v CFMEU* and *Young v Tasmanian Contracting Services*.

37 Fourthly, this question of the weight to be given to the contract is particularly acute in a labour hire tripartite arrangement.

38 Fifthly, added to these legal considerations there is the important public policy of comity between intermediate courts of appeal. The Full Court of the Supreme Court of Western Australia (sitting as the Industrial Appeal Court) has expressed a view (over 15 years ago) on a version of this contract not materially different, by application of reasoning and principle that does not reveal clear error, beyond, perhaps, an overly weighted importance to the contractual terms.

39 Sixthly, not only has this particular commercial party (Personnel) relied on the earlier decision of *Personnel v CFMEU*, it is safe to assume that other parties around Australia have done so as well. This reliance has not only been in regard to the structure of contractual relationships with third parties, but also in regard to compliance with laws, breach of which would amount to a civil penalty.

40 For these reasons I am not prepared to express the view that *Personnel v CFMEU* is plainly wrong and that it should not be followed.

I certify that the preceding forty (40) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate: 

Dated: 17 July 2020

REASONS FOR JUDGMENT

JAGOT J:

41 I agree with Allsop CJ and Lee J.

I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot .

Associate: 

Dated: 17 July 2020

REASONS FOR JUDGMENT

LEE J:

A INTRODUCTION AND PROCEDURAL HISTORY

42 A 22-year-old British lad travels to Australia on a working holiday visa. The experience he carries with him is eight months as part-time brick-layer in his teens and work as a barman in an airport pub in Liverpool. He obtains a "white card", enabling him work on construction sites. Looking for a source of income, he contacts a labour hire company and is later interviewed. Successful at the interview, he is presented with the relevant paperwork, signs it, and is told to wait for a call-up. The next day, he is told about the opportunity of work with one of the company's clients. He accepts the offer, turns up to the address provided, accompanied with nothing but motivation for engaging in work, steel-capped boots, a "hi-vis" shirt and a hard hat. 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. The conclusion of the primary judge, which was determinative of his claim for compensation and orders for penalties under ss 545, 546 and 547 of the *Fair Work Act 2009* (Cth) (**FWA**) against the first respondent, Personnel Contracting Pty Ltd (**Construct**) and its builder client for which he worked, Hanssen Pty Ltd (**Hanssen**), for breaches of the *Building and Construction General On-Site Award 2010* (**Award**), was that he was an independent contractor.

43 This appeal by the Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), and the worker, Mr McCourt, challenges the conclusion of the primary judge as "intuitively unsound" (to adopt the language of the High Court in *Hollis v Vabu Pty Ltd* [2001] HCA 4; (2001) 207 CLR 21 (at 42 [48] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ)).

44 It is convenient to address the determination of the appeal by reference to the following headings:

- B RELEVANT FACTUAL BACKGROUND
- C THE LEGAL PRINCIPLES
- D THE PRIMARY JUDGMENT
- E THE GROUNDS OF APPEAL
- F CONSIDERATION OF THE GROUNDS

- G CONCLUSION

B RELEVANT FACTUAL BACKGROUND

45 The factual background and nature of the relationship between the parties was detailed comprehensively by the primary judge. These facts were largely uncontested (see the judgment below: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 (**J**) (at [17])) but, for reasons that will become evident, it is necessary to pay close regard to them.

46 Construct is a labour hire company based in Perth which arranges for workers (such as Mr McCourt) to work at the sites of its clients (such as Hanssen), under the supervision of the client. At any one time, Construct has about 1,000 workers on its books, and between 300 and 350 of its workers at the sites of its clients.

47 Hanssen is a builder of high-rise residential apartments, and to a lesser extent, offices. To describe Hanssen as an important client of Construct is perhaps an understatement: in 2017, Hanssen accounted for between 70 to 75 per cent of all workers supplied to clients by Construct.

B.1 The LHA

48 Construct and Hanssen entered into a Labour Hire Agreement (**LHA**) (set out in Annexure A to the judgment below). The arrangement works as follows: Hanssen places an order with Construct for labour; Construct then arranges for workers listed on its register to present themselves at the work site and work under Hanssen's supervision; Construct is responsible for vetting and engaging workers who are then placed on site; Hanssen does not operate any "veto" over workers recruited by Construct, the only exception being where a worker proposed by Construct has previously worked on a Hanssen job and was considered by those responsible within Hanssen to be a poor performer; Hanssen pays Construct, and Construct pays the workers for their hours worked. While it is unnecessary to extract this document in full, it is important to note that the LHA included the following term:

> 4. DIRECTION
>
> *Construct Contractor Solutions (sic) 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.

B.2 The ASA and Related Documents

49 Construct "connects" its builder clients (or their contractors) with "self-employed contractors" for the provision of labour. It also supplies financial administrative services to the workers. The relationship between Construct and the workers is subject to an Administrative Services Agreement (**ASA**). Due to the central importance of the ASA, it is appropriate to set it out 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 (sic) that he is no longer available for the supply of labour under the terms of this Agreement.

50 A number of other documents shed light on the nature of the relationship. In addition to the factors contained in the ASA, the "Most Frequently Asked Questions" document (**FAQ Document**) details that Construct pays superannuation at the Superannuation Guarantee Levy rate for all non-incorporated workers; that the rates of pay will differ according to each job and there are no penalty rates; the manner in which a worker is paid (being weekly); and that all workers operate under the PAYG tax arrangement (by which Construct withholds the appropriate tax and submits it to the Australian Taxation Office on a monthly basis): see J[13]. Mr McCourt was also required to sign a "Contractor Safety Induction Manual" (**Safety Induction Manual**), in which he agreed, *inter alia*, to: follow all safety rules and procedures; not work beyond his qualifications; have current licences and/or competencies relevant to work assigned; immediately advise Construct if his job is altered by the "host client"; take reasonable care of his own safety and others in the workplace; and report safety hazards and incidents to the site supervisor or administrator and to Construct: see J[14]. Mr McCourt was also given a document entitled "Guide to Work at a Glance" (**Guide**) (set out in Annexure B to the judgment below).

B.3 The Nature of the Arrangement

51 Construct engages workers of a wide variety of ages, skill levels and trades. Apart from labourers such as Mr McCourt, some workers are highly skilled tradesmen (e.g. carpenters and electricians), while others have other specialised skills such as riggers and crane drivers. Each supplies their own tools, however, the extent of supply depends on the requirements of the client and job. For example, carpenters supply their own basic hand and power tools, and steel fixers supply their own wire reels and snips. General labourers on the other hand, may be contracted with little more than the requirement to supply Personal Protective Equipment (**PPE**) and appropriate work attire. Construct does not require any of the workers to wear a uniform.

52 In relation to remuneration, contract work is most often accounted by hours worked, however, may also be accounted on a piece-rate basis. Workers are required to record their hours or piece-rate work to enable verification by Construct with the respective client. This data is obtained from site "clock-in" and "clock-out" systems, correlated with "time allocation sheets". In the case of Hanssen, the time allocation sheets are completed by each worker at the end of each day and the data is collated by Hanssen (which then forwards the details to Construct).

53 The specific rates for job orders are negotiated by the Client Services Representatives of Construct with the client or with site management, which is most often the site supervisor on large construction sites. This rate is conveyed to the workers when they receive the job offer. The rate is a "flat-rate" per hour, regardless of the hours worked, or whether the work is performed on the weekend. Hanssen sets the hours for work at a site, and can change them at will, the effect of which is that Construct's arrangements with its workers is such that the workers are subject to the direction and supervision of Hanssen.

54 When contracted at a site, all workers are directed in their work by site supervisors. When a Construct Client Services Representative conducts a site visit, they do not direct the worker in the performance of work. If the Client Services Representative becomes aware of a safety breach or risk on the site, they do, however, have a duty to bring it to the attention of the contractor and site supervisor.

B.4 Mr McCourt

55 Mr McCourt attended his interview on 25 July 2016, at which time he told Mr van der Plas, a Construct Client Representative, that he was prepared to do any construction labouring, to work

on weekends, that he had his own means of transport, and that he was available to start work immediately. Mr van der Plas enquired whether Mr McCourt had his own safety gear or PPE (which he did, having purchased them in Perth for less than $100). Mr van der Plas also gave evidence (recorded at J[67]), that he would have run Mr McCourt through a number of documents (including, *inter alia*, the ASA, FAQ Document, Safety Induction Manual and Guide: see J[66]). He also gave evidence that "[w]hile going through the Guide, I make a real point of explaining our workers are contractors, not employees". Following the interview, Mr McCourt was given around 30 minutes to inspect and sign the documents.

56 Unsurprisingly in these circumstances, Mr McCourt was not asked whether he had assets or equipment to run a business; a business name; a building from which to run a business; "invoicing systems"; standard rates, terms or conditions of trade; payment or debt collection systems; budgeting or forecasting systems; or whether he was registered for GST or had an Australian Business Number (**ABN**).

57 On 26 July 2016, Mr McCourt received a call from Mr Marshall (a Construct Client Representative for the Concerto and Aire Projects), to inform him that there was work at the Concerto site, that it would start the following day and that the job would likely run until at least Christmas. Mr McCourt received a text message detailing the location of the site and instructing him to arrive for onsite induction.

58 During the induction, Mr McCourt was given the Hanssen Site Safety Induction Form (**Hanssen Induction Form**) (set out in Annexure C to the judgment below) and the Hanssen Site Rules (**Hanssen Site Rules**) (set out in Annexure D to the judgment below). These documents contained a range of information concerning, relevantly: the site hours; "smoko" times; the need to cooperate and adhere with site management; that there was a compulsory "toolbox meeting" every day at 7am; the requirement to contact the Site Manager or the Site Administrator prior to 7am if he was to be late; and that holidays must be booked at least one week in advance.

59 Between July and November 2016, Mr McCourt worked at the Concerto Project after which time he finished work and left Perth. He returned the following March and arranged to re-commence work at the Concerto Project, where he worked until 24 June 2017. Aware the Concerto Project was finishing, Mr McCourt enquired whether there was another project at which he could work. He was informed about the Aire Project in West Perth, where he commenced work on 26 June 2017. The nature of the work at the Aire Project was

"substantially identical" to that at the Concerto Project: J[38]. Mr McCourt only worked at the Aire Project for one week, when he was contacted by Mr Marshall who told him that he was not to go back to the Aire Project to work. Following this, Mr McCourt did not receive any more work from Construct.

60 By way of summary and emphasis, six characteristics of the nature of the work conducted by Mr McCourt at both the Concerto and Aire Projects merit specific identification:

(1) *First*, Mr McCourt was directed by a leading hand (usually Ms O'Grady on the Concerto Project), who told him what work to do and the way in which it had to be done; he was also told sometimes what to do by other people, including Site Managers.

(2) *Secondly*, Mr McCourt supplied his own steel cap boots, hard hat and "hi-vis" shirt; all other impedimenta of work were supplied by Hanssen.

(3) *Thirdly*, the majority of the work performed by Mr McCourt was that of a low skilled labourer: see J[39], [98] and [105].

(4) *Fourthly*, Mr McCourt was engaged in physically demanding work, around 50 hours per week, and it was not feasible for him to have another job. He was also never told he could delegate the performance of the work assigned to him to a third party; nor was he ever asked to organise a substitute worker to perform the work.

(5) *Fifthly*, Mr McCourt "clocked" on and off by means of a fingerprint scan, and then filled in a timesheet. He did not keep a record of his hours worked and was never asked to provide any invoice or statement of hours worked. Mr McCourt was paid weekly by Construct, with a superannuation contribution. Construct provided him with payment advices at the end of each week, which showed that he was paid a flat rate of $22 per hour for work performed until October 2016, and then $23 per hour thereafter. The hourly rate of pay was set by Construct and was not the subject of negotiation between Mr McCourt and Construct or Mr McCourt and Hanssen. In the event that work was not completed to the standard required, Mr McCourt would be instructed to redo the work. There was no "penalty" schedule in place whereby Mr McCourt would be paid less if he did not perform work in a competent and diligent manner.

(6) *Sixthly*, if Mr McCourt was ill or running late, he would inform the site manager ahead of time. He also took leave of a few days to go on a short holiday in October 2016, for which he was required to put in a request for leave with Hanssen. Lastly, when he was absent due to holiday or illness, he was not paid.

C THE LEGAL PRINCIPLES

C.1 Introduction

61 Courts have long been tasked with characterising a relationship between human actors and determining whether or not one of those actors is to be afforded the protections that accompany employment classification. The approach to such an assessment is deep-rooted in the common law and requires courts to draw a binary divide between two distinct types of a worker: an employee and an independent contractor: *Hollis v Vabu* (at 38 [36] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Sweeney v Boylan Nominees Pty Limited* [2006] HCA 19; (2006) 226 CLR 161 (at 173 [33] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* [2015] FCAFC 37; (2015) 228 FCR 346 (at 389–9 [173]–[176] per North and Bromberg JJ); *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* [2011] FCA 366; (2011) 214 FCR 82 (at 199 [188] per Bromberg J). It is fair to say that the evolution of this dichotomy has produced ambiguity, inconsistency and contradiction. As Freeland has stated, the "accumulation of case law has added weight rather than wisdom" to how this dichotomy works in a practical sense: Freeland M, *The Personal Employment Contract* (Oxford University Press, 2003) (at 20).

62 It is unnecessary to canvass in any depth the historical development of, and justification for, this dichotomy. However, it is worth noting that the "modern" employment contract can be seen as a synthesis of liberal contract theory's conception of the law of obligations created by consensual bargains and the older vestiges of the status based relationship of master and servant: Owens R, Riley J and Murray J, *The Law of Work* (2nd ed, Oxford University Press, 2011) (at 213). One account of the dichotomy between the modern employee and independent contractor can be traced to the early 19th Century Master and Servant Acts, which were applied to all servants and labourers, but not to higher status employees. The test adopted for distinguishing between the two classes of workers was based on the criterion of exclusive service: see *Lancaster v Greaves* (1829) 9 B & C 627 (at 631–2 per Parke J).

63 The modern distinction between employee and independent contractor is, however, primarily drawn from the development of the common law doctrine of vicarious liability. The concept of vicarious liability derives from the notion that the master of the house was legally responsible for its subservient members, in which the law ascribed liability to him for the conduct of those under his charge: *Scott v Davis* [2000] HCA 52; (2000) 204 CLR 333 (at 409–10 [230] per

Gummow J); *Hollis v Vabu* (at 37 [33] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); see also Holmes O W, 'Agency' (1891) 4 *Harvard Law Review* 345 (at 364); Wigmore J H, 'Responsibility for Tortious Acts: Its History' (1894) 7 *Harvard Law Review* 315 (Pt 1), 383 (Pt 2). This ascription of responsibility came to be adopted in agency and employment contexts, with the concept of vicarious liability now principally invoked to hold an employer liable for the wrongs of an employee, acting in the "course of employment": *Stevens v Brodribb Sawmilling Company Proprietary Limited* [1986] HCA 1; (1986) 160 CLR 16 (at 43 per Wilson and Dawson JJ); see *Prince Alfred College Incorporated v ADC* [2016] HCA 37; (2016) 258 CLR 134 (at 150 [46]–[47] per French CJ, Kiefel, Bell, Keane and Nettle JJ).

64 Today, the common law distinction between an employee and independent contractor remains essential to determining tortious liability as well as a range of relationships between parties under statute. It is presently determinative of the question of the applicability of the provisions of the FWA upon which the appellants rely: see *C v Commonwealth* [2015] FCAFC 113; (2015) 234 FCR 81 (at 87 [34] and [36] per Tracey, Buchanan and Katzmann JJ).

C.2 Labour Hire Arrangements

65 Historically, work has usually been structured as a bilateral arrangement between two contractual counterparties. However, it is now possible to conceptualise common work relations as trilateral or even, with the emergence of the so-called "gig" economy, multilateral. A prevalent trilateral work arrangement is that involving a labour hire firm or agency, where workers who are "on the books" of the agency are offered work placements with the agency's business clients. In this arrangement, the agency usually maintains an ongoing role in the work relationship. It is common for the business client to pay the agency an amount that covers the cost of the work performed by the worker placed with it, and of the service provided by the agency, with the worker in turn paid by the agency, which may also be responsible for various other matters, as in this case, such as the payment of superannuation and withholding of tax. As the primary judge outlined (at J[120]), these arrangements generally take the following contractual structure:

> (1) a conttact exists between a worker and a labour hire company;
>
> (2) a contract exists between the labour hire company and a third party, whereby the labour hire company agrees to provide the worker to perform the work and the third party agrees to pay the labour hire company for the worker's services; and
>
> (3) no contract exist (sic) between the worker and the builder.

66 This type of trilateral arrangement and its interaction with employee classification was first considered at length in *Odco Pty Ltd v Building Workers' Industrial Union of Australia* [1989] FCA 483 (*Odco Trial*). In that case, Odco Pty Ltd, trading as "Troubleshooters Available" (**Troubleshooters**), provided workers to its builder clients. Each of the workers signed a document entitled "Agreement to Contract", which contained the following terms (as outlined at J[121]):

> (1) an acknowledgment that there was no relationship of employer-employee;
>
> (2) an acknowledgment that the worker was self-employed and not bound to accept work;
>
> (3) an acknowledgment that the worker had no claims on [Troubleshooters] in respect of holiday pay, sick pay, superannuation, long service leave or the like, (sic)
>
> (4) an agreement that the worker would supply his or her own plant and equipment, safety gear, boots and gloves; and
>
> (5) an agreement that the worker agreed to carry out all work that they agreed to do "in a workmanlike manner" and that [Troubleshooters] was "hereby guaranteed against faulty workmanship".

67 The builder client was in turn required to pay Troubleshooters for the work of the self-employed contractors, which was then on paid to those contractors. The rates paid to the workers varied unilaterally each year without the workers being consulted.

68 In examining the relationship, Woodward J found that the workers were independent contractors, reasoning (at 121–2) that:

> … it is clear that the arrangements which Troubleshooters makes with its workers are very different form (sic) those made by other labour hire agencies. It makes it clear that it does not intend its workers to be its employees. They are not paid a weekly wage nor do they receive any of the normal benefits of a wages employee, particularly annual leave and sick leave. There is no obligation upon any man registered with Troubleshooters to work at any particular time. Equally there is no obligation on Troubleshooters to find work for the man on any particular day.
>
> So far as payment is concerned, what Troubleshooters does, in practice, is to pay to the worker his share of the amount which will in due course be received from the builder; Troubleshooters' share represents its outgoings, including its superannuation and public liability insurance payments on behalf of the worker, and its profits. It is true that Troubleshooters normally pays the worker before it has received anything from the builder and, furthermore, it makes the payment even though it may never receive payment from the particular builder. But Troubleshooters only pays its men for work which they claim actually to have done for a builder, and it does so in the confident expectation that it will soon be reimbursed.
>
> So far as control is concerned, the workers are free to work when they please. The only requirement is that they keep Troubleshooters informed of their availability if they want work, or if they are ceasing to work at a site where Troubleshooters labour is still

> required. The elements of stability and continuity, which are such a central part of every contract of service extending over a period of time, are not present.
>
> Troubleshooters exercises absolutely no control over the way in which work is carried out. It merely passes on to the worker the time and place at which a builder wishes him to report. If the worker does not like the sound of the particular job - perhaps because of its location - he is under no obligation to accept that engagement.
>
> I have no doubt that, in acting as an agency finding work for persons in the building trade, Troubleshooters creates a relationship, between it and the men who use its services, of principal contracting parties and not of employer and employee.

69 The decision of Woodward J was confirmed on appeal: see *Building Workers' Industrial Union of Australia v Odco Pty Ltd* [1991] FCA 96; (1991) 29 FCR 104 (per Wilcox, Burchett and Ryan JJ) (*Odco Appeal*).

70 Given its commercial attraction to those seeking labour without assuming the responsibility for engaging employees, the "Odco" type of trilateral arrangement has been widely replicated by those looking to fashion the same characterisation result, albeit with varying degrees of success: see, for example, *Swift Placements Pty Limited v WorkCover Authority of New South Wales* [2000] NSWIRComm 9; (2000) 96 IR 69; *Staff Aid Services v Bianchi* (2000) 133 IR 29; *Drake Personnel Ltd v Commissioner of State Revenue* [2000] VSCA 112; (2000) 2 VR 635; *Country Metropolitan Agency Contracting Services Pty Ltd v Slater* [2003] SAWCT 57; (2003) 124 IR 293; *Damevski v Giudice* [2003] FCAFC 252; (2003) 133 FCR 438; *Forstaff Pty Ltd v Chief Commissioner of State Revenue* [2004] NSWSC 573; (2004) 144 IR 1; *Personnel Contracting Pty Ltd t/as Tricord Personnel v Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312; (2004) 141 IR 31 (*Personnel Contracting v CFMEU*); *Young v Tasmanian Contracting Services Pty Ltd* [2012] TASFC 1; *Johnson v MNG Investments t/as Australian Temporary Fencing* [2011] ACTSC 124; *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7; *Fair Work Ombudsman v Quest*. The significance of the decision in *Personnel Contracting v CFMEU* is a matter to which I will return.

71 As will now doubt already have become evident, it is this type of trilateral relationship which is the subject of the current appeal.

72 It may be thought that the prevalence of trilateral relationships, the evolution of digital platforms and the increasing diversity in worker relationships has evolved in a way that the traditional dichotomy may not necessarily comprehend or easily accommodate. Indeed, Freedland's thesis that the binary divide between employee and independent contractor

represents both a *false unity* (in that all employment relationships share common unifying characteristics) and a *false duality* (in that work relationships fall into one of two monolithic categories, when there are in fact many and various complex relationships under which work is performed in contemporary industrial societies) might be thought to have much to commend it: *The Personal Employment Contract* (at 15–22). But these considerations (which in part have led to statutory reform in the United Kingdom, where an additional third category of labour, known as a "worker", has been introduced by virtue of s 230(3) of the *Employment Rights Act 1996* (UK)) are beyond the scope of these reasons. This is because, as Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ noted in *Sweeney v Boylan Nominees* (at 173 [33]), the employee-independent contractor distinction is "too deeply rooted to be pulled out". The distinction therefore remains binary (contrary to an alternative submission put by Mr Blackburn SC on this appeal that the relationship in issue was *sui generis*). A worker must be placed (or perhaps shoehorned) into either the employee or the independent contractor classification.

C.3 The "Multi-factorial" Approach

C3.1 Overview

73 Courts traditionally viewed "control" as the determinative factor: see, for example, *Yewens v Noakes* (1880) 6 QBD 530 (at 532–3 per Bramwell LJ); *Performing Rights Society Limited v Mitchell and Brooker (Palais de Danse) Limited* [1924] 1 KB 762 (at 767–8 per McCardie J). The current approach however, is multi-factorial, requiring an assessment of the "totality of the relationship": *Stevens v Brodribb* (at 29 per Mason J, with whom Brennan J was in general agreement at 47; similar remarks were also made at 35 per Wilson and Dawson JJ and at 49 per Deane J); *Hollis v Vabu* (at 33 [24] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). There is no exhaustive list of relevant factors; indicia have accreted over time in the authorities which are thought to throw light on the outcome without being determinative: *ACE Insurance Ltd v Trifunovski* [2011] FCA 1204; (2011) 200 FCR 532 (*Ace Trial*) (at 543 [29] per Perram J). It is not necessary, nor useful, to set these factors out here. This is because the relevant factors are well known and will vary from case to case, as will the weight to be afforded to them: see *Stevens v Brodribb* (at 35 per Wilson and Dawson JJ); *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 (at 597 per Samuels JA, with whom Meagher JA agreed). As was explained in *Wesfarmers Federation Insurance Ltd v Stephen Wells trading as Wells Plumbing* [2008] NSWCA 186 (at [70] per Basten JA, with whom Hodgson JA agreed at [4] and Handley AJA agreed at [121]), when "a relationship depends upon various indicia, there is

always a danger in extracting one indicium and giving it decisive weight because of the way in which it has been used in a different context, rather than weighing each matter in the balance".

74 Lord Wedderburn referred to the practice by courts of looking at the whole picture as an "elephant-test" – an animal too difficult to define but easy to recognise when you see it: Lord Wedderburn of Charlton, *The Worker and the Law* (3rd ed, Penguin Books Ltd, 1986) (at 116). Since there is no universally accepted understanding of how many indicia, or what combination of indicia must point towards a contract of service, the balancing exercise is necessarily impressionistic: see *Re Porter; Re Transport Workers Union of Australia* [1989] FCA 226; (1989) 34 IR 179 (at 184 per Gray J). Indeed, such an approach inevitably involves what has been described as a "smell test", or a "level of intuition": *On Call Interpreters* (at 121–2 [204] per Bromberg J); see also *Hollis v Vabu* (at 42 [48] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Fair Work Ombudsman v Quest* (at 391 [183] per North and Bromberg JJ). The task was, with respect, aptly summarised by Mummery J (as his Lordship then was) in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 (at 944):

> …[the multi-factorial approach] is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

75 This statement has been cited with approval on a number of occasions: see, for example, *J A & B M Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue* [2001] NSWCA 125; (2001) 105 IR 66 (at 68 [14] per Ipp AJA, with whom Giles JA and Hodgson JA agreed); *Lopez v Commissioner of Taxation* [2005] FCAFC 157; (2005) 143 FCR 574 (at 600 [82] per Ryan, Lander and Crennan JJ); *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528 (at 533 per Winneke P, with whom Phillips and Kenny JJA agreed); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* [2010] FCAFC 52; (2010) 184 FCR 448 (at 460 [31] per Keane CJ, Sundberg and Kenny JJ); *Jensen v Cultural Infusion (Int) Pty Ltd* [2020] FCA 358 (at [130] per Wheelahan J).

76 Plainly, such an impressionistic and amorphous exercise is susceptible to manipulation and its application is inevitably productive of inconsistency, in that courts can apply the same legal test to similar facts, but reach a different conclusion. This open-endedness has given rise to a

number of what might be described as "tensions" regarding the "correct" application of the multi-factorial inquiry.

C.3.2 Principles Applicable to Appellate Review of Evaluative Decisions

77 Before discussing these tensions, it is necessary to make some brief observations regarding appellate principles of review in the present context.

78 Enough has been said to explain why the objective assessment or evaluation called for often involves the resolution of questions of fact and degree upon which views may legitimately differ: *Roy Morgan Research v Federal Commissioner of Taxation* (at 460 [32] per Keane CJ, Sundberg and Kenny JJ). Despite this, the evaluation called for is not a discretionary decision: see *Crown Resorts Ltd v Zantran Pty Ltd* [2020] FCAFC 1; (2020) 374 ALR 739 (at 764 [103] per Lee J, with whom Allsop CJ and White J generally agreed). In particular, it is not a task of weighing up the relevant indicia to form a view as to whether a person *should be* classified as an employee, but making a determination as to whether a person *is* an employee.

79 As an appeal from an evaluative judgment rather than a discretionary decision, the standard of review described in *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531 (at 551–3 per Gibbs ACJ, Jacobs and Murphy JJ) applies. This "correctness" standard has been the subject of discussion in a number of cases (see, for example, *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93; (2018) 261 FCR 301 (at 307 [4] per Allsop CJ, with whom Markovic J agreed at 346 [169])) and does not require explication. Recently, the relevant principles relating to appellate review in the current context were explained by Anderson J in *Jamsek v ZG Operations Australia Pty Ltd* [2020] FCAFC 1934 (at [165]–[174] with whom Perram J agreed at [2] and Wigney J agreed at [14]).

C.4 Tensions in the Application of the Multi-Factorial Approach

80 The tensions in the intuitive nature of the multi-factorial approach (exacerbated by evolution of new and novel forms of labour) can be grouped broadly into three categories: (1) the application of the "control" indicium to multilateral relationships; (2) the extent to which the question of whether the putative employee is conducting a business is determinative of characterisation; and (3) the weight to be given to the contract in the characterisation inquiry. The bulk of the hearing was directed to addressing these three topics and the way in which they inform the evaluative assessment. In elaborating on these tensions, it is critical to keep in mind the statement of the High Court plurality in *Hollis v Vabu* (at 38 [36]), that "[t]erms such as

"employee" and "independent contractor", and the dichotomy which is seen as existing between them, do not necessarily display their legal content purely by virtue of their semantic meaning".

C.4.1 The Application of the "Control" Indicium to Multilateral Relationships

81 It is well established that while traditionally "control" was the sole criterion used to determine whether a worker was an employee or independent contractor, control is now merely one factor to be assessed in the characterisation inquiry: *Stevens v Brodribb* (at 29 per Mason J, with whom Brennan J was in general agreement at 47, at 35 per Wilson and Dawson JJ and at 49 per Deane J); *Hollis v Vabu* (at 41 [45] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). As is evident by the bulk of time dedicated to this issue in both written and oral submissions, it remains, however, an important aspect to be considered in the multi-factorial approach: see *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; (2003) 209 FCR 146 (*Ace Appeal*) (at 173 [103] per Buchanan J, with whom Lander and Robertson JJ agreed).

82 The history of the role of the "control" indicium was explored in detail by Buchanan J in *Ace Appeal* (at 153–173 [39]–[104]) and need not be repeated here. But it is useful to make a few observations. Cognisant of criticisms that the "control" indicium is largely a product of a predominately agricultural society, in which a person who engaged another to perform work could and did exercise closer and more direct supervision, Mason J in *Stevens v Brodribb* (at 29) stated that:

> … the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it, "so far as there is scope for it", even if it be "only in incidental or collateral matters": *Zuijs v Wirth Bros Pty Ltd* [(1955) 93 CLR 561 at 571]. Furthermore, control is not now regarded as the only relevant factor. Rather it is the totality of the relationship between the parties which must be considered.

83 The dynamic nature of the "control" indicium is echoed in a number of cases: see, for example, *Hollis v Vabu* (at 40–1 [43]); *Forstaff v Chief Commissioner of State Revenue* (at 24–5 [114] per McDougall J). Indeed, Kirby P (with whom Mahoney and Meagher JJA agreed) in *Articulate Restorations and Development Pty Limited v Crawford* (1994) 57 IR 371 (at 375–6), stated that:

> Traditionally, the test of employment was expressed in terms of whether the putative employer controlled the services of the alleged worker: determining not only *what* should be done but *how* it should be performed. Doubtless because of changes in the nature of employment which accompanied advances in the economy, social and industrial democracy and technology, this formulation has been refined by the courts

> to direct attention not so much to the fact of control but to where its *ultimate authority* lay. See eg *Humberstone v Northern Timber Mills Pty* Ltd (1949) 79 CLR 389 at 404; *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 572.
>
> (emphasis in original)

84 It was upon this foundation that McCusker DPJ in *Country Metropolitan Agency Contracting Services v Slater* (at 312 [53]) sought to articulate the central conception in categorising the nature of an employment relationship as:

> … the acceptance of the subordinate role in the performance of work — the hallmark of "service". Service in this sense operates in an easily recognisable and everyday way. A worker's agreement to serve is not necessarily to the employer as such but to those the employer engages to exercise authority on its behalf, ie a foreman or supervisor. In making this observation I am not equating such a circumstance to the facts before us. Rather I am concerned to highlight an important aspect of control and its application in workplaces. **The gravamen is the acceptance of a form of subordination by service**. That the labour market has fragmented those who sell their labour into new groupings has not changed the essence of that part of "control" the worker bargains in a contract of employ[ment] …
>
> (emphasis added)

85 There is, with respect, much to be said for the simplicity in the way McCusker DPJ articulated the central conception of employment as the acceptance of a form of subordination by service. As Mr Irving QC argued, in a labour hire situation such as this, "[i]t doesn't matter who has the right to direct [Mr McCourt] about what work he does next or how he goes about doing it. His position, his obligation to obey, results in him being relevantly controlled" (D1, T26.7–9). He expanded upon this proposition by referring to the analogy of corporate groups, noting that where one entity is the payroll entity and that entity is the employer, and another entity is the operations entity and workers perform work subject to the direction of the operations entity, they are in a position of subordination, but not to their employer, being the payroll entity: on intra-group arrangements, see *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* [2011] FCA 1176; (2011) 198 FCR 174 (at 195–99 [75]–[92] per Buchanan J).

86 The incompleteness of this proposition though, is that it lacks reference to the *relationship* of employment. While the common law has been sufficiently flexible to adapt the conception of control to more modern times, such approach is inconsistent with the historical focus of the authorities, which looks to the subordination of the putative employee vis-à-vis the putative employer, by reference to a right of the employer to exercise control *over* the employee: see, for example, *Humberstone v Northern Timber Mills* [1949] HCA 49; (1949) 79 CLR 389 (at 404 per Dixon J); *Attorney-General for New South Wales v Perpetual Trustee Company (Limited)* [1952] HCA 2; (1952) 85 CLR 237 (at 299–300 per Kitto J); *Zuijs v Wirth Brothers*

Pty Ltd [1955] HCA 73; (1955) 93 CLR 561 (at 571–3 per Dixon CJ, Williams, Webb and Taylor JJ); *Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 (at 601 per Lord Brandon, delivering the advice of the Privy Council); *Stevens v Brodribb* (at 24 per Mason J, with whom Brennan J was in general agreement at 47); *Hollis v Vabu* (at 40–1 [43]–[44] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Fajloun v Khoury* [2016] NSWCA 101 (at [105] per Simpson JA). Of course, and as the authorities appreciate, that right of control is not confined to strict notions of day-to-day supervision and direction. But the notion of control in its legal sense refers to the identification of a right deriving from the employer, which subordinates the employee in a position of service to the employer; not the alternative, which can distort the relevant inquiry and leaves one searching for someone to call the employer.

87 A more appropriate way to approach this issue may be to recognise that the control indicium, while a factor in identifying relationships of service, may not be particularly helpful in the characterisation of multilateral arrangements. Mr Blackburn SC argued that while the control test is no longer dispositive, "the defining characteristic of an employee in an employment relationship … [is] the duty to obey, the right to control … [w]ithout that right to control, the worker cannot be an employee" (D2, T87.39–41) and later that "while control is one indicia (sic) in the characterisation of an employment relationship, it is an essential [indicium] ... if you can't find that, then it's not an employment relationship" (D3, T9.36–40). That submission may have been right a century ago, but the authorities are clear that control is *not* an essential factor in the characterisation inquiry. This development reflects the fact that applying a concept redolent of servitude, no matter how flexibly adapted to the exigencies of modern employment arrangements may, at times, be fruitless.

88 Indeed, while ascertaining where the "ultimate authority" lay may be helpful in some cases (enabling a focus on the true nature of the relationship), it may also be distracting. This is because the search for some element of control (as derivative or of some other form) tends to imply, unhelpfully, that the presence or absence of control is necessarily an essential factor in the characterisation inquiry. This is particularly so in the case of trilateral labour hire arrangements, where, in looking at the control indicium, courts often find that it is the client of the labour hire firm that exercises significant control over the putative employee, not the labour hire agency. What must be remembered is that a finding that there is an absence of control by the labour hire agency over the worker or that control is more easily found to be exercised by the client of the labour hire agency, does not necessarily suggest the relationship between the agency and the worker is one of principal and independent contractor; examination of the

control indicium may yield a neutral result: see, for example, *Country Metropolitan Agency Contracting Services v Slater* (at 314 [58] per McCusker DPJ); *Forstaff v Chief Commissioner of State Revenue* (at 24–5 [114] per McDougall J).

C.4.2 Whether Carrying on a Business on One's Own Account is Determinative

89 It has been 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": *Hollis v Vabu* (at 39 [40] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), citing Windeyer J in *Marshall v Whittaker's Building Supply Company* [1963] HCA 26; (1963) 109 CLR 210 (at 217): see also *Ace Appeal* (at 170 [93] per Buchanan J, with whom Lander and Robertson JJ agreed).

90 This focus on the economic reality of the relationship between the parties is clearly discernible from the plurality's judgment in *Hollis v Vabu,* including: that viewed as "a practical matter" the bicycle couriers were not independent contractors (at 41–2 [47]); the notion that the couriers were somehow running their own enterprise as "intuitively unsound" (at 42 [48]); and that it would be "unrealistic" to describe those persons as other than employees (at 44–5 [57]).

91 The distinction between an entrepreneur who ventures capital to seek profit but may not succeed, and an employed worker, who generally works on the basis that some remuneration will be received, is readily understood. So too is the notion that for employees, someone else is ultimately responsible for making decisions that will determine whether they are to continue to be given a chance to earn remuneration: Stewart A, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235 (at 261). Given how foundational these notions are to a market economy, it is unsurprising that posing the question as to whether a worker is conducting a business has been seen by some as a useful approach to commence the broader characterisation inquiry.

92 Indeed, in the pursuit of clarity in the application of the multi-factorial approach, Bromberg J in *On Call Interpreters* (at 122–3 [207]–[208]) sought to focus on the "ultimate question" by reference to a two-step inquiry, namely: (1) whether the person performing the work is an entrepreneur who owns and operates a business; and (2) if so, whether the work or the economic activity being performed is being performed in and for the business of that person. His Honour posited that if both of these questions are answered in the affirmative, the person is likely to be an independent contractor. If in the negative, the person is likely to be an employee.

93 In *On Call Interpreters* (at [217]–[220]), Bromberg J summarised a comprehensive list of indicia going to whether a commercial enterprise, operating as a going concern with employed capital and which is undertaking risk, is being carried out by the worker: *Tattsbett Ltd v Morrow* [2015] FCAFC 62; (2015) 233 FCR 46 (at 49 [3] per Allsop CJ, with whom White J agreed). None of the indicia are conclusive and as the nature of the economic activity in question differs, the indicia, and the weight afforded to those indicia, will differ. In relation to the operation of a personal services business, of relevance to the present appeal, Bromberg J stated (at 123–4 [212]–[215]):

> A personal services business is a business which is likely to involve system, repetition and continuity in the pursuit of profit. A genuine personal services business will aspire to make profits and not simply be paid remuneration, as is an employee. Such a business will seek to be remunerated not simply for the provision of the labour of the self-employed entrepreneur that provides the personal services, but also for the risks involved in that person being an entrepreneur.
>
> The risk profile of a personal services business is very different to that of an employee. By its very nature, a genuine commercial enterprise is an undertaking which involves risk. Business risk is a product of a need for a business to invest (either in physical assets, time or effort) at a cost and without any certainty or assurance of that cost being recovered and any profit being made. Unlike an employee who generally seeks security, and is not risk-tolerant, a personal services business is prepared to invest time, money and effort with little or no certainty that such investment will be rewarded with a financial return. All of that is done in the hope of making a profit. It is in that sense, that an entrepreneur operating a personal services business seeks profit and not simply remuneration, for the personal services provided.
>
> A genuine independent contractor providing personal services will typically be: autonomous rather than subservient in its decision-making; financially self-reliant rather than economically dependent upon the business of another; and (as I have said) chasing profit (that is a return on risk) rather than simply a payment for the time, skill and effort provided.
>
> In an employment relationship, there will typically be an entrepreneur, but that will be the employer, it will never be the employee. The employer will take the risk of profit or loss. The employee seeks the security of fixed and certain remuneration. Unlike the independent contractor, the employee has no business, and typically will have no interest or desire, in exposure to the risk of loss in return for the chance of profit.

94 The "entrepreneur test" was adopted and refined in *Fair Work Ombudsman v Quest*, where North and Bromberg JJ (at 389 [176]) reinforced that it is uncontroversial that a "multi-factorial" assessment is required in evaluating employee classification, but stated (at 391 [184]) that "where the hallmarks of a business are absent, it will be a short step to the conclusion that the worker is an employee." That case also concerned the provision of personal services, their Honours adding (at 390 [181]) that this "kind of business is more likely to have a simple and

less sophisticated structure. Nevertheless, even a small, simple commercial enterprise will have some of the fundamental hallmarks of a business, even though they may be modest or muted".

95 The primary judge declined to follow *Fair Work Ombudsman v Quest* for two reasons: *first*, the relevant reasoning is *obiter dicta*; and *secondly*, "it is inconsistent with a multi-factorial assessment to say that the absence of one factor (or the presence of it, for that matter) should for practical purposes dictate a result": J[153]. Reliance was placed on Jessup J's reasoning (with whom Allsop CJ and White J agreed) in *Tattsbet v Morrow* (at 61 [61]), that to "view the matter through a prism of this kind is … to deflect attention from the central question, whether the person concerned is an employee or not", the core question being "not whether the person is an entrepreneur: it is whether he or she is an employee": see also *Stevens v Brodribb* (at 35 per Wilson and Dawson JJ); *Fair Work Ombudsman v Ecosway Pty Ltd* [2016] FCA 296 (at [74] per White J); *Jamsek* (at [6]–[8] per Perram J, with whom Wigney J agreed at [14]). The primary judge (at J[154]) also cited Buchanan J's judgment in *Ace Appeal* (at 167 [87]), for the proposition that the identification of a business is "not an alternative, or a preferable test".

96 I generally accept that focussing the multi-factorial approach in terms of whether the employee is conducting a business as an entrepreneur might, in some cases, have the potential to detract attention from the central question. Indeed, as has been said, "an affirmative answer to the question of whether one is working in one's own business does not necessarily entail that one is not working in another's business or that one cannot be an employee": *Jamsek* (at [7] per Perram J, with whom Wigney J agreed at [14]); see also *Ace Appeal* (at 182 [128] per Buchanan J); *Amita Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a Uber Eats* [2020] FWCFB 1698 (at [71]–[72] per Ross P and Hatcher VP and at [83] per Coleman DP). But that is not to say that the reasoning of North and Bromberg JJ in *Fair Work Ombudsman v Quest* is not of real assistance. Whether the worker is carrying on a business is likely to be a useful way of approaching the broader inquiry in many cases, and the indicia outlined by their Honours helpfully informs such an analysis. The same can be said of inquiring into whether the worker has the capacity to generate goodwill: see *Jamsek* (at [9]–[11] per Perram J and at [234]–[237] per Anderson J); *Dental Corporation Pty Ltd v Moffet* [2020] FCAFC 118 (at [66]–[69] per Perram and Anderson JJ, with whom Wigney J agreed at [111]). However, in the end, the weight to be afforded to whether the worker is conducting a business on their own account is to be assessed in the light of the *whole* picture and will, of course, vary on a case by case basis.

C.4.3 Weight to be Given to the Contract in the Characterisation Inquiry

97 Much has been written regarding the role of the terms of the contract in the characterisation inquiry. At the outset, it is important to make two preliminary points.

98 *First*, the primary judge noted, and approached the evaluative assessment on the basis that, since any suggestion of a sham or pretence had been disavowed, "there is no sufficient reason not to find that the parties' agreement … means, and was intended to mean, what it says": J[177]. However, as was recently explained by Anderson J in *Jamsek* (at [183]–[184], with whom Wigney J agreed at [14]), it would be erroneous to approach the issue of characterisation on the basis that the terms of the contract are decisive in the absence of the contract being stigmatised as a sham or pretence: see also *Fair Work Ombudsman v Quest* (at 379 [148] per North and Bromberg JJ). Indeed, as the primary judge earlier identified (at J[119]), in assessing the "totality of the relationship", weight is not simply to be given to the contractual terms, but also the system operated thereunder and the work practices imposed by the putative employer: *Hollis v Vabu* (at 33 [24] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). Parties cannot deem their relationship to be something it is not, and the relevant question must be answered by reference to an objective assessment of the nature of the relationship: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52; (2004) 219 CLR 165 (at 179 [40] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

99 *Secondly*, what must be remembered about the aim of the characterisation process is that it is an inquiry grounded in identifying the *status* of a person. Henry Sumner Maine famously stated in Chapter V of *Ancient Law* (1861) that the evolution towards progressive societies can be seen in the passage from *status* to *contract*. Although, unlike Maine, we are not talking about an ascribed position, the focus of the process of characterisation is on the *status* of a person in their dealings with another, and the role of contractual stipulations (more particularly, the objective construction of the written instrument recording the relationship) does not, and should not dominate. Although, as Mason ACJ, Murphy and Deane JJ notably remarked in *Taylor v Johnson* [1983] HCA 5; (1983) 151 CLR 422 (at 429) "the objective theory of contract [is] in command of the field", in the present context, there are limits to its imperial march. Here the Court must look beyond and beneath the documents to the substance, practical reality and true nature of the relationship.

100 This requirement is brought into sharp focus given the evolution of new and novel labour arrangements, which may not manifest an employment relationship between the provider and

the end-user of labour. Such arrangements may be real or artificial. Where artificial, the external form, appearance or presentation of the relations between the parties may cloak or conceal either an underlying employment relationship or the identity of the true employer: *Fair Work Ombudsman v Quest* (at 377 [137] per North and Bromberg JJ). Employment is a relationship which is, in particular, susceptible to contractual obfuscation: see generally *Autoclenz Ltd v Belcher* [2011] UKSC 41; [2011] 4 All ER 745 (per Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed). This notion of "disguised employment" has been the subject of much commentary. A report of the International Labour Organisation titled 'The Employment Relationship' (Report V(1) to the International Labour Conference, 95th Session, 2006) (**ILO Report**) (at 12 [46]) described "disguised employment" as lending "an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law". The ILO Report notes that the approach taken by a number of countries to labour legislation around the world is one of examining the "primacy of fact", indicating that the determination of the existence of an employment relationship should be guided by the *facts*, and not by the *name* or *form* given by the parties: ILO Report (at 7–8 [26]).

101 Similar observations have been made by academic scholars, with many emphasising the ease with which carefully drafted contracts can purport to convert an employment relationship into an independent contractor arrangement: see, for example, Stewart A and McCrystal S, '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 7); *Redefining Employment?* (at 246–7); *The Law of Work* (at 164–5). In particular, Owens, Riley and Murray outline (at 164) that "the reality is that most contracts for the performance of work are contracts of adhesion; that is, the terms are set by one of the parties and presented to the other on a 'take it or leave it' basis"; the consequence being that "the 'chosen' classification and contractual arrangements are simply imposed by the dominant, more powerful party for its own purposes and to the detriment of the other party (usually the worker)".

102 In recognising how this focus on the practical reality of the relationship is to be applied, it is useful to examine the decision of the Supreme Court of the United Kingdom in *Autoclenz v Belcher*. That case involved persons called "valeters". Despite the name, these were not "Jeeves-like" personal attendants, but rather persons hired out by Autoclenz to clean cars under contracts which stated that they were "self-employed contractors" offering their services to a "client" on a "sub-contract" basis. The most recent version of the contract also stipulated that

the valeters had to provide their own material, that they were not obliged to provide services to the company, nor was the company obliged to provide work to them, and that they could provide suitably qualified substitutes to carry out the work on their behalf.

103 Despite the terms of the contract, the Court reached the conclusion that the valeters were employees. In doing so, Lord Clarke (at 756–7 [33], with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed) distinguished the "factual matrix in which the contract is cast" in the case of an employment contract from that of an arm's length commercial transaction. His Lordship (quoting the earlier judgment of Aikens LJ at [92]), conceptualised the critical difference as follows (at 757 [34]):

> … the circumstances in which contracts relating to work or services are concluded are often very different from those in which commercial contracts between parties of equal bargaining power are agreed. I accept that, frequently, organisations which are offering work or requiring services to be provided by individuals are in a position to dictate the written terms which the other party has to accept. In practice, in this area of the law, it may be more common for a court or tribunal to have to investigate allegations that the written contract does not represent the actual terms agreed and the court or tribunal must be realistic and worldly wise when it does so …

104 His Lordship then went on to conclude (at 757 [35]) that:

> … the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, **of which the written agreement is only a part**. This may be described as a purposive approach to the problem. If so, I am content with that description.
>
> (emphasis added)

105 As for the substitution clause, Lord Clarke (quoting Elias J in *Consistent Group Ltd v Kalwak* [2007] IRLR 560 (at [57]–[59])) stated (at 754 [25]) that:

> The concern to which tribunals must be alive is that armies of lawyers will simply place substitution clauses, or clauses denying any obligation to accept or provide work in employment contracts, as a matter of form, even where such terms do not begin to reflect the real relationship.
>
> … if the reality of the situation is that no one seriously expects that a worker will seek to provide a substitute, or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship. But if these clauses genuinely reflect what might realistically be expected to occur, the fact that the rights conferred have not in fact been exercised will not render the right meaningless.
>
> … Tribunals should take a sensible and robust view of these matters in order to prevent form undermining substance.

106 On this basis, Lord Clarke found (at 757 [36]–[37]) the characterisation of the valeters as employees was "perfectly tenable", and that "the elaborate protestations in the contractual documents that the men were self-employed … bore no practical relation to the reality of the relationship". The reasoning in *Autoclenz v Belcher* was recently applied by Full Court in *Jamsek*, where, following the explication of the former two quotes of Lord Clarke above, Anderson J (at [195], with whom Wigney J agreed at [14]) stated that "[w]hile the execution of the contract may evince the requisite meeting of the minds to establish a binding contractual relationship, accepting this is only the starting point in analysing the nature of the parties' relationship in the present context" and later (at [248]) that "the classical notions of freedom of contract may not be seamlessly applicable in employment contexts". The focus on the practical reality evident in the decision in *Autoclenz v Belcher* has been cited with approval in a number of other Australian cases: *Fair Work Ombudsman v Quest* (at 136–7 [146]–[147] per North and Bromberg JJ); *Rus v Comcare* [2017] FCA 239; (2017) 71 AAR 478 (at 485–6 [22] per Bromberg J); *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; (2018) 264 FCR 536 (at 576 [180] per Tracey, Bromberg and Rangiah JJ); *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (at [50] and [96]–[97] per Bromberg J).

107 While the primary judge accepted (at J[175]) that the "proper (objective) classification of a contractual relationship must be determined by the rights and obligations which the contract creates, not the label the parties put on it … [which] will include an examination of the reality of the relationship in practice", his Honour was content to resolve the tension produced in applying the multi-factorial approach by recourse to the wording of ASA as reflecting what amounted to a default position or "tie-break" status.

108 This approach is apparently supported by a long line of authority. In *Massey v Crown Life Insurance Co* [1978] 1 WLR 676 (at 679–80), Lord Denning MR stated:

> The law, as I see it, 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 and is capable of being one or the other, then the parties can remove that ambiguity, by the very 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 …
>
> …
>
> It seems to me on the authorities that, when it is a situation which is in doubt or which is ambiguous, so that it can be brought under one relationship or the other, it is open to the parties by agreement to stipulate what the legal situation between them shall be.

> That was said in the *Ready Mixed Concrete case* [1968] 2 Q.B. 497, 513 by MacKenna J.:
>
> > "If it were doubtful what rights and duties the parties wished to provide for, a declaration of this kind might help in resolving the doubt and fixing them in the sense required to give effect to that intention."
>
> So the way in which the parties draw up their agreement and express it may be a very important factor in defining what the true relation was between them. If they declare that one party is self-employed, that may be decisive.

109 The reasoning of Lord Denning in *Massey v Crown Life Insurance* was cited with approval by the Privy Council in *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 (at 389 per Lord Fraser, delivering the advice of the Privy Council), as well as in *Narich v Commissioner of Pay-Roll Tax* (at 601 per Lord Brandon). Likewise, Wilson and Dawson JJ in *Stevens v Brodribb* (at 37), after listing some of the indicia of the nature of the relationship suggesting a contract of service and others indicating a contract for services, concluded that "[n]one of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance".

110 Furthermore, in *Odco Trial* (at 76–7) Woodward J, after noting that the intention of the parties "is a very important consideration in most cases", continued:

> The only reason it is not as decisive in determining the nature of the contract as it is in determining its content is that the parties may intend to create one type of contract, but include in it provisions which require the law to classify it differently. Allowance must also be made for the fact that the expressed intention of the parties may be a sham, designed to achieve some taxation or other advantage; but in that case the real intention of the parties is to be ascertained from material other than their declared intentions.
>
> However, where the parties are behaving honestly, and where the nature of their proposed relationship is such that it could become that of either employer/employee or principal/contractor, then it is open to them to mould their legal relationship in either form. Their intentions will then tend to influence the details of their agreement, and any apparently contrary indicia would need to be closely examined against the background of the parties' intentions.
>
> (citations omitted)

111 This reasoning was affirmed on appeal: see *Odco Appeal* (at 126–7). Interestingly though, Wilcox, Burchett and Ryan JJ (at 126–7), after endorsing the above approach, noted that Woodward J "accorded no more than an appropriate degree of importance to the actual terms of the agreement with Troubleshooters into which workers entered at *arm's length*" (emphasis added).

112 Furthermore, in *Personnel Contracting v CFMEU* (at 40–41 [40]–[41]), Steytler J noted:

> There can be no doubt that the intention of the parties, as it appears from each contract, was to categorise the relationship as one of principal and independent contractor and not as one of employer and employee. While, as the cases make plain, that, of itself, cannot be determinative, this is, in my respectful opinion, a case in which the "label" put upon their relationship by the parties does not contradict the effect of the agreement as a whole and in which the other indicia to which I have referred (and which have been referred to in the judgments of EM Heenan J and Simmonds J) do not point clearly in any one direction. Rather, they seem to me to be ambiguous or uncertain as regards the true (sic) relationship of the parties, many of the provisions referred to by EM Heenan J being, in my respectful opinion, of potential application to both employees and independent contractors (as, for example, those requiring the worker to undertake the work in a timely, professional manner, to undertake it to a high standard of workmanship, to comply with work safety laws and regulations, to follow safe working practices and to report difficulties encountered in the performance of the work to the appellant).
>
> In such a case, and in circumstances in which (contrary to what was said by the Full Bench) there is, in my respectful opinion, little to suggest that the label applied by the parties is a sham (and a good deal to suggest that it is not), it seems to me that the evident intention of the parties should be given effect and that the relationship between them should, in each case, be found to be that which they have been at some pains to describe, namely, that of independent contractor and principal and not that of employer and employee.

113 Similarly, Simmonds J, after exploring the abovementioned authority and denouncing the terms of the written agreement as a "sham", stated (at 62 [147]):

> This does not mean that the clause in the Contractor's Agreement which labelled the parties' relationship is then simply given effect to, without further analysis. The possibility must also be considered (as I have indicated) that that language is overborne by other language (including most importantly the rights and duties that language gives rise to) in the Agreement. Here, however, there is no such overbearing, on the analysis I have already set out. Rather, there is, to set alongside the features of the parties' relationship that (as I have indicated) might be seen to point the other way, the other features that, throughout the Agreement, and its Guide, might be seen to point towards independent contractor status.

114 More recently, White J in *Fair Work Ombudsman v Ecosway* (at [76]) noted that while the characterisation process "usually requires an examination of the reality of the relationship in practice so that the Court does not consider only the written contractual terms … [n]evertheless the terms of the parties' written agreement when such exists are usually fundamental".

115 This sentiment has been reiterated in a number of other cases: see *Deputy Commissioner of Taxation v Bolwell* (1967) 1 ATR 862 (at 868 per Lush J); *NM Superannuation Pty Ltd v Young* [1993] FCA 91; (1993) 41 FCR 182 (at 199 per Hill J, with whom Burchett and O'Loughlin JJ agreed); *Jensen v Cultural Infusion* (at [75] and [126] per Wheelahan J).

116 For my part, particularly when the traditional dichotomy is to be applied to new and novel labour arrangements, it is wrong to fasten upon the terms of a contract as a "default" and then

look at each other indicium of the relationship and assess whether it either supports or detracts from the characterisation identified in the terms of the written instrument. Similarly, to approach the contractual characterisation as some type of "tie breaker", distracts from standing back and engaging in a "considered, qualitative appreciation of the whole" (to use Mummery J's words in *Hall (Inspector of Taxes) v Lorimer* (at 944)).

117 In part, this is because of the logical difficulty in extracting one indicium and giving it decisive weight, rather than weighing each matter in the balance (see *Wesfarmers Federation Insurance v Wells* (at [70] per Basten JA, with whom Hodgson JA agreed at [4] and Handley AJA agreed at [121])) but also, importantly, such an approach pays insufficient regard to the practical reality that in this area of the law, like others (such as the law of penalties), words can be chosen, not to perpetrate a sham, but to add verisimilitude to a narrative sought to be promoted by the commercially dominant contractual party. As the Supreme Court recognised in *Autoclenz v Belcher*, the true nature of a work contract, as distinct from commercial contracts, often involves inequality of bargaining power, where the organisation offering the work is in a position to dictate the terms of the paction on a "take-it-or-leave-it" basis. In these circumstances, the traditional bargain theory of contract is hardly apposite. Put directly in terms of the present circumstances, it is difficult to reconcile the central conception of a multi-factorial inquiry with the notion that the legal construct reflected in a contract of adhesion presented to an eager a 22-year-old backpacker, can assume decisive importance as a "default" or as a "tie-break".

C.5 The Need for Coherence in Australia's Single Common Law

118 Whatever else may be unclear, what is pellucid is that Construct sought to replicate an "Odco" style arrangement; bifurcating the relationship between the person who supplies their labour from the ultimate end user of that labour, by way of an intermediary labour-hire agency.

119 We have been urged by senior counsel for the CFMMEU that the current case is distinguishable from *Odco Trial*, a proposition not entirely without merit. For example, the CFMMEU argued (drawing on the reasoning of North and Bromberg JJ in *Fair Work Ombudsman v Quest* (at 400–1 [233]–[234])) that the majority of workers in *Odco Trial* carried significant business expenses including in relation to clothing, equipment, vehicles, and sickness and accident insurance (at 117–8); they wished to be considered, and thought of themselves, as self-employed independent contractors who had deliberately chosen a working pattern which gave them maximum control over their working lives while still earning a steady income (at 79);

many of them were skilled tradesmen; they moved between their own operations into work obtained through Troubleshooters and back again (at 79); a significant number of them arranged their businesses as partnerships or, in a few cases, companies or family trusts (at 83); and they often worked across a multitude of businesses, moving from one builder to the next on a daily-hire basis (see 54–6). Indeed, in *Odco Trial*, there was quite a strong foundation for the conclusion that the workers were running their own business.

120 However, distinguishing this case from *Odco Trial* by reference to identified facts does not progress the matter meaningfully. This is because since that decision, the "Odco" style arrangement has been replicated on a multitude of occasions, with courts then tasked with adjudicating upon whether such arrangement has been successfully implemented, or the intention of the instigator has miscarried.

121 As noted above, one of these "Odco" cases is that of the Western Australian Industrial Appeals Court (**WAIAC**) in *Personnel Contracting v CFMEU*. That case involved essentially the same dispute between the same parties (albeit, Personnel trading as Tricord). Specifically, two workers, Messrs Bartley and Fowler, entered into agreements with Construct to supply labour to Hanssen. Both men were labourers: Mr Bartley had no qualifications and Mr Fowler was a formwork carpenter (but both of them were able to construct formwork): see *Construction, Forestry, Mining and Energy Union of Workers v Personnel Contracting Pty Ltd trading as Tricord Personnel* [2004] WAIRComm 11445; [2004] 84 WAIG 1275 (at 1286 [174]), a finding that was not disturbed on appeal. The WAIAC in that case, after weighing the relevant indicia, concluded by majority that the workers were independent contractors.

122 It is unnecessary to detail the intricacies of the minor factual differences between the present arrangements and those in *Personnel Contracting v CFMEU*. It suffices to note that, overall, the mechanics of the labour hire arrangement have remained largely the same. As senior counsel for Construct outlined, "the work practices, as evidenced from the description set out in the Full Bench decision, have not changed" (D3, T39.31–2). What has changed, however, is the wording of the "Agreement to Contract", which now goes under the title of the "Administrative Services Arrangement". To simplify an exercise in semantics, which is neither productive nor helpful, what has in effect happened, is that Construct, 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 Construct; 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 CFMMEU engagingly conceded, "the situation has got worse for us" (D2, T56.4).

123 With no intended disrespect, the CFMMEU is, in effect, re-running the same case it did 16 years ago, albeit with a worker who carries less construction site expertise (a statement I intend to be in no way derogatory to the importance of Mr McCourt's contribution to the work site) and in the context of a more nuanced agreement drafted following the "feedback" of judicial examination in *Personnel Contracting v CFMEU*. This reality led to the following exchange between the Chief Justice and Mr Irving QC during the course of oral submissions (at D2, T60.41–61.03):

> ALLSOP CJ: Well, do you say that, just so that I understand your submission. I understand how you say it's different.
>
> MR IRVING: Yes.
>
> ALLSOP CJ: Do you say [*Personnel Contracting v CFMEU* is] wrong?
>
> MR IRVING: Yes.

124 I will deal with each of these arguments in turn.

C.5.1 Comity Considerations

125 It is now beyond argument that by reason of the general grant of appellate jurisdiction in s 73 of the *Constitution*, there is a "single system of jurisprudence" in Australia: *Lange v Australian Broadcasting Corporation* [1997] HCA 25; (1997) 189 CLR 520 (at 563–4 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Lipohar v The Queen* [1999] HCA 65; (1999) 200 CLR 485 (at 505–6 [44]–[45] and 507 [50] per Gaudron, Gummow and Hayne JJ). It is also well-established that a corollary to this, is that an intermediate appellate court should not depart from a decision of another intermediate appellate court unless it is convinced that the decision of that Court is "plainly wrong": *Farah Constructions Pty Limited v Say-Dee Pty Limited* [2007] HCA 22; (2007) 230 CLR 89 (at 151–2 [135] per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

126 The term "plainly wrong" has been subject to much criticism, and a more constructive articulation of the principle enunciated by the High Court in *Say-Dee*, is that, after first identifying that to decide the case in a certain way would lead to a real difference in approach, the question that arises is whether there is a compelling reason to depart from that decision: see *RJE v Secretary to Department of Justice* [2008] VSCA 265; (2008) 21 VR 526 (at 553–4 [104] per Nettle JA); *Gett v Tabet* [2009] NSWCA 76; (2009) 254 ALR 504 (at 567 [301] per Allsop P, Beazley and Basten JJA); *Hasler v Singtel Optus Pty Ltd* [2014] NSWCA 226; (2014) 87 NSWLR 609 (at 632 [102] per Leeming JA, with whom Barret JA agreed at 612 [1] and Gleeson JA agreed at 613 [6]). In making such a determination, the Court should consider, *inter alia*, the length of the period for which the earlier decision has stood, and whether it has been relied upon in the arrangement of human affairs: see *Undershaft (No 1) Ltd v Federal Commissioner of Taxation* [2009] FCA 41; (2009) 175 FCR 150 (at 166 [74] per Lindgren). Indeed, as McHugh J stated in *Re Tyler; Ex parte Foley* [1994] HCA 26; (1994) 181 CLR 18 (at 39) "[l]ike cases should be decided alike. Uniformity in judicial decision making is a matter of great importance. Without it, confidence in the administration of justice would soon dissolve". This statement was cited with approval by this Court in *Trade Practices Commission v Abbco Iceworks Pty Limited* [1994] FCA 1279; (1994) 52 FCR 96 (at 113–114 per Burchett J, with whom Black CJ and Davies J agreed at 99 and Gummow J agreed at 130).

127 A number of arguments were advanced as to why this Court should depart from the decision of the WAIAC, but before coming to them it is appropriate to engage with an argument that was (with respect sensibly), not advanced by the CFMMEU. That is, that comity considerations do not arise in the same way in dealing with a decision of the WAIAC as would be the case if this Court was dealing, for example, with a decision of the Western Australian Court of Appeal. The WAIAC is established by s 85 of the *Industrial Relations Act 1979* (WA) (**IRA**) to hear and determine appeals under ss 90 and 96K of that Act against decisions of the Western Australian Industrial Relations Commission and the Industrial Magistrates Court. It is comprised of a Presiding Judge, a Deputy Presiding Judge and two other judges of the Supreme Court, all appointed by the Chief Justice of Western Australia. It hears appeals against decisions of the Full Bench, the Commission on application under s 49(11) of the IRA Act and the Commission in Court Session, but only on the grounds that the decision is in excess of jurisdiction, that the decision is erroneous in law or on the ground that the appellant has been denied the right to be heard. In *Kirk v Industrial Court of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 (at 580–1 [97]–[100] per French CJ, Gummow, Hayne, Crennan, Kiefel

and Bell JJ) reference was made to the Supreme Court, not any specialised court, as being ultimately responsible for ascertaining the metes and bounds of the legitimate exercise of State judicial power. Heydon J also expressed the caveat (at 589–90 [122]) that one needed to pause before "accepting too readily the validity of what specialist courts do". In the present circumstances, however, given its composition and status, the deference to be given to a decision of the WAIAC is for all practical purposes the same as would apply in the event it was a decision of the Full Court of the Supreme Court of Western Australia (as it then was).

128 While a number of propositions were put as to why this Court should depart from *Personnel Contracting v CFMEU*, two substantive arguments were advanced: *first*, that the WAIAC did not give sufficient weight to the centrality of "the business on your own account" factors in the multifactorial inquiry; and *secondly*, that the WAIAC gave exalted weight to the characterisation terms. As would be evident, these two arguments reflect two of the "tensions" identified and discussed in Section C.4 above.

129 The problems with the assertion that these arguments present compelling reasons to depart from *Personnel Contracting v CFMEU* are fourfold. *First*, that decision was reached on a considered and supported interpretation of a long line of authority: see [108] to [115] above. *Secondly*, the decision of the WAIAC has stood for over 16 years, and no doubt a number of entities and their advisers, on the assumption of certainty within the law, have relied upon it in developing their mode of doing business. Construct alone engages between 800 and 1,000 contractors each year to work on its clients' sites; approximately 300 at any given time and on any given day. To decide this case contrary to the WAIAC decision, which tested and found valid this arrangement in 2004, would be to throw Construct's whole enterprise, as well as that of any other entity that has been operating on the assumption that its arrangement has a valid and legitimate foundation within the law, into uncertainty.

130 *Thirdly*, and connected to the last point, stigmatising the arrangements refined and persisted upon by Construct following the WAIAC decision, is not a matter to be approached lightly. The allegations made below were of numerous contraventions of the Award and the FWA (see the statement of claim at [48], [52], [54], [56], [58]–[59], [61], [63], [66], [68], [71]–[72], [74], [76]–[77], [79], [81]–[82], [84], [87], [89], [91], [93] and [100]). Construct conceded that if McCourt was found to be an employee, all but two of the alleged contraventions would be made out; the consequence being an exposure to numerous civil penalties of some seriousness.

131 *Fourthly*, and in not dissimilar circumstances, the Full Court of the Supreme Court of Tasmania (Blow, Tennent and Wood JJ) in *Young v Tasmanian Contracting Services*, considered a case involving the Odco system of documentation, and endorsed an approach to the multi-factorial analysis consistent with the primary judge and the majority in *Personnel Contracting v CFMEU* (including at [21] and [23] repeating, without identifying any error, observations made by the primary judge, Evans J, regarding the exercise of control by the builder client as not pointing to an employment relationship between the worker and the labour hire agency, and not being willing to dismiss contractual documents reflecting the independent contractor status "so readily"). Of particular importance in that case was that the appellant, to use the words of Blow J (at [4]), was doing "unskilled work, and was not in the position of selling skill or expertise to an open market". This means that at least two intermediate appellate courts have found that an unskilled worker can be validly categorised as an independent contractor under an Odco style arrangement.

132 I will make reference below as to why I consider there is merit in the argument that: (a) the majority in *Personnel Contracting v CFMEU* did not give sufficient weight to focussing upon whether the workers were conducting a business on their own account; and (b) the characterisation terms dominated the analysis of the majority. In the end, however, I conclude it cannot be said there was a flaw in the reasoning of the WAIAC sufficiently plain so as to provide a compelling reason for this intermediate court of appeal to depart from longstanding authority in relevantly identical circumstances.

C.5.2 Whether *Personnel Contracting v CFMEU* is Distinguishable

133 I have said enough to dispose of the submission by senior counsel for the CFMMEU that the WAIAC's decision is distinguishable. While senior counsel for the CFMMEU identified differences in the new ASA as indicating a relationship of employment, this argument is not compelling. The current position is *a fortiori* to that considered in 2004. To rely on relatively insignificant differences to distinguish the present circumstances would be artificial.

134 It follows that notwithstanding that I consider that some aspects of the reasoning of the primary judge are, with respect, problematical (as I expand upon below), the ultimate conclusion was consistent with that mandated by application of *Personnel Contracting v CFMEU*. As a consequence, the appeal must be dismissed. For completeness, however, I turn to considering the grounds of appeal advanced by the appellant, along with the contentions raised by the respondent.

D THE PRIMARY JUDGMENT

135 The primary judge's reasoning leading to the conclusion that Mr McCourt was an independent contractor can be summarised as follows.

136 *First*, in determining the nature of control exercised by Construct over Mr McCourt (at J[134]–[147]), the primary judge did not accept that the express terms in the ASA rendered the significant control exercised by Hanssen over Mr McCourt as deriving from Construct. The relevant terms relied on are contained in cl 4, which warrant that the Contractor shall:

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

137 The primary judge concluded (at [136]–[138]) that the "core terms" of the ASA which include general obligations to co-operate; to turn up for work at a nominated hour; and to work safely, competently and diligently, do not vest in Construct a right to say what work is to be done or where, when and how it is to be done. Nor did the primary judge accept the submission that having contractually bound Mr McCourt to obey Hanssen, any direction by Hanssen was a manifestation of control by Construct. On this basis, it was found that the entity with the ultimate authority over Mr McCourt was Hanssen, not Construct.

138 Furthermore, it was held (at J[143] and [146]) that Mr McCourt's freedom to accept or reject work and to work for others (despite this being "impractical" because of the long hours worked) was consistent with a lack of control. By way of contrast, the primary judge recognised (at J[144]–[145]) that the requirement of personal service by Mr McCourt with no opportunity for delegation, that he had to give four hours' notice if he wished to stop working, and that he had to give a week's notice for any holiday he wished to take, were factors indicating control on the part of Construct over Mr McCourt. The conclusion reached was that although there are

"more "control indicia"" pointing to Mr McCourt not being an employee, the question of control is not dispositive: J[147].

139 *Secondly*, the primary judge (at J[148]–[169]) recognised that Mr McCourt did not operate a business on his own account. His Honour stated (at J[156]) that "to provide his services he needed a robust constitution, a hard hat and boots, so he had no expenses to speak of, and no need to set up a separate business of his own". In doing so, the primary judge held that this factor was only one indicator, in the context of a multi-factorial approach, that Mr McCourt was an employee.

140 *Thirdly*, while the evidence demonstrated that Mr McCourt was paid by the hour, his Honour observed (at J[158]–[159]) that "nowadays, the mode of remuneration is inconclusive because, on its own, it tells you little, if anything, about the true characterisation of the relationship between a worker and an employer".

141 *Fourthly*, the primary judge (at J[160]–[162]) noted that the provision of tools and equipment was, to a limited extent, an indicator that Mr McCourt was an employee.

142 *Fifthly*, the primary judge (at J[164]–[165]) considered the lack of Mr McCourt's integration into the Construct organisation, noting that: Mr McCourt did not have a Construct email address, phone, business cards, vehicle, office or any of the other benefits which Construct employees have; he was excluded from staff communications, functions and celebrations; he did not own a uniform or wear any Construct branding; and the ASA expressly required McCourt not to represent himself as an employee of Construct at any time. These factors were held to indicate against a relationship of employment.

143 *Sixthly*, his Honour (at J[166]–[167]) did not consider the right to negotiate a rate increase, the payment of taxation and superannuation or the lack of paid leave or other entitlements as carrying any significant independent weight.

144 *Seventhly*, and of critical importance, was the weight placed by the primary judge on the written terms of the agreement between the parties. In concluding (at J[170]) that "there are significant matters that point in opposite directions on the critical question of whether Mr McCourt was an employee", the primary judge noted (at J[172]) that "it is always important to pay close regard to the way in which the parties have characterised their relationship". On this basis, and relying on a number of authorities (see J[173]–[176]), his Honour came to the following conclusion (at J[177]–[179]):

> In those circumstances, where the question might be seen to be reasonably evenly balanced, and where any suggestion of sham or pretence is disavowed, 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. The terms of the ASA clearly indicated that the relationship between Construct and McCourt was to be one of principal and self-employed contractor, including as follows:
>
> (a) Mr McCourt was defined and referred to throughout the document as the "Contractor", not an employee;
>
> (b) "Construct is an administrative services agency ... 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" (Recital A);
>
> (c) "The Contractor warrants that: ... he is self-employed" (clause 3(b)); and
>
> (d) "The Contractor shall ... not represent himself as being an employee of Construct at any time" (Clause 4(h)).
>
> Each of these statements is a clear statement of intent that the relationship between Construct and Mr McCourt was not to be one of employment, but one of principal and self-employed contractor.
>
> Mr McCourt acknowledged that he read all the documents he was given, including the ASA. So, absent some other reason (none is advanced) he is taken to have read and approved them. And that must be so, because otherwise serious and obvious mischief might result.
>
> (citations omitted)

145 Stated simply, the primary judge, in weighing the various indicia and coming to the conclusion that, as is often the case, there were matters which pointed in different directions, resorted to the express terms of the agreement between the parties seeking to characterise the relationship as the "tie-break" factor.

E THE GROUNDS OF APPEAL

146 As articulated in Ground 14 of the appellants' Notice of Appeal, and as is no doubt evident from the reasoning thus far, the overarching ground of appeal is that the primary judge erred in concluding that Mr McCourt was not an employee of Construct. In support of this ground, the appellants rely on a number of subsidiary grounds. With some degree of oversimplification, they can be summarised as three contentions, being that the primary judge erred by:

(1) not finding that Construct exercised a significant level of control over McCourt (**Control**);

(2) not affording sufficient weight to the consideration that Mr McCourt was not operating a business on his own account (**Business on Own Account**); and

(3) placing exalted weight on terms of the contract as a way of resolving ambiguity caused by competing indicia (**The Characterisation Terms**)

147 In considering these three arguments, I will also address the matters raised in contention by Construct which have not already been dealt with throughout the course of these reasons.

F CONSIDERATION OF THE GROUNDS OF APPEAL

F.1 Control

148 Counsel for the appellant broke down the Control ground of appeal into four sub-grounds. As the hearing proceeded, it became evident that two aspects assumed prominence: (1) the relevance of the documents exchanged between Mr McCourt and Construct, as well as those between Construct and Hanssen, in characterising the relationship; and (2) in the light of (1) and the nature of the engagement as a whole, the application (and importance) of the control indicium to the characterisation of the present arrangement.

F.1.1 Relevance of the Documentary Evidence to the Characterisation of the Relationship

149 Before dealing with the substance of the control argument, anterior questions arise as to the relevance and weight to be given to the documents exchanged by the parties in the characterisation process.

150 *First*, is the relevance of the LHA in construing the relationship. It is uncontroversial that the ASA formed part of the contract that arose between Mr McCourt and Construct upon an offer of work at a particular site. What is controversial is the extent to which the LHA executed between Construct and Hanssen can be taken into account in characterising the nature of the relationship. Construct submitted that the ASA cannot be construed by having regard to the LHA; the primary reason for this being that Mr McCourt gave evidence that he had never seen the LHA and was not aware of its terms. It is well established that only surrounding circumstances known to both parties can be taken into account when construing the objective meaning of a contract: see, for example, *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 (at 351–2 per Mason J). However, whether a worker is an employee or independent contractor, as the High Court stated in *Hollis v Vabu* (at 33 [24] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), is not to be determined by mere reference to the contract between the putative employee and the labour hire agency, but the "system which was operated thereunder and the work practices

imposed". Therefore, while the LHA may not inform the construction of the ASA, it does go squarely to establishing the "totality of the relationship".

151 *Secondly*, is the extent to which the Safety Induction Manual executed by Mr McCourt alongside the ASA has contractual significance in the characterisation process. Counsel for the CFMMEU argued that the primary judge should have found that the Safety Induction Manual contained express contractual terms because: (a) it was executed by Mr McCourt at the same time as he signed the ASA; (b) it uses mandatory language; and (c) it governs matters that are typically the subject of employment contracts. The Safety Induction Manual contains nine pages of directions and states that it is "not intended to replace instructions given on site by our clients, their supervisors, or other authorised persons". This was a document which Mr McCourt executed, agreeing, *inter alia*, to ensure that he would "follow all safety rules and procedures given by the 'host client'". The CFMMEU submitted that by executing and agreeing to the terms of the document, Mr McCourt thereby also agreed to obey the directions outlined in the Hanssen Induction Form and the Hanssen Site Rules, which were provided to Mr McCourt by Hanssen upon commencement of work at the Concerto and Aire Project sites. I would note from the outset that, given the three reasons identified by the CFMMEU, there are strong reasons to regard the Safety Induction Manual as contractual in nature: see *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120 (at [23]–[32] per Black CJ and at [327] per Jessup J).

152 In counter to this, Construct contended that the "terms" agreed to by Mr McCourt in the Safety Induction Manual were simply a replication of its statutory obligations under the *Occupational Safety and Health Act 1984* (WA) (**OSH Act**). Section 23F(4) of the OSH Act provides that a labour hire entity, referred to as an "agent", and its client, have the same general duties of care to the workers provided by the agent ("workers" defined to include employees and contractors: s 23F(1) of the OSH Act) in relation to those matters over which each has the capacity to exercise control and as are applicable to an employer pursuant to s 19 of the OSH Act. In other words, the obligations contained in s 19 of OSH Act apply to labour hire entities as if both the labour hire entity and its client are employers of the worker.

153 Section 19 of the OSH Act provides:

> **19. Duties of employers**
>
> (1) An employer shall, so far as is practicable, provide and maintain a working environment in which the employees of the employer (the ***employees***) are not

exposed to hazards and in particular, but without limiting the generality of the foregoing, an employer shall —

(a) provide and maintain workplaces, plant, and systems of work such that, so far as is practicable, the employees are not exposed to hazards; and

(b) provide such information, instruction, and training to, and supervision of, the employees as is necessary to enable them to perform their work in such a manner that they are not exposed to hazards; and

(c) consult and cooperate with safety and health representatives, if any, and other employees at the workplace, regarding occupational safety and health at the workplace; and

(d) where it is not practicable to avoid the presence of hazards at the workplace, provide the employees with, or otherwise provide for the employees to have, such adequate personal protective clothing and equipment as is practicable to protect them against those hazards, without any cost to the employees; and

(e) make arrangements for ensuring, so far as is practicable, that —

(i) the use, cleaning, maintenance, transportation and disposal of plant; and

(ii) the use, handling, processing, storage, transportation and disposal of substances,

at the workplace is carried out in a manner such that the employees are not exposed to hazards.

(2) In determining the training required to be provided in accordance with subsection (1)(b) regard shall be had to the functions performed by employees and the capacities in which they are employed.

154 Furthermore, ss 23F(5) and (6) provide that a worker carrying out work for a client of an agent has "the duties of an employee under s 20", "as if" each of the agent and the client were the employer of the worker and the worker were an employee of each of the agent and the client.

155 Section 20 of the OSH Act provides:

20. Duties of employees

(1) An employee shall take reasonable care —

(a) to ensure his or her own safety and health at work; and

(b) to avoid adversely affecting the safety or health of any other person through any act or omission at work.

(2) Without limiting the generality of subsection (1), an employee contravenes that subsection if the employee —

(a) fails to comply, so far as the employee is reasonably able, with instructions given by the employee's employer for the safety or health of the employee or for the safety or health of other persons; or

> (b) fails to use such protective clothing and equipment as is provided, or provided for, by his or her employer as mentioned in section 19(1)(d) in a manner in which he or she has been properly instructed to use it; or
>
> (c) misuses or damages any equipment provided in the interests of safety or health; or
>
> (d) fails to report forthwith to the employee's employer —
>
> (i) any situation at the workplace that the employee has reason to believe could constitute a hazard to any person that the employee cannot correct; or
>
> (ii) any injury or harm to health of which he or she is aware that arises in the course of, or in connection with, his or her work.
>
> (3) An employee shall cooperate with the employee's employer in the carrying out by the employer of the obligations imposed on the employer under this Act.

156 In the light of these provisions, Construct submitted that the Safety Induction Manual was no more than a re-statement of the obligations in s 19 of the OSH Act, and Mr McCourt, by agreeing to and acknowledging the conditions, was doing no more than simply complying with his obligations pursuant to s 20 of the OSH Act. Further, Construct asserted that to regard the Safety Induction Manual as contractual, would be to infer that the parties intended McCourt would be liable in damages for any breach of the obligations contained within it.

157 It is necessary to draw on the Full Court's observations in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCAFC 177; (2014) 231 FCR 403 (at 419–20 [52]–[53] per Allsop CJ, Rares and McKerracher JJ), where, in assessing whether a "Workplace Harassment and Discrimination" policy was contractual in nature, stated:

> It would be unlikely, Farstad contends, for this particular Policy to constitute a contractual component because there were already in existence bullying laws, work health and safety, Commonwealth and State occupational health and safety laws at the time of these events.
>
> However, the better view is to the contrary. The existence of legal obligations on the part of both parties, might be thought to be a good reason for contractually binding the parties to a specific method as to the manner in which those statutory obligations are to be observed. The legislation necessarily dictates that the obligations are serious, being an added reason why one would expect the promises to be binding.

158 The proposition is a sound one: there is no reason why an agreement between parties should be regarded as non-contractual to the extent that the provisions of that agreement mirror statutory obligations: see also *Gramotnev v Queensland University of Technology* [2015] QCA 127; (2015) 251 IR 448 (at 463 [52]–[53] per Jackson J, with whom McMurdo P and Holmes JA agreed). To state the issue in another way; it would be unsound for a court to deconstruct a

contract entered into by parties and render non-contractual any term which substantially encapsulates a statutory obligation.

159 Further, the argument that to take the Safety Induction Manual as contractual would be to infer that the parties intended Mr McCourt would be liable in damages for any failure to comply should not be accepted. As the Court further noted in *Romero v Farstad Shipping* (at 419 [51]):

> If the Policy is contractual and it is breached, Farstad argues, it would be an absurd result that every time an employee, or for that matter the employer, commits a minor breach, a cause of action in contract would accrue. That argument is without substance. Whatever the terms of a contract, each party is liable to the other if the former acts in breach of one of those terms. The legal remedy for breaches of contract that are trivial is nominal damages. No doubt a court that was called on to decide a claim for a single, trivial and inconsequential breach of contract would now approach the management of the proceedings and the award of costs with the provisions of Pt VB of the *Federal Court of Australia Act* and its analogues in mind. In a practical sense, parties in an ordinarily harmonious employment relationship will accept a measure of sensible give and take in their day-to-day dealings without resorting to asserting contractual exactitude from the other. That is not to say persistent and unaccepted, but individually trivial, departures from contractual promises could not be considered to be a substantive breach, as cases such as *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 show. However, the issue of what consequences might flow from a breach does not arise as a consideration of whether a particular matter was agreed to be a part of a contract, except, perhaps, to the extent that it might affect the objective assessment of whether the parties will be taken, in all the circumstances, to have intended that matter to express a binding and enforceable promise: cf *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95 at [24]-[25] per Gaudron, McHugh, Hayne and Callinan JJ.

160 I therefore accept that the Safety Induction Manual was contractual in nature and imposed obligations on Mr McCourt supplementing those outlined in the ASA. In any event, the time and effort spent on this contractual exercise was somewhat beside the point: on any view, the terms of the Safety Induction Manual (as well as those provisions of the Hanssen Induction Form and Hanssen Site Rules) formed part of the "totality of the relationship", and, giving weight to the High Court's reasoning in *Hollis v Vabu* (at 33 [24] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), are relevant to the characterisation inquiry.

F.1.2 The Application (and Importance) of the "Control" Indicium to the Characterisation of the Present Arrangement

161 This necessarily feeds into the overarching submission put by the CFMMEU, namely that, with these factors in mind, the primary judge erred in concluding that: (1) it was Hanssen who had the "ultimate authority" over Mr McCourt and not Construct; (2) what is significant is that Mr McCourt was subject to a high degree of subordination, not who possessed the right of control over him; and (3) further, or alternatively, in the context of trilateral arrangements, the lack of

control by Construct is not a significant indicator of the character of the contract and overall relationship between the parties.

162 On the question of whether Construct had "ultimate authority" over Mr McCourt, senior counsel for the CFMMEU asserted that the primary judge erred in concluding (at J[136]–[138]) that cl 4(a) and (c) of the ASA did not vest a right of control or direction in Construct. These provisions provide that:

> The Contractor shall:
>
> (a) Co-operate in all respects with Construct and the builder in the supply of labour to the Builder; [and]
>
> …
>
> (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 …

163 The CFMMEU contended that these obligations required Mr McCourt to supply his labour and co-operate with Hanssen; in effect, the way in which Mr McCourt earned remuneration under this agreement was by way of the attendance and supply of labour in a manner which "[c]o-operate[s] in all respects". It was put that if Hanssen had ultimate authority to direct every aspect of the work of Mr McCourt, then that authority was derived from a power to direct in cl 4(a) and (c) of the ASA between Construct and Mr McCourt.

164 Further, during the course of oral submissions, senior counsel for the CFMMEU also pointed to cl 4 of the LHA (see [47] above), to highlight the importance of the subordination of Mr McCourt in the labour hire arrangement.

165 The CFMMEU submitted that a right to control that has, in law or in practice, been delegated or devoted to a third party is still control in the relevant sense, noting that the LHA between Construct and Hanssen, by virtue of cl 4, gave control to the latter: see, for example, *Attorney-General (NSW) v Perpetual Trustee Company* (at 299–300 per Kitto J); *Swift Placements v WorkCover Authority of New South Wales* (at 91–2 [43]–[44] per Wright P, Walton VP and Hungerford J). It was also submitted that it was necessary for Mr McCourt to be controlled as to what and how work was done as this went to the very heart of the services proffered by Construct to its clients; the provision of subordinated labour. Indeed, it was argued that the practical reality was that Construct could not provide labour to be "under the … direction and supervision" of Hanssen unless Construct possessed such a right in relation to Mr McCourt.

The CFMMEU further contended that the Safety Induction Manual, Hanssen Induction Form and Hanssen Site Rules imposed on Mr McCourt an obligation owed to Construct to obey the directions given by Hanssen. On this basis, the CFMMEU argued that the primary judge erred in concluding that Mr McCourt's obedience to daily directions as to what and how tasks were to be performed was not relevantly control on the part of Construct and that the exercise of control by Hanssen, and the purported lack of such exercise by Construct, contra-indicated employment.

166 Three core arguments were mounted against the CFMMEU's control arguments.

167 *First*, counsel for Construct identified a number of authorities to support the primary judge's conclusion that generally expressed obligations to co-operate, to turn up for work at a nominated hour, and to work safety, completely and diligently are of neutral consideration: *Personnel Contracting v CFMEU* (at 40–1 [40] per Steytler J); *Gupta v Porter Pacific* (at [66] per Ross P and Hatcher VP); cf *Personnel Contracting v CFMEU* (at 43 [49] per Heenan J). Counsel also identified a number of authorities supporting the fact that cl 4 of the LHA did not vest a right of control in Construct: *Odco Trial* (at 94); *Tasmanian Contracting Services v Young* [2011] TASSC 49 (at [19] per Evans J); cf *Country Metropolitan Agency Contracting Services v Slater* (at 311 [49]–[50] per McCusker DPJ). With respect, extracting references to clauses in other, albeit similar, arrangements in this way was not particularly helpful.

168 *Secondly,* and perhaps exhibiting a tension with the first point, is the contention that the ASA must be construed as a whole, and that even if cl 4(a) and (c) did manifest a right of control by Construct, these provisions were overbore by the sheer number of references to Mr McCourt being "self-employed" and a "contractor". The same contention was made in relation to the LHA, in that cl 4 must be construed with regard to cl 1 and 5, which echo Construct's role as an "administrative services agency, liaising between the *client* and self-employed *contractors*" and that Construct "is not preforming the services required of our *contractors*; but is instead the referrer of contractors, to perform work at the *client's* request". For my part, it strikes me as quite odd that the studied repetition of certain terms in an agreement should somehow dominate a principled analysis of its operative and substantive provisions: see *R v Foster; Ex parte Commonwealth Life (Amalgamated) Assurances Limited* [1952] HCA 10; (1952) 85 CLR 138 (at 151–2 per Dixon, Fullagar and Kitto JJ).

169 *Thirdly*, prefaced on an understanding that a contract is formed each time Mr McCourt accepts an offer of work at a particular site and that that contract incorporates the terms of the ASA as

well as anything that is said orally, Construct submitted that there was no need for Construct or Hanssen to have a legal right to control Mr McCourt. This is because under the contract, Hanssen had the power to admit or not admit Mr McCourt to the site, as well as the express power, which was ultimately exercised, to terminate the contract. On this basis, it was asserted that Mr McCourt simply complied with the directions given by Hanssen on the site "because he wanted to work". Hence, a right of control on the part of either Construct or Hanssen would not only be inconsistent with the other terms of the ASA but was also unnecessary, there being no reason for Construct or for Hanssen to have a legal right to control Mr McCourt any more than there would be for Construct or Hanssen to have a legal right to control other independent contractors on the site. This submission ought to be rejected. As Counsel for the CFMMEU correctly noted, the "availability and use of effective sanctions to deal with non-performance is a manifestation of control" (D3, T56.26–7), or to put the matter more bluntly, it is like "providing a loaded gun and saying, "I'd like you to sweep up, otherwise I will shoot you"" (D3, T57.3–4). In substance, the threat of termination on short notice is a manifestation of control: *On Call Interpreters* (at 136 [264] per Bromberg); *Personnel Contracting v CFMEU* (at 43–4 [51] per Heenan J); *J A & B M Bowden & Sons v Chief Commissioner of State Revenue* (at 70 [26], 74–5 [74], 75–6 [80] and 76 [83] per Ipp AJA, with whom Giles and Hodgson JJA agreed).

170 In the very detailed submissions of Construct, it seemed to me that sight of the overall question was lost. There is no doubt that the current arrangement has been artfully structured so that no contractual relationship is said to exist between Mr McCourt and Hanssen, and also so that minimal interaction occurs between Mr McCourt and Construct. The corollary to this is that the search for "control", being the ability of the putative employer (Construct) to exercise rights over the putative employee (Mr McCourt), is placed in fundamental tension. But the creation of this tension, to put it frankly, is the whole purpose of this arrangement; to ensure that the relationship reflects as little as possible one of employment. It may be that when one construes the arrangement, one is able to locate an implied right to terminate the arrangement by Construct, or that Construct, by supplying workers that will comply with the directions of its builder clients, means those workers are in a subordinate position to the labour hire agency. However, the bottom line is that this whole discussion, and the several hours spent on it in oral submissions, does not really progress matters. It is a further example of the danger in allowing form to dominate substance in this area of discourse. As I outlined above, examination of the

control indicium can and may, particularly the context of trilateral relationships, yield a neutral result.

F.1.3 Other Relevant Grounds

171 Counsel for the CFMMEU also pursued two other grounds of appeal that can be discussed under the banner of "control".

172 *First*, that the primary judge erred (at J[143]) by erroneously accepting that stability and continuity are a central part of every contract of employment extending over a period of time and that the right to reject work contra-indicated control and employment. Counsel for the CFMMEU submitted that cl 5(c) of the ASA, which gave Mr McCourt the "right" to terminate the engagement on four hours' notice, read together with cl 4(c), which required Mr McCourt to "supply to the builder … labour for the duration required", provided stability in the engagement. This was supplemented by the fact that Mr McCourt was not called up each day to be re-engaged by Hanssen; he was called up on one day and continued working until he decided to end that engagement by going on a holiday. Further, Mr McCourt's freedom was attenuated in the sense that he was required to inform Hanssen, by virtue of the Hanssen Site Rules, when he wanted time off for a holiday, when he was running late, when he was sick, and he did so. Hence, it was argued that once Mr McCourt accepted an offer of work he was not "free to accept or reject work" as he wished as outlined in the FAQ Document.

173 Further, although the case was run on the basis that Mr McCourt was employed on an ongoing basis, it was asserted that in the event he was found to be a casual employee, the absence of a firm commitment to perform work according to an agreed pattern is the *essence* of casual employment: see *WorkPac v Skene* (at 571 [153], 574 [169] and 575 [172] per Tracey, Bromberg and Rangiah JJ); *WorkPac v Rossato* (at [31] per Bromberg J). Indeed, senior counsel for the CFMMEU asserted that given the FWA defines employee as including a reference to a person who is "usually such an employee", this extends the meaning of the term to include casuals who do not have continuity of engagement: s 15(1)(a) of the FWA; see *National Tertiary Education Industry Union v Swinburne University of Technology* [2015] FCAFC 98; (2015) 232 FCR 246 (at 256–7 [32] per Pagone J).

174 *Secondly,* that the primary judge erred (at J[146]) in finding that there was a right under the ASA to work for others, and that entitlement contra-indicated employment. It was submitted that the ASA conferred no such right and that while the requirement to work exclusively for one employer certainly indicates employment, the absence of such requirement does not of

itself contra-indicate employment: see *Sgobino v State of South Australia* (1987) 46 SASR 292 (at 308 per Matheson J, with whom Cox J generally agreed at 293). The proposition was made that casual employees are entitled to go and work for whomever they like. As counsel put it, one might "work Monday at McDonalds, and Tuesday at Dominos, and the fact that they're not restrained from doing so doesn't make them any more or less an employee of one or the other" (D2, T53.12–4). Further, it was impracticable for Mr McCourt to be employed elsewhere as he usually worked over 48 hours per week over six days, the work was manual labour and when at work, McCourt was unable to use his phone. Lastly, it was submitted that if there was an exclusive service clause restricting the right to work for others then it would have been an unreasonable restraint in the absence of a promise by Construct to provide work: see *Capital Aircraft Services Pty Ltd v Brolin* [2007] ACTCA 8 (at [26]–[27] per Higgins CJ, Crispin P and Madgwick J).

175 I would agree that by virtue of the requirements in the ASA in having to provide notice to end the engagement and supply labour for the duration required by the builder, there was an exercise of control by Construct over Mr McCourt, who, by virtue of obligations placed upon him, was in a position of subservience to Construct. I would also agree that, in relation to the second ground, the primary judge erred in concluding that "the right under the ASA to work for others" contra-indicated a finding of employment. However, these factors form part of the qualitative whole and are not of any decisive significance. Nor are the minutia listed by Construct in its notice of contention, including the fact that Construct did not provide Mr McCourt with tools or protective equipment and that Mr McCourt had very little interaction with any representatives from Construct during the time he worked at Hanssen's sites.

F.2 Business on Own Account

176 Senior counsel for the CFMMEU, in line with existing authority, recognised that answering the question of whether the putative employee is "conducting a business on his or her own account" as a prelude to the multi-factorial approach, does not appear to be consistent with the reasoning in *Stevens v Broddibb* or the way in which the characterisation inquiry was approached in *Hollis v Vabu*. Instead, the alleged error of the primary judge was that this factor was not afforded sufficient weight.

177 The CFMMEU asserted that in a multi-factorial test involving the balancing of various factors, the weight to be given to any particular factor is to be guided by the purpose of the inquiry. In doing so, the CFMMEU highlighted that the meaning of employment within the FWA is

defined by reference to its "ordinary meaning": s 15 of the FWA. That is the meaning contemplated by the common law (*C v Commonwealth* (at 87 [34] and [36] per Tracey, Buchanan and Katzmann JJ)), which, as seen above (at [63]), is in turn based on the distinction drawn in the law governing vicarious liability. Employing this line of reasoning, the CFMMEU argued that the matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability therefore guide the characterisation inquiry (see also *Hollis v Vabu* (at 41 [45] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ)), namely, the distinction between the two types of relationships: a relationship of *independence* and a relationship of *service*.

178 The CFMMEU identified two of these fundamental concerns underlying the doctrine of vicarious liability as: (1) enterprise risk; and (2) agency. The *first* being that liability is imposed because the act which causes injury or loss falls within the ambit of the risk that the employer's enterprise creates or exacerbates; such liability not arising when a worker is conducting an independent business. The *second* grounding the imposition of liability because the employee is the agent of the employer acting on its behalf, and for its purposes. On these underlying concerns, see *Colonial Mutual Life Assurance Society Limited v Producers and Citizens Co-operative Assurance Company of Australia Limited* [1931] HCA 53; (1931) 46 CLR 41 (at 48–9 per Dixon J, with whom Rich J agreed at 47); *Deatons Proprietary Limited v Flew* [1949] HCA 60; (1949) 79 CLR 370 (at 380–2 per Dixon J); *Scott v Davis* (at 418–9 [253] per Gummow J); *Sweeney v Boylan Nominees* (at 170–1 [19]–[24] and 172 [29] per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Hollis v Vabu* (at 38–9 [39]–[42] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *State of New South Wales v Lepore* [2003] HCA 4; (2003) 212 CLR 511 (at 560 [128] per Gaudron J and at 591–2 [231] and 594 [239] per Gummow and Hayne JJ).

179 Upon this foundation, the CFMMEU asserted that the distinction between employee and independent contractor, in part, is found in the fundamental distinction between those who carry on their own business and those who serve another. In this sense, it was argued that the in business on one's own account test should assume a central focus – an organising concept by which this employee and independent contractor distinction can be understood and by reference to which the factors can be weighed. That distinction is not in whose business and for whose benefit the work is done, but whether the worker is conducting his or her own business. This was posited as the "central" or "essential" question (D2, T43.34).

180 Three further related grounds of appeal were: *first*, the fact that Mr Court was an unskilled labourer was not considered in the multi-factorial inquiry; *secondly*, that the primary judge erred (at J[159]) by failing to find that the mode of remuneration indicated employment; and *thirdly*, that the primary judge erred (at J[164]–[165]) by concluding that Mr McCourt was not integrated into the business of Construct (in this regard, it was submitted that his Honour should have found that, quoting the plurality's reasoning in *Hollis v Vabu* (at 44–5 [57]), that Mr McCourt was "the very essence of the public manifestation of [Construct's] business"). Although I consider there is something to be said for the first and second of these points, the extraction and isolation of these minutia as some form of calculus distracts from the nuanced and impressionistic inquiry required.

181 While it is not strictly necessary to express a concluded view, I incline to the view that much could be said for the conclusion that insufficient weight was given to whether Mr McCourt was conducting a business on his own account. To my mind, in stepping back and having regard to the full picture, it is a surprising result to ascribe the label of independent contractor to a 22-year-old backpacker, turning up to a worksite to sweep the floors and take out the bins (in his hi-vis shirt and steel-capped boots he purchased down the street).

F.3 The Characterisation Terms

182 As was established throughout the course of the hearing, the term "categorisation terms" was used by the CFMMEU to refer to the way in which Construct had sought to characterise the nature of its relationship with Mr McCourt and the way in which this consideration should be weighed in the multi-factorial inquiry (as opposed to what one might at first glance take to be referring to the construction of the terms of the contract itself). Notwithstanding this observation, it was contended that even at a contractual construction level, the primary judge fell into error, as his Honour isolated those terms identifying Mr McCourt as "self-employed" and as a "contractor" from the instrument as a whole. This is because these terms failed in their purpose of establishing a non-employment relationship in the light of the other express terms that manifested control. Furthermore, it was asserted that even if all the express terms amounted to a characterisation of the agreement as one of independence, what followed was that the worker then started performing work in a position of subservience, rendering clauses which sought to categorise Mr McCourt as self-employed ineffectual.

183 This necessarily segues into the core submission made by the CFMMEU on this ground of appeal, namely that the primary judge erred in treating the characterisation terms as a

determinative "tie-break" factor in the multi-factorial inquiry. The CFMMEU submitted that the primary judge incorrectly drew a distinction between characterisation terms that are shams or pretences, and other characterisation terms which are to be given effect unless there is a "sufficient reason" to do otherwise. On this basis, the CFMMEU argued that his Honour's conclusion (at J[177]–[179]) that in "those circumstances where the question might be seen to be reasonably evenly balanced, and where any suggestion of sham or pretence is disavowed, 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", placed the categorisation terms in a higher category of importance; an approach inconsistent with the multi-factorial inquiry.

184 I have already explained above why I consider this submission of the CFMMEU as to the use of the characterisation terms ought to be accepted. But although, as I have explained, there are aspects of the approach taken by the primary judge which were, with respect, problematical, this is an appeal against orders, not reasons.

G CONCLUSION

185 There exists tensions in the application of the multi-factorial approach to new and novel labour arrangements and there is force in the criticisms advanced by the CFMMEU of the current state of the law. While the above reasoning demonstrates that if approached *tabula rasa*, I would have concluded the notion of Mr McCourt being an independent contractor is somewhat less than intuitively sound, the current circumstances demand more. The reality is that the arrangement the subject of this appeal is materially identical to that considered by the WAIAC in 2004. The importance of certainty means this Court ought not to depart from a decision in relevantly indistinguishable circumstances (being an evaluative decision that was open on the circumstances common to both cases). On the current state of the law, the judgment and orders made by the primary judge have not been demonstrated to be erroneous and, as a consequence, the appeal must be dismissed.

186 I would, however, make the three concluding remarks.

187 *First*, the multi-factorial approach has now long been accepted as a satisfactory (albeit, imperfect) way of distinguishing between relationships of *independence* and of *service*. As was noted by the plurality in *Sweeney v Boylan Nominees* (at 173 [33]), the employee-independent contractor distinction is "too deeply rooted to be pulled out". Yet, as this inquiry,

which produces a binary outcome, is forced to accommodate and respond to new and novel labour relationships, it might be thought that its limitations become more apparent.

188 *Secondly*, although a sensible and robust view has prevailed in the context of *bilateral* arrangements (reflecting the prevalence of disguised employment and the inequality that often exists between contracting parties), it strikes one as odd, that in the context of *tripartite* relationships, a degree of formalism and a deference to so-called "voluntary" stipulations retains such resilience (as the submissions in this appeal demonstrate). It is possible that this is changing, and the ultimate consequence of the plurality's focus in *Hollis v Vabu* (at 42 [48] and 44–5 [57]) on intuition and realism means (as the authors of *Creigton & Stewart's Labour Law* (6th ed, The Federation Press, 2016 (at 259), suggest) that the "the days of the Odco system may be numbered". Given that contractual obfuscation is just as likely to be prevalent in the context of tripartite relationships as in the case of bilateral relationships, the focus of Heenan J in *Personnel Contracting v CFMEU* (at 44 [52]) on the "substance of the relationship and not its form" has real resonance.

189 *Thirdly*, to adopt an approach different to that evident in the majority decision in *Personnel Contracting v CFMEU* raises potentially large questions as to the role of the common law conception of employment and the suitability of what might be described as a "purposive approach" to the employment concept adopted in a number of North American authorities: see Bomball P, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42 *University of Melbourne Law Review* 372. As Perram J observed in *ACE Trial* (at 542–3 [27]–[28]), a case involving a claim by a group of workers to leave entitlements, the statutory question of whether workers were employees was answered by reference to the common law conception of employment and this was unaffected by the purposes underpinning any statute that engaged the concept. However, it might be thought that this approach may not sit happily with cases such as *Day v The Ocean Beach Hotel Shellharbour Pty Ltd* [2013] NSWCA 250; (2013) 85 NSWLR 335 (at 341–2 [15] per Leeming JA, with whom Meagher and Emmett JJA agreed) and *Tattsbet v Morrow* (at 50 [5] per Allsop CJ, with whom White J agreed) which placed emphasis on the particular purpose of the statute in the characterisation inquiry (be it for tax, superannuation, or employment rights purposes). The extent to which the specific purposes underpinning a statute, rather than the common law conception (underpinned, as it is, by notions of vicarious liability), should factor in the multifactorial inquiry of characterisation, raises important questions beyond the scope of this judgment.

I certify that the preceding one hundred and forty-eight (148) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lee.

Associate: 

Dated: 17 July 2020