[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

ABDALLA v VIEWDAZE PTY LTD

Lawler VP, Hamilton DP, Bacon C

14 May 2003

Termination of Employment — Jurisdiction — Employee or independent contractor — Appeal — Degree of control of person — Economic reality — Summary of law on distinguishing employees from independent contractors — Consideration of matters suggesting employment relationship and matters suggesting independent contractor — Indicia pointing in both directions — Absence of control to be given substantial weight — Onus — Evidence suggesting that appellant was conducting his own business — Appeal dismissed — Workplace Relations Act 1996 (Cth), s 170CEA.

Employee — Employee or independent contractor — Termination of employment — Jurisdiction — Principles — Degree of control — Other indicia — Onus

THE COMMISSION.

Introduction

1 It is a matter of concern to us that this is the fourth hearing in relation to an application for relief made by Mr Abraham Abdalla under s 170CE of the *Workplace Relations Act 1996* (the Act). These hearings have all related to a preliminary jurisdictional objection taken by the respondent, Viewdaze Pty Ltd. What could be termed the merits of the s 170CE application and the alleged termination of employment have not yet been heard.

2 The application was filed on 24 April 2002. On 12 July 2002 Foggo C dismissed the matter on jurisdictional grounds. Mr Abdalla appealed that decision. On 24 September 2002 a Full Bench of this Commission allowed the appeal[1] and determined that the application would be directed to a member of the Commission to rehear.

3 The matter was referred to Drake SDP, who reheard the matter and handed down a decision[2] on 10 December 2002 dismissing the s 170CE application on jurisdictional grounds. Mr Abdalla appealed against this decision, and the appeal was before us on 17 February 2003.

4 We first note that the Bench said in its 24 September 2002 decision that:[3]

> ''Each of the parties should give earnest consideration to being represented at the rehearing by a person who will not be required to give

[1] Unreported, AIRC, Full Bench, PR922818, 24 September 2002.
[2] Unreported, AIRC, Full Bench, PR925347, 10 December 2002.
[3] Unreported, AIRC, Full Bench, PR922818, 24 September 2002 at [6].

evidence in the matter. In our view, to do otherwise, may affect the proper presentation of their cases.''

5 Notwithstanding this suggestion both parties continued to represent themselves in the subsequent proceedings before Drake SDP and before us. This has in both cases made the determination of the matter more difficult, and has hindered the parties in the presentation of their cases.

6 This is particularly the case given the nature of these proceedings. This matter concerns a relatively new procedural provision of the Act introduced in 2001, s 170CEA, a provision which, in its application, raises particular difficulties which perhaps have not been well understood. It also concerns a jurisdictional objection which raised difficult issues of fact and law.

The decision under appeal

7 As directed, Drake SDP heard the matter and on 10 December 2002 her Honour delivered a decision just over one and a half pages in length finding for the respondent and dismissing Mr Abdalla's application on jurisdictional grounds. Her Honour's consideration of the evidence and analysis of the issue for determination was as follows:

> ''7. The case presented by the applicant was rambling, and for the most part not relevant to the issues in dispute, even making allowances for the fact that he was self represented. The applicant focused on the evidence of the respondent as to the arrangements between them and whether or not those arrangements amounted to a breach of the legislation governing the conduct of the licensing of travel agents.
>
> 8. He submitted that any consultancy arrangement between the respondent and himself as an unlicensed person would be a breach of the relevant Act. Therefore he must be an employee.
>
> 9. Wherever the evidence of Mr Abdalla and Mr Vella differs in relation to the arrangements between the parties I accept the evidence of Mr Vella.
>
> 10. I have not attempted to determine whether or not the arrangements relied on by Mr Vella breach any legislation relevant to the conduct of travel agents. I am not persuaded that that issue is determinative of any matter before me.
>
> 11. I find that Mr Abdalla was a travel consultant who occupied business space at the respondent's premises and was paid a commission by the respondent arising from business conducted by him at those premises. Whilst the contract between the parties is entitled 'Employment Contract' (Exhibit Vella 1) it defines the applicant's services at clause 1(c) as those of any (sic) independent agent.
>
> 12. I find that the use of that title 'Employment Contract' simply reflects a careless or non technical use of language. I accept that the day to day arrangements between the parties are as described in paragraph 1(c) of Exhibit Vella 1.
>
> 13. I could not identify any evidence that established to my satisfaction an employment relationship between the applicant and the respondent.
>
> 14. However, had I been persuaded that Mr Abdalla had an employment relationship with the respondent I would not have been persuaded that any action taken by the respondent was responsible for the termination of that relationship or arrangement.
>
> 15. I accept Mr Vella's evidence and I find that the arrangement between

the parties ceased as a result of Mr Abdalla's refusal to accede to repeated requests by the respondent and his financial representatives that he comply with the legislative requirements of the goods and services tax.''

The evidence before Drake SDP

8 Mr Abdalla pointed to the following items of evidence in support of his oral evidence as to his status as an employee of Viewdaze Pty Ltd:

(1) A contract of employment dated 1 July 1998 entitled ''Employment Contract'' in the form of a letter as follows:

> ''*EMPLOYMENT CONTRACT*
>
> Dear Abraham,
>
> I have pleasure in confirming your employment with Malta travel service.
>
> Your employment with this agency will be on the terms and conditions contained in this letter.
>
> Please find this employment contract as agreed to prior to take over.
>
> *1. Position and Duties*
>
> (a) your commencing position (Independent agent)
>
> (b) Your duties and responsibilities are to meet the requirements of Malta travel service as an independents [sic] agent.
>
> (c) Your employment is ongoing from CIANTAR BROS PTY LTD to VIEWDAZE PTY LTD ACN NO 056 984 000 licence no 32220 Trading as MALTA TRAVEL SERVICE.
>
> *2. Salary*
>
> (a) you are not on a gross weekly salary.
>
> (b) your remuneration may be reviewed by this agency BY MUTUAL AGREEMENT.
>
> *COMMISSIONS*
>
> (a) You will be paid a monthly commission based on the following formula:
>
> 80% of gross commission sales created or listed by you.
>
> (b) except insurances sales where you will pay 20% of your commissions to us.
>
> . . .
>
> I Confirm that I accept the offer of employment by 'MALTA TRAVEL SERVICE' in the terms set out in this letter of agreement.
>
> Signed: ..... Date: .....
>
> *Mr A Abdalla*''

(2) A letter from the bookkeeper of Viewdaze Pty Ltd, dated 21 October 2002 in the following terms:

> ''Prior to August 2000 Abraham Abdalla was a casual employee being paid on a commission basis via the payroll system.
>
> On Abraham's return in March 2001, we requested him, on a monthly basis, to provide us with tax invoices with an ABN for processing. Until he received his ABN we advanced him $1000 per month to assist with his cash flow. The remainder was to be paid when commission was reconciled and finalised by a tax invoice for 80% of total commission earnt, the balance paid being 80% of total commission earnt less the advance of $1000.''

[It should be noted that this document was in fact tendered by Mr Vella on behalf of the respondent.]

(3) An Australian Taxation Office employment declaration dated 20 December 1999 and signed by Mr Vella on behalf of the ''employer'' Viewdaze Pty Ltd. This document identifies Mr Abdalla as a casual employee.

(4) A group certificate issued by Viewdaze Pty Ltd for the 2000 financial year which identifies Mr Abdalla as employee number 29 and records gross payments $22,422 with tax deducted of $4,640 (apparently as group tax deducted and remitted by Viewdaze Pty Ltd).

(5) A Malta Travel Service business card identifying Mr Abdalla as ''Corporate Manager''.

(6) Documents suggesting that Viewdaze Pty Ltd had at one time been making superannuation contributions on Mr Abdalla's behalf.

9 It was common ground between the parties that Mr Vella did not receive a wage but rather was paid by commission: the commission earned on bookings placed by Mr Abdalla was split 80% to Mr Abdalla and 20% to Viewdaze Pty Ltd. Relevant to the issue of Mr Abdalla's employment status Mr Vella's evidence was short in compass:[4]

> ''MR VELLA: Your Honour, when I took over the business name of Malta Travel back in 1 July 1998 Mr Abdalla was working as an independent agent in that agency with the owners of that company at the time. He was on an arrangement with this company. He takes business to the office and he was receiving 70 per cent of the Commission. That is me, 70 per cent of the total Commission received was being given to Mr Abdalla and 30 per cent was being kept by the previous owners of that company.
>
> When I came in on 1 July 1998 I spoke to Mr Abdalla prior to taking over the business name, if he was happy to stay on and work with our company, which of course he wanted to. So we came to an agreement that I offered him 80 per cent of the Commission if he wants to keep bringing business to that office. So Viewdaze Pty Ltd took over the business name of Malta Travel and started operation in Melbourne 1 July '98. Mr Abdalla was happy to work under that basis, that he was a freelance operator, that he always has been and this was verified by himself, by the previous owners, by the previous directors of the other company. One of them passed away but his wife is still alive, which has just been verified that that was the agreement that they had with him.
>
> THE SENIOR DEPUTY PRESIDENT: So are you saying you verified that prior to commencement of taking over the business?
>
> MR VELLA: Yes, correct. So what we did, it was a very happy arrangement. It was very happy to stay and get 80 per cent of his commission and an agreement was drawn up stating so, that I had no control on his hours, he comes whenever he likes. He can go walkabout for three months, two months, three weeks. The more business he brings in the more money he makes. If he turns over $100 commission we keep $20. That entitled me to $20 was to cover my faxes, my telephones, my computer systems, my paperwork, which wasn't a really good agreement

[4] Transcript PN54-57; PN89-90.

> on my part but we stand by that agreement all the way through. So we worked on a commission basis —
>
> . . .
>
> MR VELLA: Commission. Everything is commission, your Honour. Now, our company, we abide by what we are told by our accountants. If there is any changes in law we have to abide to with whatever changes come in effect. On 1 July 2000 instructions were that an ABN number has to be produced. We were told that any payments goes out as commission, they must be followed by an ABN number, tax office, and this is why we are here today. The problem is not whether Mr Abdalla was an employee or otherwise.
>
> The problem is there was an agreement in place, there have been new changes to the company laws. We have to abide by the new changes, but Mr Abdalla refused to change according to the new laws any the new laws state any commission paid out we must have a tax invoice with an ABN number. Now, Mr Abdalla gave us his banking details. He has got a business name by the Univoyages. We are supposed to pay Univoyages and Univoyages gives us the tax invoice. It hasn't been forthcoming. We have been trying, not so much myself, my financial controller, my managers for a tax invoice at the end of each month.''

10 Mr Vella tendered a form entitled ''Payroll Authorisation — Banking Details'' completed and signed by Mr Abdalla which nominates a bank account with the name ''Univoyages'' and concludes with the declaration: ''I hereby agree and authorise the company to credit my Wages, Salary/Commission to my bank account each day.'' It might also be noted that a schedule of payments was tendered by the respondent (not apparently disputed by Mr Abdalla) which recorded total payments of Mr Abdalla in the six months prior to his termination of about $8,500.

Leave to appeal

11 An appeal to the Full Bench lies only by leave of a Full Bench: s 45(1). A Full Bench must grant leave to appeal if, in its opinion, the matter is of such importance that, in the public interest, leave should be granted: s 45(2). Otherwise, a grant of leave is governed by the conventional considerations for the grant of leave to appeal by an appellate court which include whether the decision is attended with sufficient doubt to warrant its reconsideration or whether substantial injustice may result if leave is refused.[5] However, ''[t]hese 'grounds' should not be seen as fetters upon the broad discretion conferred by s 45(1), but as examples of circumstances which will usually be treated as justifying the grant of leave'' although ''[i]t will rarely, if ever, be appropriate to grant leave unless an arguable case of appealable error is demonstrated. This is so simply because an appeal cannot succeed in the absence of appealable error''.[6]

12 Where an appeal turns on jurisdiction the Full Commission will be inclined to grant leave to appeal. The public interest demands that the Commission uphold its jurisdiction where it exists and declines jurisdiction where it does not

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[5] *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30].
[6] *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481 at [30].

exist. However, a grant of leave is not automatic in such cases.[7] Thus, in *Sammartino v Mayne Nickless*[8] a Full Bench, granting leave to appeal from a decision finding that an applicant was not an employee, noted at [20]:

> ''Our grant of leave to appeal in this case is not the product of an acceptance that a grant of leave to appeal should be automatic merely because a question of jurisdictional fact is determined in a s 170CE proceeding. The appropriate principles for determining leave to appeal do not preclude an Appeal Bench from taking the view that the grounds of appeal do not sufficiently establish an arguable case that an error was made in the determination of the jurisdictional point.''

13 The decision below makes no mention of any authority or principle by reference to which the conclusion that Mr Abdalla was not an employee was reached. It makes no reference to the evidence referred to in items (2), (3), (4), (5) or (6) in [8] above. In the circumstances, we conclude that the decision below is attendant with sufficient doubt to warrant its reconsideration. Accordingly, in the exercise of our discretion we grant leave to appeal in relation to the grounds directed towards the finding that was there was no employment relationship between the parties, namely grounds 1, 6, 7, 10, 12, 14, 15, 16 and 17. We address the remaining grounds below. Suffice it to say, we are not persuaded that leave to appeal ought be granted in relation to those grounds.

Role of the Full Bench on appeal

14 The decision of the High Court in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission*[9] makes it clear that an appeal under s 45 ''is properly described as an appeal by way of rehearing'', that the powers under s 45(7) ''are exercisable only if there is error on the part of the primary decision-maker'' and that this is so ''regardless of the different decisions that may be the subject of an appeal under s 45''.

15 The Commission's jurisdiction under s 170CE of the Act cannot be exercised unless the application has been made by ''an employee whose employment has been terminated by the employer''.[10] The issue raised by the respondent's motion under s 170CEA before the Member below was one of jurisdictional fact. As such, the Full Bench on appeal is concerned with whether or not the Member below reached the right conclusion as to the existence or otherwise of the jurisdiction fact, not simply with whether or not the decision was reasonably open to the Member.[11] Although, that task is to be undertaken on the basis of the primary facts as found by the Member below (and any findings as to credit) unless such findings are open to challenge on the usual appellate principles.[12]

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[7] See, for example, *Leigh Carpenter v Corona Manufacturing* (unreported, AIRC, Full Bench, PR925731, 17 December 2002).

[8] (2000) 98 IR 168.

[9] (2000) 203 CLR 194; 99 IR 309 at [17]. See also *Re Commonwealth of Australia; Ex parte Marks* (2000) 177 ALR 491 per McHugh J at [23].

[10] s 170CE(1) of the Act.

[11] *Pawel v Australian Industrial Relations Commission* (1999) 97 IR 392 at 395 (per Branson and Marshall JJ); *Administrative Clerical and Services Union v Automated Meter Reading Services* (unreported, AIRC, Full Bench, PR022053, 3 September 2002).

[12] Usefully summarised in *Fearnley v Tenix Defence Systems Pty Ltd* (unreported, AIRC, Full Bench, S6283, 22 May 2000).

Principles relevant to determining whether an employment relationship exists

16 In reading her decision, it is tolerably clear that her Honour's primary focus was on the issue of control and the apparent lack of control implicit in Mr Abdalla's approach to his work.

17 In *Bearings Incorporated (Australia) Pty Ltd*[13] a Full Bench of this Commission reviewed the relevant law at some length and concluded[14] that, despite various criticisms, the Commission is obliged to follow the approach laid down by the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd.*[15]

18 The traditional approach to characterisation was to apply a control test. In *Brodribb* Mason J, with whom Brennan J[16] and Deane J[17] relevantly agreed, addressed the factor of control, and issue of characterisation generally, in the following way:[18]

> ''A prominent factor in determining the nature of the relationship between a person who engages another to perform work and the person so engaged is the degree of control which the former can exercise over the latter. It has been held, however, that the importance of control lies not so much in its actual exercise, although clearly that is relevant, as in the right of the employer to exercise it: *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 402; *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404. In the last-mentioned case Dixon J said (at 404):
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> > 'The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.'
>
> But the existence of control, whilst significant, is not the sole criterion by which to gauge whether a relationship is one of employment. The approach of this Court has been to regard it merely as one of a number of indicia which must be considered in the determination of that question: *Queensland Stations Pty Ltd v Commissioner of Taxation (Cth)* [(1945) 70 CLR 539 at 552; *Zuijs'* Case; *Commissioner of Taxation (Cth) v Barrett* [at 401]; *Marshall v Whittaker's Building Supply Co* [(1963) 109 CLR 210 at 218]. Other relevant matters include, but are not limited to, the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee.''

19 Mason J returned to the issue to state:[19] ''. . . 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.''

20 His Honour also indicated that the power to delegate (in the sense of the

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[13] Unreported, AIRC, Full Bench, R4924, 2 July 1999.
[14] Uunreported, AIRC, Full Bench, R4924, 2 July 1999 at [70].
[15] (1986) 160 CLR 16.
[16] (1986) 160 CLR 16 at 47.
[17] (1986) 160 CLR 16 at 49.
[18] (1986) 160 CLR 16 at 24.
[19] (1986) 160 CLR 16 at 29.

capacity to engage others to do the work) is an important factor in deciding whether a worker is an employee or independent contractor.[20]

21 In their joint judgment their Honours Wilson and Dawson JJ said:[21]

> ''In many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant: *Montreal v Montreal Locomotive Works* [(1947) 1 DLR 161 at 169]. This has led to the observation that it is the right to control rather than its actual exercise which is the important thing (*Zuijs v Wirth Bros Pty Ltd* [at 571]) but in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed, at 552, that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.
>
> The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.
>
> Having said that, we should point out that any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.''

22 In many cases the application of the principles in *Brodribb* will not necessarily yield a clear answer. Typically this will be because there are ''indicia'' present which point both ways. The problem was acknowledged by Wilson and Dawson JJ in *Brodribb*:[22]

> ''The modern approach is, however, to have regard to a variety of criteria.

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[20] (1986) 160 CLR 16 at 26.
[21] (1986) 160 CLR 16 at 36-37.
[22] (1986) 160 CLR 16 at 35.

This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances.''

23 In *Sammartino* the Full Bench of the Commission said:[23]

''In considering whether Mr Sammartino is an employee we are obliged to apply what an earlier Full Bench has described as 'the relatively well established body of law setting out tests for the existence of a contract of service. The determination of whether a contract of service has been entered into requires a finding of fact based on the application of certain tests or indicia' (*Re Family Day Care Providers*, per Boulton and Munro JJ and Donaldson, 5 April 1991, Print J7216 at 2-4). In that decision the approach and indicia extracted, in the main, from *Stevens v Brodribb* were stated in terms that may be summarised as follows:

> 'It must first be established that work is being done by a person in performance of a contractual obligation to a second person. The possession by the second person of a right to exercise control over the way in which the work is carried out, and the degree of such control, are then to be examined and applied as prominent factors in distinguishing a contract of service from a contract for services.
>
> It is also clear that the totality of the relationship must be considered in determining whether the relationship between the [parties] is one of employer and employee or not [*Stevens v Brodribb Sawmilling Co Pty Ltd* per Mason J at 24]. . . .
>
> The characterisation of the relationship is made by assessing and putting in balance the relevant indicia. Consequently the decision making process requires reference to criteria for which no relative weight has been authoritatively determined [op cit; at 35-36 and 49]. . . .' (*Re Family Day Care Providers* at 3)

We have revised the list of the headings and matters to which that Full Bench had regard. In our view, the process for characterising any relevant contract between Mr Sammartino and Mayne Nickless requires findings to be made about the following matters as the basis for the overall assessment:

(1) the work performed;
(2) the existence of a contractual relationship and the identification of the main contractual terms;
(3) the indicia of an employment relationship;
  (a) degree of control;
  (b) mode of remuneration;
  (c) provision and maintenance of equipment or resources;
  (d) obligation to work;
  (e) delegation of work by contractor or exclusivity of performance;
  (f) hours of work and entitlements to leave;
  (g) provision for holidays;
  (h) deduction of income tax;

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[23] (2000) 98 IR 168 at [59]-[60].

(i) characterisation of relationship for purposes of regulatory provisions such as superannuation and workers compensation.''

24 In *Re Porter; Re Transport Workers Union of Australia*[24] Gray J observed perceptively:[25]

> ''A court determining whether a particular relationship is that of employment or of some other kind can therefore only resort to the process of balancing all of the factors, or as they are called in *Stevens v Brodribb Sawmilling Co Pty Ltd* and other cases, the 'indicia'. In truth the result may be a matter of impression. It is unfortunate that this is so. It should not be necessary for people to obtain a decision of a court, in order to know the true nature of their relationship. Unfortunate or not, that is the case.''

25 In *Treloar v Bearings Incorporated (Australia) Pty Ltd*[26] the Full Bench, after noting various judicial and academic criticisms of the conventional approach to distinguishing between employees and independent contractors, concluded:[27]

> ''Despite these criticisms we are obliged to follow the most recent leading authority — namely *Brodribb*. This requires us to have regard to a variety of criteria including the right to control and matters of economic reality including the level of economic dependence of one party upon another.''

26 While there is no reference in *Brodribb* to ''matters of economic reality including the level of economic dependence of one party upon another'', the subsequent decision of the High Court in *Hollis v Vabu Pty Ltd*[28] may be seen as providing the necessary content to which the notion of ''economic reality'' is directed.

27 In *Hollis v Vabu* the High Court was concerned with the vicarious liability of a city courier company in relation to an injury caused by the negligent riding of one of its bicycle couriers. The New South Wales Court of Appeal in earlier unrelated proceedings had held that the Vabu couriers were independent contractors rather than employees. The appellant in *Hollis v Vabu* (having accepted at the intermediate appellate stage the binding authority of that earlier Court of Appeal decision) had argued that the doctrine of vicarious liability should be extended to agents. The High Court granted leave to the appellant to argue that the Vabu couriers were employees. Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ in a joint judgment overruled the earlier Court of Appeal decision and held that the bicycle courier was an employee with the consequence that Vabu was vicariously liable for the negligence of its employee. McHugh J was disinclined to overturn the finding that the courier was not an employee. His Honour observed:[29]

> ''I am not in favour of extending the classical tests or their application to make the couriers employees of Vabu. To do so would be likely to unsettle

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[24] (1989) 34 IR 179.
[25] (1989) 34 IR 179 at 184.
[26] Unreported, AIRC, Full Bench, R4924, 2 July 1999.
[27] Unreported, AIRC, Full Bench, R4924, 2 July 1999 at [70].
[28] (2001) 207 CLR 21 at 49; 106 IR 80 at 100.
[29] (2001) 207 CLR 21 at 49; 106 IR 80 at 100.

many established business arrangements and have far-reaching consequences . . .''

28 Instead his Honour held that the doctrine of vicarious liability should be expanded: [30]

''Rather than attempting to force new types of work arrangements into the so-called employee/independent contractor 'dichotomy' based on medieval concepts of servitude, it seems a better approach to develop the principles concerning vicarious liability in a way that gives effect to modern social conditions.''

29 McHugh J concluded that in the specified circumstances Vabu was liable for the negligent acts of the courier as an agent acting within authority. It is important to note this approach because it highlights the apparent extension of traditional principles for distinguishing between employees and independent contractors implicit in the joint judgment.

30 It is necessary to set out a lengthy passage from the joint judgment: [31]

''In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* [(1931) 46 CLR 41], Dixon J explained the dichotomy between the relationships of employer and employee, and principal and independent contractor, in a passage which has frequently been referred to in this Court: *Kondis v State Transport Authority* [(1984) 154 CLR 672 at 691-692]; *Burnie Port Authority v General Jones Pty Ltd* [(1994) 179 CLR 520 at 574]; *Northern Sandblasting Pty Ltd v Harris* [(1997) 188 CLR 313 at 329-330, 366]. His Honour explained that, in the case of an independent contractor:

'[t]he work, although done at [the principal's] request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal.'

This statement merits close attention. It indicates that employees and independent contractors perform work for the benefit of their employers and principals respectively. Thus, by itself, the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. However, Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor. These notions later were expressed positively by Windeyer J in *Marshall v Whittaker's Building Supply Co* [(1963) 109 CLR 210 at 217]. His Honour 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'. In *Northern Sandblasting* [at 366], McHugh J said:

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[30] (2001) 207 CLR 21 at 50; 106 IR 80 at 101.

[31] (2001) 207 CLR 21 at 38-41; 106 IR 80 at 91-93.

> 'The rationale for excluding liability for independent contractors is that the work which the contractor has agreed to do is not done as the representative of the employer.'

In *Bazley v Curry* [[1999] 2 SCR 534 at 552-555], the Supreme Court of Canada saw two fundamental or major concerns as underlying the imposition of vicarious liability. The first is the provision of a just and practical remedy for the harm suffered as a result of the wrongs committed in the course of the conduct of the defendant's enterprise. The second is the deterrence of future harm (a matter discussed in 1934 by Seavey in his essay, 'Speculations as to ''Respondeat Superior''' [1934] *Harvard Legal Essays* 433 at 448), by the incentive given to employers to reduce the risk of accident, even where there has been no negligence in the legal sense in the particular case giving rise to the claim.

In general, under contemporary Australian conditions, the conduct by the defendant of an enterprise in which persons are identified as representing that enterprise should carry an obligation to third persons to bear the cost of injury or damage to them which may fairly be said to be characteristic of the conduct of that enterprise. In delivering the judgment of the Supreme Court of Canada in *Bazley v Curry* [at 548], McLachlin J said of such cases that 'the employer's enterprise [has] created the risk that produced the tortious act' and the employer must bear responsibility for it. McLachlin J termed this risk 'enterprise risk' and said that 'where the employee's conduct is closely tied to a risk that the employer's enterprise has placed in the community, the employer may justly be held vicariously liable for the employee's wrong' (*Bazley v Curry* at 548-549). Earlier, in *Ira S Bushey & Sons Inc v United States* [(1968) 398 F 2d 167 at 171], Judge Friendly had said that the doctrine of respondeat superior rests:

> 'in a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities.'

These notions also influence the meaning to be given today to 'control' as a discrimen between employees and independent contractors. In *Stevens v Brodribb Sawmilling Co Pty Ltd* [(1986) 160 CLR 16], the Court was adjusting the notion of 'control' to circumstances of contemporary life and, in doing so, continued the developments in *Zuijs v Wirth Brothers Pty Ltd* [(1955) 93 CLR 561] and *Humberstone v Northern Timber Mills*. In *Humberstone* [at 404], Dixon J observed that the regulation of industrial conditions and other statutes had made more difficult of application the classic test, whether the contract placed the supposed employee subject to the command of the employer. Moreover, as has been pointed out:

> 'The control test was the product of a predominantly agricultural society. It was first devised in an age untroubled by the complexities of a modern industrial society placing its accent on the division of functions and extreme specialisation. At the time when the courts first formulated the distinction between employees and independent contractors by reference to the test of control, an employer could be expected to know as much about the job as his employee. Moreover, the employer would usually work with the employee and the test of control and supervision was then a real one to distinguish between the employee and the independent contractor. With the invention and

> growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one.' [Glass, McHugh and Douglas, *The Liability of Employers in Damages for Personal Injury* (2nd ed, 1979), pp 72-73]

It was against that background that in *Brodribb* [at 29] Mason J said that, whilst these criticisms might readily be acknowledged:

> '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 Brothers Pty Ltd* [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.'

So it is that, in the present case, guidance for the outcome is provided by various matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability. These include, but are not confined to, what now is considered 'control'.''

31 Their Honours approached the position of the Vabu couriers in the following way:[32]

> ''In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. *Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations*. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu's business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees.'' (Emphasis added.)

32 Their Honours then identified six aspects of the facts supporting their conclusion that the bicycle couriers were employees including ''the matter of deterrence'' referring to ''the knowledge of Vabu as to the dangers to pedestrians presented by its bicycle couriers and the failure to adopt effective means for the personal identification of those couriers to the public''.[33]

33 We think it particularly significant that the joint judgment endorsed the proposition 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

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[32] (2001) 207 CLR 21 at 41-42; 106 IR 80 at 93-94.
[33] (2001) 207 CLR 21 at 43; 106 IR 80 at 95.

on a trade or business of his own'''.[34] In [47] their Honours dealt with the issue in the case before them by in essence asking whether, ''viewed as a practical matter'' the workers in question were ''running their own business or enterprise'' with ''independence in the conduct of their operations''.[35]

Summary of the law on distinguishing employees from independent contractors

34 Following *Hollis v Vabu*, the state of the law governing the determination of whether an individual is an employee or an independent contractor may be summarised as follows:

(1) Whether a worker is an employee or an independent contractor turns on whether the relationship to which the contract between the worker and the putative employer gives rise is a relationship where the contract between the parties is to be characterised as a contract of service or a contract for the provision of services. The ultimate question will always be whether the worker is the servant of another in that other's business, or whether the worker carries on a trade or business on his or her own behalf:[36] that is, whether, viewed as a practical matter, the putative worker could be said to be conducting a business of his or her own.[37] This question is answered by considering the totality of the relationship.[38]

(2) The nature of the work performed and the manner in which it is performed must always be considered. This will always be relevant to the identification of relevant ''indicia'' and the relative weight to be assigned to various ''indicia'' and may often be relevant to the construction of ambiguous terms in the contract.

(3) The terms and terminology of the contract are always important[39] and must be considered. However, in so doing, it should be borne in mind that parties cannot alter the true nature of their relationship by putting a different label on it.[40] In particular, an express term that the worker is an independent contractor cannot take effect according to its terms if it contradicts the effect of the terms of the contract as a whole:[41] that is, the parties cannot deem the relationship between themselves to be something it is not.[42] Similarly, subsequent conduct of the parties may demonstrate that relationship has a character contrary to the terms of the contract.[43] If, after considering all other matters, the relationship is ambiguous and is capable of being one or the other, then the parties can remove that

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[34] (2001) 207 CLR 21 at 39; 106 IR 80 at 92.

[35] (2001) 207 CLR 21 at 41; 106 IR 80 at 93.

[36] *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217 per Windeyer J approved by the majority in *Hollis v Vabu* (2001) 207 CLR 21 at 39; 106 IR 80 at 92; see also *Brodribb* per Wilson and Dawson JJ at 37.

[37] *Hollis v Vabu* (2001) 207 CLR 21 at 41-42, and 45; 106 IR 80 at 93-94, and 97.

[38] *Brodribb* esp Mason J at 29.

[39] *Brodribb* per Wilson and Dawson JJ at 37.

[40] ''The parties cannot create something which has every feature of a rooster, but call it a duck and insist that everyone else recognise it as a duck''; *Re Porter* (1989) 34 IR 179 at 184 per Gray J; *Massey v Crown Life Insurance* [1978] 2 All ER 576 at 579 per Lord Denning approved by the Privy Council in *AMP v Chaplin* (1978) 18 ALR 385 at 389.

[41] *AMP v Chaplin* (1978) 18 ALR 385 at 389.

[42] *Hollis v Vabu* (2001) 207 CLR 21 at 45; 106 IR 80 at 97.

[43] *AMP v Chaplin* (1978) 18 ALR 385 at 394.

ambiguity by the very agreement itself which they make with one another.[44]

(4) Consideration should then be given to the various ''indicia'' identified in *Brodribb* and the other authorities bearing in mind that no list of indicia is to be regarded as comprehensive and the weight to be given to particular indicia will vary according to the circumstances. Where a consideration of the ''indicia'' points one way or overwhelmingly one way so as to yield a clear result, the determination should be in accordance with that result. For ease of reference we have collected the following list of ''indicia'':

- *Whether the putative employer exercises, or has the right to exercise, control over the manner in which work is performed, place of work, hours of work and the like*[45]

  Control of this sort is indicative of a relationship of employment. The absence of such control or the right to exercise control is indicative of independent contract.[46] While control of this sort is a significant factor it is not by itself determinative.[47] In particular, the absence of control over the way in which work is performed is not a strong indicator that a worker is an independent contractor where their work involves a high degree of skill and expertise.[48] On the other hand, where there is a high level of control over the way in which work is performed *and* the worker is presented to the world at large as a representative of the business then this weighs significantly in favour of the worker being an employee.[49]

  ''The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.''[50]

  ''[B]ut in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty Ltd v Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.''[51]

- *Whether the worker performs work for others (or has a genuine and practical entitlement to do so)*

  The right to the exclusive services of the person engaged is characteristic of the employment relationship. On the other hand, if the individual also works for others (or the genuine and practical entitlement to do so) then this suggests independent contract.

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[44] *Massey v Crown Life Insurance* [1978] 2 All ER 576 at 579 per Lord Denning.
[45] *Brodribb*.
[46] Flows from the reasoning of Mason J in *Brodribb* at 24.
[47] *Brodbribb* esp Mason J at 24.
[48] *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 at 571.
[49] *Hollis v Vabu* (2001) 207 CLR 21.
[50] *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404 per Dixon J.
[51] *Brodribb* per Wilson and Dawson JJ at 36.

- *Whether the worker has a separate place of work*[52] *and/or advertises his or her services to the world at large*
- *Whether the worker provides and maintains significant tools or equipment*[53]

  Where the worker's investment in capital equipment is substantial and a substantial degree of skill or training is required to use or operate that equipment the worker will be an independent contractor in the absence of overwhelming indications to the contrary.[54]
- *Whether the work can be delegated or subcontracted*[55]

  If the worker is contractually entitled to delegate the work to others (without reference to the putative employer) then this is a strong indicator that the worker is an independent contractor.[56] This is because a contract of service (as distinct from a contract for services) is personal in nature: it is a contract for the supply of the services of the worker personally.
- *Whether the putative employer has the right to suspend or dismiss the person engaged*[57]
- *Whether the putative employer presents the worker to the world at large as an emanation of the business*[58]

  Typically, this will arise because the worker is required to wear the livery of the putative employer.
- *Whether income tax is deducted from remuneration paid to the worker*[59]
- *Whether the worker is remunerated by periodic wage or salary or by reference to completion of tasks*[60]

  Employees tend to be paid a periodic wage or salary. Independent contractors tend to be paid by reference to completion of tasks. Obviously, in the modern economy this distinction has reduced relevance.
- *Whether the worker is provided with paid holidays or sick leave*[61]
- *Whether the work involves a profession, trade or distinct calling on the part of the person engaged*[62]

  Such persons tend to be engaged as independent contractors rather than as employees.
- *Whether the worker creates goodwill or saleable assets in the course of his or her work*[63]

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[52] *Brodribb* per Wilson and Dawson JJ at 37.
[53] *Brodribb* per Mason J at 24.
[54] *Hollis v Vabu* (2001) 207 CLR 21; 106 IR 80 at [47] see also [58].
[55] *Brodribb* per Mason J at 24.
[56] *Queensland Stations Pty Ltd v Commissioner of Taxation (Cth)* (1945) 70 CLR 539; *AMP v Chaplin* (1978) 18 ALR 385 at 389.
[57] *Brodribb* per Wilson and Dawson JJ at 36.
[58] *Hollis v Vabu* at [50].
[59] *Brodribb* per Mason J at 24; Wilson and Dawson JJ at 37.
[60] cf *Brodribb* per Mason J at 24.
[61] as to paid holidays, see *Brodribb* per Mason J at 24.
[62] *Brodribb* per Wilson and Dawson JJ at 37.
[63] *Brodribb* per Wilson and Dawson JJ at 37.

- *Whether the worker spends a significant portion of his remuneration on business expenses*[64]

This list is not exhaustive. Features of the relationship in a particular case which do not appear in this list may nevertheless be relevant to a determination of the ultimate question.

(5) If the indicia point both ways and do not yield a clear result the determination should be guided primarily by whether it can be said that, viewed as a practical matter, the individual in question was or was not running his or her own business or enterprise with independence in the conduct of his or her operations as distinct from operating as a representative of another business with little or no independence in the conduct of his or her operations.

(6) If the result is still uncertain then the determination should be guided by ''matters which are expressive of the fundamental concerns underlying the doctrine of vicarious liability'' including the ''notions'' referred to in [41] and [42] of *Hollis v Vabu*.

Consideration

35 It is useful to begin by summarising the various matters relevant to the characterisation in the present case. The matters in favour of Mr Abdalla being an employee of the respondent are as follows:

- The various references to ''employment'' in the letter of 1 July 1998 which bears the subject heading ''Employment Contract''.
- The lodgment of an employment declaration, executed by Mr Vella on behalf of Viewdaze, with the Australian Taxation Office, the deduction and remittal of group tax and the issuing of group certificates in relation to Mr Abdalla and the suggestion that Viewdaze had at one time made superannuation contributions on behalf of Mr Abdalla.
- The letter from the respondent's bookkeeper dated 21 October 2002 recording that ''prior to August 2000 Abraham Abdalla was a casual employee being paid on a commission basis by the payroll system''.
- Mr Abdalla did not provide any business equipment but rather used the telephone, facsimile, computer and office facilities of the respondent when he was working.
- The provisions of the *Travel Agents Act 1986* (Vic).
- Mr Abdalla's inclusion as a ''consultant'' in the respondent's entry in an industry directory and the existence of business cards identifying Mr Abdalla with Viewdaze.

36 The matters suggesting that the relationship between the parties was one of independent contract are:

- The characterisation of Mr Abdalla's position and duties as one of ''independent'' agent in the letter of 1 July 1998.
- The absence of control by the respondent over the work performed by Mr Abdalla and his status as a ''freelance operator''.
- The payroll authorisation submitted by Mr Abdalla identifying an account styled ''Univoyages'' as the account to which payments of commission were to be credited.
- The non-payment of salary or wages.

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[64] *Brodribb* per Wilson and Dawson JJ at 37.

37 We turn now to consider the terms of the contract and weight to be given to the various factors. In so doing we note that Drake SDP made a credit based finding that she preferred the evidence of Mr Vella where it conflicted with the evidence of Mr Abdalla. We see no basis within the relevant principles to interfere with that finding.

The contract

38 The express written terms of the contract between the parties are contained in the letter of 1 July 1998 bearing the subject heading ''Employment Contract''. That document points in both directions. In favour of the relationship between the parties being one of employment, the letter refers to the respondent's ''pleasure in confirming [Mr Abdalla's] employment with Malta Travel Service'' and refers to the ''employment with this agency'' being on the ''terms and conditions contained in this letter'' and to Mr Abdalla's ''employment'' being ''ongoing'' from the previous owner of the business. On the other hand, the letter describes Mr Abdalla's position as ''Independent agent'' and his ''duties and responsibilities'' are ''to meet the requirements of Malta Travel Service as an ''*independents* [sic] agent''. These references to Mr Abdalla being ''independent'' must be given some meaning and content. On the evidence before Drake SDP, the only sensible meaning to be given to that word is that the parties intended[65] that Mr Abdalla had independence in the extent of work that he performed and the manner in which he performed that work.

Control

39 The key evidence of Mr Vella in relation to control was that:

> ''I spoke to Mr Abdalla prior to overtaking the business name, if he was happy to stay on and work with our company ... So we came to an agreement that I offered him 80% of the commission if he wants to keep bringing business to that office. ... Mr Abdalla was happy to work under that basis, that he was a freelance operator ... I have no control on his hours, he comes whenever he likes. He can go walkabout for three months, two months, three weeks.''

The absence of control indicated by this and other evidence given by Mr Vella is a significant indicator that the relationship between the parties was one of independent contract. Moreover, it is consistent with the references to ''independent'' agent in the letter of 1 July 1998.

Mode of remuneration

40 The contract provides that Mr Abdalla was ''not on a gross weekly salary'' but rather that he would be ''paid a monthly commission''. The fact that Mr Abdalla did not receive salary or wages but was paid by commission cannot be regarded as a particularly significant factor in the present case (notwithstanding that, at least for a period of some months, Mr Abdalla was paid a minimum amount of $1,000 per month irrespective of sales). In the modern economy many workers who can properly be characterised as

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[65] In the objective sense discussed in *Codelfa Construction Proprietary Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 per Mason J (with whom Stephen and Wilson JJ agreed) at 352.

employees earn remuneration on the basis of commission. For example, the couriers in *Hollis v Vabu Pty Ltd* received no wage or salary.[66]

41 The fact that Mr Abdalla nominated as an account for the payment of commission, an account styled ''Univoyages'' (a business name which on its face has travel industry connotations) points towards Mr Abdalla operating on the basis that he was conducting an independent business.

Payment of group tax etc

42 The lodgment of an ATO employment declaration, the deduction and remittal of group tax and issuing of group certificates and the apparent payment of superannuation contributions on Mr Abdalla's behalf are the strongest features suggesting a relationship of employment. However, they cannot be seen as determinative. A respondent may carelessly or mistakenly proceed on the basis that a worker is an employee when on a true analysis the relationship is one of independent contract. The lodging of an employment declaration, the deduction of group tax and the issuing of group certificates in such circumstances will simply be in error.

Other indicia

43 A number of the ''indicia'' referred to in the authorities have no application or are neutral in the present case.

44 The fact that Mr Abdalla used the respondent's office and facilities when he was working is a matter of relatively minor significance given the nature of the work involved.

45 While we agree with Mr Abdalla that the operation of the *Travel Agents Act 1986* (Vic) is a relevant matter to consider, it is a minor matter and does not weigh strongly in favour of a conclusion that Mr Abdalla was an employee.[67] We are prepared to assume that Mr Abdalla is correct when he contends that, given he held no licence, it would have been an offence for him to have acted as a travel agent otherwise than as an employee of another licence holder.[68] However, Mr Abdalla had himself drafted the letter of 1 July 1998 which creates the appearance that he was an employee (possibly so as to avoid this very exposure). Notwithstanding those appearances, the question before us turns on a substantive consideration of the totality of the relationship between the parties. Mr Abdalla's potential exposure under the *Travel Agents Act 1986* (Vic) has no bearing upon the presence or absence of other relevant indicia.

46 Mr Abdalla's inclusion as a ''consultant'' in the respondent's entry in an industry directory and the fact of business cards identifying Mr Abdalla as associated with the respondent adds little to the argument. We note that the term ''consultant'' (the term appearing in the industry directory) is ambiguous and is equally consistent with a relationship of independent contract.

47 The assertions by Mr Abdalla in his evidence that he was an employee carry no weight: they are assertions of a conclusion of mixed law and fact and are not probative. The bookkeeper's letter has little weight for the same reason. On its face, that letter was prepared in contemplation of the proceedings and can

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[66] *Hollis v Vabu* at [19].

[67] See the treatment of statutory regulation in *Re Family Day Care Providers* (unreported, AIRComm, Full Bench, Print J9218, 5 April 1991).

[68] Sections 4 and 6 of the *Travel Agents Act 1986* (Vic).

represent nothing more than the bookkeeper's (non-expert) understanding or belief as to Mr Abdalla's legal status.

48 Similarly, the assertions by Mr Abdalla in his evidence that the parties had agreed he was an employee have little probative value in the present case. As outlined above, the task of distinguishing between employment and independent contract is one of characterisation turning upon matters of substance (including substantive contractual rights and obligations) rather than form: labels applied by the parties cannot alter the substantive character of the relationship.

Conclusion

49 In this case the various indicia point in both directions such that the case falls close to the ill-defined dividing line between employment and independent contract. In our view, the absence of control emerging from the evidence is a matter to which substantial weight should be attached in the circumstances of the present case. On balance, the various factors to which we have referred tend more strongly to a characterisation of independent contract. The case is by no means clear cut and, accordingly, we must consider whether it can be said that, viewed as a practical matter, Mr Abdalla was or was not running his own business or enterprise with independence in the conduct of his business operations as distinct from operating as a representative of Viewdaze with little or no independence in the conduct of his operations. On the evidence before Drake SDP, we conclude that, viewed as a practical matter, Mr Abdalla was in substance running his own business enterprise with independence in the conduct of his operations. He was entirely free to work as little or as much as he liked. Consistent with a contractual right to act as an ''independent'' agent, he was not subject to any substantial measure of control by the respondent in relation to his attendance at work or the manner in which he performed his work. The evidence suggests that his work involved bringing his own business to the respondent's agency (rather than transacting business allocated to him by the respondent) and retaining the vast bulk of the commission generated from that business. The primary purpose of the relationship between the parties seems to have been to provide Mr Abdalla with a convenient vehicle through which to transact the business that he generated through his own sources and contacts with Viewdaze in return taking a small portion of the commissions thereby generated. It follows that, on the evidence before Drake SDP, the proper characterisation of the relationship between the parties is one of independent contract.

Other grounds of appeal

50 In relation to the remaining grounds of appeal we have determined that, in the exercise of our discretion, leave to appeal should be refused. For the reasons that follow we are not persuaded, in relation to those grounds, that the decision of Drake SDP is attended with sufficient doubt to warrant its being reconsidered by the Full Bench and we are not persuaded that substantial injustice will result if leave is refused. In our view, the matter is not of such importance that, in the public interest, leave to appeal should be granted pursuant to s 45(2) of the Act in relation to those remaining grounds of appeal.

Grounds 2, 3 and 21

''2. The Senior Deputy President erred in law in making a decision whilst proceedings in the High Court of Australia (Case No M194/2002) issued and served by the applicant were pending.

3. It was improper and or unreasonable and or a breach of the rules of natural justice for the Senior Deputy President to make a decision whilst High Court Proceedings were pending.

. . .

21. That it is not in the public interest in all the circumstances for the Senior Deputy President to make a decision when she knew or ought to have known that proceedings in the High Court of Australia relating to the case were pending.''

51 In the absence of a writ of prohibition or other order issued by the High Court or the Federal Court of Australia prohibiting or restraining the Commission from further hearing or determining a matter, the Commission is obliged to discharge its statutory functions and to hear and determine matters regularly brought before it. In the present case Drake SDP was entitled to proceed to issue her decision. There is no substance in grounds 2, 3 and 21.

Grounds 4 and 11

''4. The Senior Deputy President was not impartial and is biased.

. . .

11. The Senior Deputy President has prejudged the relationship and her reference to clause 1(c) of the Employment Agreement in her decision confirms the employment of the Applicant with the Respondent was ongoing and rolled over from Ciantar Bros Pty Ltd.''

52 We regard the grounds alleging bias or apprehension of bias against the Senior Deputy President as entirely lacking in merit. There is nothing in transcript which would sustain a finding of apprehension of bias. The appellant was unable to identify any specific matters which we would regard as making out an apprehension of bias within the meaning of the authorities. We have dealt with the contract above.

Grounds 5 and 8

''5. The Senior Deputy President erred in law in not ordering the Respondent to make available all documents material and relevant to the case available to the Applicant and the Commission.

. . .

8. The Senior Deputy President erred in law in allowing the Respondent to continue its case when it had wilfully and knowingly failed to comply with and was in breach of the Summons to Witness to Produce Documents issued by the Senior Deputy President on the 3rd October 2002.''

53 The applicant submitted a summons to the respondent requiring the production of 20 listed categories of documents. The respondent did not produce documents falling within many of those categories. In respect of some categories, the respondent produced only some of the documents falling within the categories. It is tolerably clear from the transcript that the respondent objected to the production of documents under the summons on grounds that

equate to relevance (ie lack of legitimate forensic purpose) and oppression. The Senior Deputy President went through each of the categories in the summons and adjudicated upon the question of whether the respondent ought be required to produce the documents in each category. The respondent subsequently complied to some extent with the determination of the Senior Deputy President. When a party to an application requests the issue of a summons the Commission is usually not in a position to consider, at that time, whether the summons is unreasonable, oppressive or otherwise liable to be set aside. The rules do not provide a specific procedure for a challenge to a summons to a person to attend and produce documents. The procedure to be adopted by the Commission is its discretion: see s 110(2)(a). Given that a summons is issued by the Commission it is within the power of the Commission to absolve the recipient from the obligation to comply with some or all of the summons. Ordinarily the Commission will entertain an objection to production by the recipient of the summons and ordinarily it would apply the principles generally applicable to the setting aside of subpoenas in the Federal Court.

54 In the present case, when the issue of compliance with the summons arose, the Senior Deputy President formed a judgment in relation to each category of documents as to whether or not the documents ought be produced or whether a more limited category of documents ought be produced. It appears that the respondent still did not produce all documents covered by the revised categories. In so far as the respondent failed to produce documents within categories in the summons that Drake SDP ruled should be produced the decision of the High Court in *Commonwealth Bank of Australia v Quade*[69] is relevant. In that case the High Court unanimously upheld a decision of the Federal Court ordering a new trial in a case where it came to light after the verdict at first instance that the defendant bank had failed to produce relevant documents pursuant to an order for discovery and where it was assessed that the result ''might'' have been different if the bank had produced those documents on discovery. The High Court held:[70]

> ''It is neither practicable nor desirable to seek to enunciate a general rule which can be mechanically applied by an appellate court to determine whether a new trial should be ordered in a case where misconduct on the part of the successful party has had the result that relevant evidence in his possession has remained undisclosed until after the verdict. The most that can be said is that the answer to that question in such a case must depend upon the appellate court's assessment of what will best serve the interests of justice, 'either particularly in relation to the parties or generally in relation to the administration of justice' (cf, eg, *McDonald v McDonald* (1965) 113 CLR 529 at 533, 542). In determining whether the matter should be tried afresh, it will be necessary for the appellate court to take account of a variety of possibly competing factors, including, in addition to general considerations relating to the administration of justice, the degree of culpability of the successful party (cf *Southern Cross Exploration NL v Fire & All Risks Insurance Co Ltd* (1985) 2 NSWLR 340 at 357), any lack of diligence on the part of the unsuccessful party and the extent of any likelihood that the result would have been different if the

[69] (1991) 178 CLR 134.
[70] (1991) 178 CLR 134 at 142-143.

> order had been complied with and the non-disclosed material had been made available. While it is not necessary that the appellate court be persuaded in such a case that it is 'almost certain' or 'reasonably clear' that an opposite result would have been produced, the question whether the verdict should be set aside will almost inevitably be answered in the negative if it does not appear that there is at least a real possibility that that would have been so.''

55 In our opinion this principle is applicable to proceedings in the Commission where a party fails to produce documents covered by a summons and this fact is not apparent at the time of the hearing. Where the non-production of documents covered by a summons is apparent at the time of the hearing the member conducting the hearing ought to address that issue. Usually this will involve requiring the defaulting party to produce the documents and considering whether the interests of justice require an adjournment to remedy any injustice which may arise from the other party not having had an adequate opportunity to consider the documents together with an order for costs against the defaulting party under s 170CJ(3). In the present case it appears that the respondent did not produce all documents covered by the summons as modified by Drake SDP and in failing to address that issue her Honour erred. The principle in *Commonwealth Bank v Quade* is applicable in such circumstances.

56 We are not persuaded that there is a real possibility that the documents which the respondent did not produce under the summons as modified by Drake SDP would have altered the outcome of the matter. A consideration of the categories in the summons and the assertions of the applicant in the transcript demonstrates that those documents could only have afforded further evidence that the applicant was treated as an employee for administrative purposes, including payment of salary and associated benefits and in relation to access to third party booking systems. Even assuming that to be so, it does not alter the conclusion we have reached on the primary issue of characterisation of the relationship between the parties.

Ground 9

> ''9. The Senior Deputy President erred in law in not allowing and or inviting the Applicant to cross-examine the Respondent when she specifically did so assist invite the Respondent in the course of the hearing at transcript PN478.''

57 The transcript shows that the procedure adopted by the Commission was to swear the respondent's representative, Mr Vella, and then permit him to ''address'' it (apparently from the bar table) about whether or not Mr Abdalla was an employee or not (PN 49). Mr Abdalla did not cross-examine Mr Vella. Ground 9 in the notice of appeal is directed to this aspect of the matter. In this context it is appropriate to note that the Commission said the following to the parties before any ''evidence'' had been given:

> ''. . . I think I might say this, if you both of you wish to instead of having to pop in and out of the witness box, you can at least make your opening statement from where you are seated and if that is your evidence you can before you do that swear to the truth of it, Mr Vella. Then if Mr Abdalla wishes to ask you some questions you can take the witness box and he can do so. Then, Mr Abdalla, if you wish to give some evidence you can take an affirmation and give that evidence from the bar table and then if

Mr Vella wishes to ask you some questions you can take the witness stand and he can ask you some questions from there.'' [71]

58 While it is true that the Commission did not invite Mr Abdalla to cross-examine Mr Vella, at the conclusion of Mr Vella's ''address'' (in which a number of documents were tendered) it is clear from what is recorded at transcript PN22 that Drake SDP had informed Mr Abdalla of his entitlement to cross-examine Mr Vella. It is true that there was no clear termination point to Mr Vella's evidence: it simply trailed into a series of exchanges between the bench and the parties culminating in her Honour's refusal to receive or take into account provisions of the *Travel Agents Act 1986* (Vic) which Mr Abdalla sought to invoke in aid of his defence to the respondent's motion. However, on balance we do not think that the Commission was in error in failing to remind Mr Abdalla as to his entitlement to cross-examine Mr Vella (although it would have been desirable for her Honour to have done so). This entitlement had been made clear to Mr Vella at the commencement of the proceedings. On the other hand, we do think that the matter illustrates again the general desirability of requiring parties who appear in person in a case where factual matters are contested to give their evidence from the witness box so as to minimise the confusion between evidence and submissions, facilitate the taking of objections and to make plain the opportunity for cross-examination by the other party.

Ground 13

''13. The Senior Deputy President erred in law in allowing the Respondent to give evidence of cheque butts when only a sample were produced for a short period of time and not all were produced as subpoenaed.''

59 In our opinion the cheque butts do not materially impact on the determination of the primary issue before the Commission. We have proceeded on the assumption that the further cheque butts if produced would have afforded further evidence that the appellant was paid commission from which tax was deducted as if he were an employee.

Ground 18

''18. The Senior Deputy President erred in law in not giving sufficient and or any weight to the Applicants Submissions dated 15 November 2002 including the request for a view of the workplace.''

60 There is no basis for concluding that the Senior Deputy President failed to take account of the applicant's submissions dated 15 November 2002. The Commission is not obliged to undertake a view merely because a party requests that a view be undertaken. In the present case we have difficulty seeing how a view could rationally impact upon the determination of the issue in dispute. There was certainly no error in the present case in the Member below declining to conduct a view.

Ground 19

''19. The Senior Deputy President's decision is inconsistent with good Travel Industry Practice and and [sic] procedure.''

61 ''Good travel industry practice'' was not a relevant consideration in relation to any of the issues before the Member below.

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[71] Transcript PN22.

Ground 20

> ''20. That it was improper, unreasonable and denial of natural justice for the Senior Deputy President to decide the lawfulness of the termination (clause 14 of the decision) in the absence of evidence and not the subject of the jurisdictional hearing.''

62 Paragraph [14] of the decision amounts to a finding that if there was a relationship of employment between Mr Abdalla and Viewdaze Pty Ltd then that relationship had been terminated at the initiative of the employee because, as the Commission explained in [15], ''the arrangements between the parties ceased as a result of Mr Abdalla's refusal to accede to repeated requests by the respondent and his financial representatives that he comply with the legislative requirements of the Goods and Services Tax''. In our opinion this reasoning is flawed. No GST is payable by an employer in respect of remuneration paid to an employee. The ''repeated requests'' made by Viewdaze and its accountant related to information sought in order to pay Mr Abdalla as though he were an independent contractor. If (contrary to what we have found) Mr Abdalla was in fact an employee then those ''repeated requests'' were misconceived and his ''refusal to accede'' to them would have been entirely justified and cannot properly be characterised as involving a termination of employment at the initiative of the employee.

63 However, having said this, the observations of the member below in [14] and [15] of the decision were obiter and in no way material to her determination of the jurisdiction motion before her. We have considered the subject matter of that motion for ourselves and reached a conclusion adverse to the appellant. Accordingly, [14] and [15] of the decision below become irrelevant.

Ground 22

> ''22. That by reason of the aforementioned it is in the public interest that leave to appeal the decision of Senior Deputy President Drake be granted.''

64 This is not a proper ground of appeal.

Other matters

65 The earlier Full Bench decision in this matter stated (at [6]):

> ''A respondent bears the responsibility of making out its case for establishing a jurisdictional bar to the Commission proceeding to deal with an application under s 170CE of the WR Act.''

It refers to the following authorities in support of that proposition: *Cabay v Total Fire Protection* (unreported, AIRC, Full Bench, Print T4143, 5 December 2000). See also *Curran v Thomas Jewellers Australia Pty Ltd* (unreported, AIRC, Williams SDP, Print P6275, 28 October 1997); cited with approval in *Egan v Botanic Gardens Management Services Pty Ltd* (unreported, AIRC, Full Bench, Print S4512, 28 March 2000). The earlier Full Bench continued:

> ''Where a respondent disputes the existence of jurisdiction, that respondent is required to lead evidentiary material or, at least, to put in a detailed manner its case in substantiation of its contention.''

66 In the first of these propositions we understand the earlier Full Bench to have been indicating that the respondent bears what might be referred to as an

''evidentiary onus'' [72] which it must discharge in order to put the Commission's jurisdiction in issue. That is, the respondent must lead evidence or make specific factual submissions which, if accepted, would lead to the conclusion that the Commission had no jurisdiction. Once that ''onus'' has been discharged the ''onus'' passes back to the applicant who bears the ultimate responsibility for establishing that the application is within jurisdiction. Where, on an motion under s 170CEA, the evidence before the Commission is insufficient to enable it to come to a conclusion favourable to the mover of the motion on an issue which has to be determined, the motion should be dismissed. [73]

67 So much appears from the authorities relied upon by the earlier Full Bench. Thus, in *Cabay* the Full Bench stated:

> ''[4] *In general, a person who seeks to have the Commission exercise its jurisdiction bears an onus of satisfying the Commission as to the existence of that jurisdiction*. However, in a matter such as this, where a respondent disputes the existence of the jurisdiction on a ground prescribed by regulation, that respondent is required to lead evidentiary material or, at least, to put in a detailed manner its case in substantiation of its contention. [*Curran v Thomas Jewellers Australia Pty Ltd*; cited with approval in *Egan v Botanic Gardens Management Services Pty Ltd*.] In this case, there was detailed evidence from the respondent which supported its contention. It is apparent from the decision of the Senior Deputy President that she accepted that the respondent had fulfilled any obligation to provide appropriate evidentiary material in support of its contention.''

The words in italics come from the decision of Williams SDP in *Curran v Thomas Jewellers Aust Pty Ltd*. That same statement was adopted with approval by the Full Bench in *Egan v Botanic Gardens Management Services Pty Ltd*.

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[72] In using the term onus we are cognisant of the warning issued by the Full Bench in *Coal and Allied Operations Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (1997) 73 IR 311 at 317: ''It is doubtful how far the notion of onus of proof is relevant at all to Commission proceedings. There is a respectable basis for the view that, where there is a statutory requirement for the Commission to be 'satisfied' about exercising a discretion, the notion of onus of proof imports legal doctrines that should have no part in the Commission's procedural or decisional process. This is especially so where a discretion, as in the case of section 127, is exercisable on the Commission's own motion. In short, the Commission is either satisfied that it should exercise the discretion, or it is not. It matters little how the Commission arrives at that state of mind. Perhaps no party can be said to bear an onus in a quasi-judicial proceeding that is freed of legal technicality and is directed to the determination of a statutory discretion. Even if that view be accepted, there are ingredients of the principles associated with the notion of onus of proof that have a useful role in any adversarial proceeding. In that context, a notion of onus stems from the fact that an applicant is the party who usually has the carriage of the application and who bears the risk of failure. The applicant thus may be said to bear an onus of satisfying the Commission that an order should be made. Where a matter commences on the Commission's own motion, no party bears any direct onus but the Commission must be satisfied that a proper basis for exercise of power in the matter is established.'' The notion of ''evidentiary onus'' is convenient in the Commission's unfair termination jurisdiction where the Commission is determining an application inter-parties and cannot act of its own motion.

[73] *Reilly v Nepean Country Club* (unreported, AIRComm, Hamilton DP, PR929453, 31 March 2003).

Summary

68 We grant leave to appeal in relation to grounds 1, 6, 7, 10, 12, 14, 15 and 16 of the notice of appeal but dismiss the appeal. We refuse leave to appeal in relation to the remaining grounds in the notice of appeal.