[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

SAMMARTINO v MAYNE NICKLESS t/as WARDS SKYROAD*

Munro J, Duncan DP, Jones C

23 May 2000

Termination of Employment — Jurisdiction — Australian Industrial Relations Commission directed by Federal Court to hear and determine application for leave to appeal — Leave granted on ground that appeal is of such importance it is in public interest to grant leave — Whether applicant an ''employee'' of the respondent — Not a discretionary decision — Whether contract of service — Applicant an owner-driver for courier service — Tests — Matters considered — Applicant held to be an employee of the respondent — Matter referred for conciliation or arbitration — Workplace Relations Act 1996 (Cth), ss 170CE, 170CK.

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* [EDITOR'S NOTE: For proceedings in the Federal Court of Australia, see (1999) 93 IR 52.]

THE COMMISSION.

1. Background and principles relevant to determination of appeal

1 Mr Tony Sammartino worked as an owner-driver for Mayne Nickless Express (Mayne Nickless) in its Wards Skyroad courier services from about July 1986 until January 1998. On 29 January 1998 Mayne Nickless terminated the services of Mr Sammartino as a contract carrier. The dismissal followed an investigation into an allegation that Mr Sammartino had misconducted himself in the performance of his work. Mr Sammartino lodged an application for relief under s 170CE of the *Workplace Relations Act* 1996 (Cth) (the Act). That application was founded upon a premise that he had been an employee of Mayne Nickless. The grounds upon which relief was claimed were that:

- the termination of his employment was harsh, unjust or unreasonable within the meaning of s 170CE; and
- the termination was unlawful under s 170CK(2)(e) which prohibits termination for reasons including the filing of a complaint against an employer involving recourse to a competent administrative authority.

2 This matter is a s 45 notice of appeal given on 4 August 1998 against a decision by Foggo C on 18 June 1998 to dismiss Mr Sammartino's application for relief. We first heard the matter on 14 October 1998 and dismissed the appeal in an ex tempore decision given on transcript.[47] That decision was quashed on judicial review by order of a Full Court of the Federal Court dated 25 August 1999.[48] A writ of mandamus was issued directing the Full Bench of the Commission to hear and determine the appeal according to law.

3 The Full Court decision identified an error of law going to jurisdiction. It required that the appeal be determined by this Full Bench by reference to the principles applicable to determining an appeal against a question of jurisdictional fact. The Full Court's reasoning appears in passages which conveniently state also the approach to be applied on this appeal:

> ''... The question whether a person is an employee for the purposes of Division 3 of the Act is not in any way a discretionary decision. The decision maker must first ascertain what is meant by the word 'employee' when used in Division 3. Then the decision maker must make findings of fact and determine whether the facts as found establish whether the person is an employee or not. No exercise of discretion is involved.
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> On an appeal from such a decision, if leave to appeal is given, the Commission is plainly not confined, in its consideration of the case, by principles that are found in cases such as *House v The King*. In dealing with the appeal, the Commission is under a duty to consider all of the proven facts and those facts that have been admitted, and any inferences to be drawn from those facts, to arrive at its decision. It is also under a duty to determine the content of any point of law upon which its decision might depend. If, in undertaking any of these tasks, it finds that the Commissioner has made an error of law or an error of fact, it can exercise its powers under s 45(7).

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[47] Print Q7591.

[48] *Sammartino v Commissioner Foggo* (1999) 93 IR 52 per Moore, Marshall and Finkelstein JJ.

It will find an error of law or an error of fact if the Commission reaches a different conclusion on the facts or on the law than that arrived at by the primary decision-maker. Further, what must be shown in order to succeed on an appeal will plainly have a bearing on whether leave should be granted.''[49]

4 Under a direction made on 4 November 1999, the appellant, Mr Sammartino, lodged written submissions on 24 November 1999. Those submissions are a three-page document accompanied by a folder of material comprised of the appeal papers in the matter before the Court. The submission of the respondent to the appeal, Mayne Nickless, is a 21-page document over the signature of Mr F Parry, counsel for the respondent. It was lodged in the Commission on 3 December 1999. On the hearing of the appeal on 7 December 1999 Mr Sammartino appeared in person. Mr Parry, by leave, appeared for Mayne Nickless.

2. The decision subject to appeal

5 Foggo C had the task of determining a jurisdictional objection to Mr Sammartino's application. That objection put in issue Mr Sammartino's status as an employee for purposes of subs 170CE(1). That subsection reads:

''170CE Application to Commission to deal with termination under this Subdivision

(1) Subject to subsection (5), an *employee* whose employment has been terminated by the *employer* may apply to the Commission for relief in respect of the termination of *that employment*:

(a) on the ground that the termination was harsh, unjust or unreasonable; or

(b) on the ground of an alleged contravention of section 170CK, 170CL, 170CM or 170CN; or

(c) on any combination of grounds in paragraph (b) or on a ground or grounds in paragraph (b) and the ground in paragraph (a).'' (Emphasis supplied.)

6 Foggo C ruled on Mayne Nickless' objection that Mr Sammartino ''was at all times engaged under a contract for services and was not an employee''. Mayne Nickless contended that Mr Sammartino was engaged as a ''contract carrier'' under the terms of an unregistered industrial agreement between it and the Transport Workers Union of Australia; and that Mr Sammartino had accepted the terms of the agreement. A term of the agreement provided that the legal relationship between Mayne Nickless trading as Wards Express and Mr Sammartino was that of principal and independent contractor.

7 Foggo C on 14 July 1998 published detailed reasons for an ex tempore decision that she gave at the conclusion of the hearing before her on 18 June 1998. One point is apparent from those reasons for decision, and manifest also from the transcript of the hearing before Foggo C. The issue of whether or not Mr Sammartino was an employee of Mayne Nickless was presented entirely in terms of whether he was engaged under a contract of service or under a contract for services. Thus, it was common ground before Foggo C that the appropriate test for Mr Sammartino's employment status required application of the common law principles by which a contract of service is distinguished from

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[49] *Sammartino v Commissioner Foggo* ibid at pars 4-5.

a contract for services. The presence of a contract of service, we note, has long been the legal determinant of whether a master servant relationship exists.

8 In her published reasons for decision, Foggo C stated that her ex tempore decision was that ''the Commission did not have jurisdiction to hear the application on the grounds that Mr Sammartino was an independent employee [sic]''.[50] In fact, in her recorded ex tempore decision, Foggo C did not use the expression ''independent employee''. Rather, she stated ''I have drawn the conclusion arising from the evidence and submissions today that Mr Sammartino was an independent contractor''.[51] Although Foggo C repeated the term ''independent employee'' in the final paragraph of her published reasons for decision, it seems that she used it as a synonym for independent contractor:

> ''For the reasons above, I find that Mr Sammartino is not an employee within the provisions of the Act but that he was an independent employee [sic]. As such he is precluded from the jurisdiction of the Act in relation to the provisions of s 170CE.''[52]

9 Foggo C's reasons for decision that Mr Sammartino was not an employee and her process of analysis may be summarised as follows:

- On the evidence of the General Manager of Mayne Nickless Express, including documents produced, there was no ambiguity that Mr Sammartino was anything other than an independent contractor. Foggo C concluded that Mr Sammartino ''had signed off on the 'Agreement between Contracted Owner Drivers Operating within the Melbourne Metropolitan Area' on several occasions and had signed all the relevant contracts and invoices for the work he received from the company''.
- Foggo C assessed whether Mr Sammartino was an independent contractor by reference to the same kind of indicia as had been applied by McIntyre VP in determining whether a courier driver was an employee or independent contractor in *Bruce v Rimade*.[53]
- Foggo C then made findings under 15 separate headings or indicia. Each of those findings concluded with an observation by her as to whether or not the consideration supported a conclusion that Mr Sammartino was an independent contractor. Those headings were:
  - Documentation Specifying employment as an Independent Contractor.
  - Times at which Mr Sammartino was to be available for work.
  - Mode of Remuneration.
  - Annual Leave.
  - Sick Leave.
  - Provision of Motor Vehicle.
  - Uniform.
  - Radio.
  - Taxation.
  - Workers Compensation.

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[50] Print Q3706 at p 1.
[51] Transcript of 18 June 1998 at p 81.
[52] Print Q3706 at p 8.
[53] Print N4691.

- Terms of the Contract Between Mr Sammartino and the company.
- Superannuation and sickness and accident insurance payments.
- Invoices Tendered by Mr Sammartino.
- Documentation completed by Mr Sammartino.
- Ability to Negotiate with Clients of the company.

- Foggo C then expressed her overall finding and conclusion in the following passages:

  ''It is also evident that Mr Sammartino reached the view that he was a 'permanent' employee [p 8 of Exhibit S1], and therefore was not an independent contractor but an award employee. Mr Sammartino is incorrect in his belief. It is correct that the 'seniority list' to which Mr Sammartino refers, is in fact a list provided to the union with the commencement dates of independent drivers who had full time contracts with the company. It did not state that the drivers to whom it referred, had, in any way, a change of status to award employee of the company. Mr Sammartino had worked in 1986 as a casual employee. He took up a full-time position in 1987, and in his words, was called a 'permanent airfreight driver (floater).' In 1989, he was 'promoted' to his own run. These changes to the areas he covered in his contract work may have led Mr Sammartino to believe that he was an employee of the company, but the evidence does not show that there was a change in Mr Sammartino's employment status.

  I am unable to find any evidence in the substantial material before me, or arising from the evidence of Mr Sammartino or Mr Byrne, from which Mr Sammartino could have deduced that he was other than an independent contractor.

  For the reasons above, I find that Mr Sammartino is not an employee within the provisions of the Act but that he was an independent employee [sic]. As such he is precluded from the jurisdiction of the Act in relation to the provisions of s 170CE.'' [54]

3. The grounds of appeal

10 Counsel, appearing as amicus curiae, assisted the Federal Court in the judicial review of the appeal proceedings. Mr Sammartino appeared in person in each hearing of the appeal to this Full Bench. The notice of appeal listed 12 grounds. All save one of those grounds go primarily to claimed error in findings or evaluation of facts or particular considerations. In our view, the most material of those grounds challenge:

(1) The finding that the applicant ''signed'' all agreements and invoices.
(2) The finding that it was open to Mr Sammartino to choose within a timeframe the hours of work that were suitable to him; and the related conclusion that the way in which Mr Sammartino was able to work indicated that he was an independent contractor.
(3) A claimed failure to make finding that wages were paid in accordance with the relevant award labour rate.
(4) A claimed failure to take into consideration or find that annual leave, leave loading and other entitlements have always been aligned with award conditions and included among owner-driver entitlements.

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[54] Print Q3706 at p 8.

(5) A finding that drivers could refuse ''late jobs'', whereas failure to abide by the direction of the radio operator would incur a punishment.

(6) A claimed failure to take into account that invoices associated with pick-ups and deliveries were required at the direction of the employer, and were not required at all before 1996. Undue weight was given to the practice. The use of invoices should properly have been seen to be part of a device to simulate independent contractor status and avoid obligations that would otherwise apply to the employer.

(7) A finding, or assumption that Mr Sammartino could seek work with other firms. In fact, and on the evidence, to attempt to do so was prohibited by Mayne Nickless, had not occurred, and would be impracticable because of the working hours commitment required by Mayne Nickless.

(8) The weight given to the consideration that Mayne Nickless had established separate seniority lists for award employee drivers and owner drivers. No weight or insufficient weight was given to evidence that the seniority arrangement had existed only for two years, prior to which all drivers were ranked in seniority according to their date of commencement.

11 On the resumed hearing of the appeal before this Full Bench, Mr Sammartino's written submission invoked generally the summary of arguments and complete Appeal Book submitted to the Federal Court in the judicial review proceeding. Mr Sammartino sought also to tender some documentary material not hitherto accepted in evidence. Mr Sammartino relied upon the Court's conclusions overall as the basis for a submission that if the Commission now ''look properly at the evidence that was before Foggo C and her conclusions, errors that would attract the granting of the appeal are manifest''. Mr Sammartino supplemented that submission with a contention that, because the Full Court of the Federal Court had investigated where the errors lay, the Court's opinion that leave to appeal should be granted ought be inferred from the following passage of the judgment:

> ''Finally, it was said that the writs should not issue because the Commission would inevitably hold that leave to appeal should be refused. We disagree. If the Commission bears in mind what the prosecutor must establish in order to succeed on an appeal and perhaps also takes account of the general importance of the case, we are far from satisfied that leave will inevitably be refused. Accordingly, we would grant the relief sought against the Commission . . .'' [55]

Mr Sammartino submitted that we should accept and be guided by the fact that the Court is of the view that leave to appeal should be granted. If not, he submitted, we should refer the matter back to the Court for their ''formal opinion in accordance with s 46'' of the Act. As developed in oral argument, that contention would involve our seeking reference to the Court of a question not relevantly distinguishable from the question of whether leave to appeal should be granted by us. A question of that kind is not competent to be referred to the Court as question of law because it is not a question of law. We reject the application for reference of any such question to the Court.

4. The respondent's main contentions on the appeal

12 For the respondent, Mr Parry analysed recent cases concerning the grant of

[55] Ibid [1999] FCA 123 at par 16.

leave to appeal. He acknowledged that leave to appeal is generally granted in matters that raise questions as to jurisdiction. Where leave is granted on such questions, it appears that the Full Bench is required to examine the facts of the case and determine whether in making the decision the Commission erred in law or fact. The critical question of law that was before Foggo C, and is before the Full Bench on the appeal, is the meaning of ''employee'' in respect of an application made under s 170CE. That question was argued before Foggo C. It was determined by her by reference to various indicia that have been used by the Courts in assessing whether, at common law, a person is an employee, or, an independent contractor. The Full Court in the judicial review proceeding had before it, but did not deal with, an argument about the meaning of ''employee'' in Div 3 of the Act. Mr Parry noted also that Mr Sammartino had applied to the Court to admit further evidence. He opposed the application made by Mr Sammartino in the course of his submissions to us.

13 In relation to both the grant of leave to appeal and the merits, Mr Parry noted that the appellant took issue with a number of Foggo C's findings. Some of the disputed findings were about points as to which there were differences in the evidence. Instances of that kind were the findings in relation to Mr Sammartino's knowledge of the industrial agreement and the use made of invoices. In respect of those points, Mr Parry submitted that Foggo C's findings may and should be relied upon by the Full Bench to determine the appeal. Other disputed facts were considerations derived from the industrial agreement itself and its operation. The factual basis for the relevant findings was not in dispute. Mr Parry accepted that, in determining questions about the grant of leave to appeal, the fact finding process followed by Foggo C is a consideration in itself. However, he submitted, there are no errors of fact that would require review by the Appeal Bench.

14 Mr Parry contended that, although not articulated in terms by Mr Sammartino, the errors of law claimed must be taken to go to considerations thought wrongly to have been taken into account, wrongly to have been ignored, or to have been inappropriately weighed by Foggo C, in arriving at her conclusion that Mr Sammartino was not an employee. The test for whether a person is an employee or not, is central to the assessment of those considerations. The test has been set down in various Court and tribunal decisions. In the judicial review proceeding, the Full Court said that the Commission should first determine what is meant by ''employee'' in Div 3 of the Act. That observation may be presumed to have been stimulated by the decision in *Konrad v Victoria Police*,[56] decided after the first determination of the appeal against Foggo C's decision.

15 In relation to any possible reliance on the observations or analysis in *Konrad v Victoria Police*, Mr Parry submitted:

(1) The submissions of the applicant and the respondent to the Commissioner were all predicated on common law tests and authorities. There had not been any authority up to that time to suggest that the word ''employee'' in Div 3 should have other than its common law meaning. Whilst not explicit, the Commissioner applied common law tests from the authorities. No ground of appeal or submission on the appeal contended that such use of the common law test was wrong. Before the Full Court, the applicant

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[56] [1999] FCA 988.

himself submitted through senior counsel that to succeed he had to show he was an employee at common law.

(2) *Konrad v Victoria Police* is not a decision about independent contractors. It is about officers and in particular police officers. Independent contractors are discussed in obiter, but the ratio of the case does not deal with independent contractors. The obiter observations were unnecessary in relation to the issue before the Court in that case. Further *Konrad v Victoria Police* was a decision in respect of Div 3 of Pt VIA of the *Industrial Relations Act* 1988 (Cth). That legislation relied upon the Termination of Employment Convention for its constitutional validity. Section 170CB of the current Act is distinguishable in that respect.

(3) Even if it be assumed that the obiter is correct and applicable, it means only that there is an expanded definition of the word ''employee'' in Div 3 of the current Act. This does not help the appellant. The Commission should not get involved with questions it does not need to answer. The appellant is pursuing an application under subs 170CE(1) on the ground that the termination was harsh, unjust or unreasonable. To be eligible to make that application, the applicant must be either ''a federal award employee'' under subs 170CB(1) or a Victorian employee who, for present relevant purposes, is not excluded under s 170CC. A federal award employee has to meet the common law tests. Accordingly, a federal award employee relying on harsh, unjust or unreasonable dismissal under Div 3 has to be an employee at common law.

(4) The referral of powers by Victoria under the *Commonwealth Powers (Industrial Relations) Act* 1996 (Vic) (the Victorian Act) had a clear definition of ''employee'' in s 3. It expressly excludes a person engaged under a contract for services. Moreover, s 489 of the Act explicitly relates the s 3 definition in the Victorian Act to the meaning of employee in Pt XV. Accordingly, s 492 of the Act cannot be read as broadening the concept of ''employee'' in Div 3 in application to Victorian employees.

(5) The Commissioner applied the correct approach. Similarly, the Full Bench should assess the facts against the common law tests of employment.

16 Mr Parry submitted that the criteria that should be taken into account in making an assessment of whether a person is an employee or not have been covered in a number of recent cases, several of which deal with courier or contract drivers.[57] Without being prescriptive, these various decisions look at such factors as control, provision of equipment, method of payment, hours of work, the express agreement entered into, taxation arrangements, ability to work for someone else and corporate arrangements. In *Vabu Pty Ltd v Commissioner of Taxation (Cth)*,[58] the Court noted that, although the principal contracting company had a degree of control over its couriers, other important criteria were indicative that the couriers were not employees. The Court gave significant weight to the view that the couriers provided the resource and bore the cost of delivering items that the company had contracted with its clients to

[57] *Bruce v Rimade* (unreported, McIntyre VP, Print N4691, 9 September 1996); *Vabu v Commissioner of Taxation (Cth)* (1996) 81 IR 150; *Stevens v Brodribb Sawmilling* (1996) 160 CLR 16; *BWIU v Odco* (1991) 99 ALR 735.

[58] Ibid, *Vabu*.

deliver. In *Bruce*,[59] McIntyre VP applied a checklist of criteria to similar effect. Foggo C had applied the same criteria to Mr Sammartino's case. The circumstances of that case were similar in many respects to those in *Bruce*. Mr Parry submitted that Foggo C looked at each of the factors, made findings with respect to them and took them into account in coming to her conclusion. No error of law appears from her decision. That should be sufficient to refuse leave to appeal.

17 Mr Parry also developed a full submission as to how the evidence should be applied to the various indicia if leave to appeal is granted and a determination of the appeal on the evidence is necessary.

5. Conclusions and determination: leave to appeal

18 We are satisfied that having regard to the nature of the matter now raised on the appeal, the matter of the appeal is of such importance that it is in the public interest that leave to appeal should be granted. Our view in that respect is influenced by two considerations. The first is the possible relevance of the decision in *Konrad v Victoria Police*. It may bear upon the task of making the finding of jurisdictional fact about whether an applicant under s 170CE is an employee within the meaning of that section, or, perhaps, s 170CK. It seems the finding is thought by at least some members of the Federal Court to now involve a point of statutory construction of an expression that has until recently had a well settled meaning in federal arbitral jurisprudence.

19 The second consideration is that even if we determine that, for the purposes of this matter, the established common law meaning of employment prevails, the question posed on the appeal still involves a finding of jurisdictional fact. That finding needs to be made as an assessment involving reference to a set of legal concepts and criteria. Assessments of the kind required can be problematic. The legal concepts and criteria on which the assessment process must be based are themselves perceived by some commentators to be out of touch with economic reality, to be artificial, or circular in effect.[60] Moreover, in this case, it is manifest that the total circumstances need to be considered in a way that ensures the indicia are applied and assessed by reference to the particular case of Mr Sammartino. In that assessment careful consideration ought be given to the degree of weight that should be accorded to the way in which the parties themselves described their legal relationship. In this instance, it is appropriate that leave to appeal be granted to ensure the assessment has that dimension.

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. We have not taken that view in this instance. We are satisfied that the circumstances of the case, as now presented, are such that the matter of the appeal is of such importance that it is in the public interest that leave to appeal should be granted. Accordingly leave to appeal is granted.

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[59] Ibid, *Bruce*.

[60] Thus Creighton and Stewart *Labour Law. An Introduction* (3rd Ed 1999) at pars 7.01 to 7.25.

6. The primary issue of the appeal: was Mr Sammartino an employee: the statutory context of ''employee''

21 Section 170CE of the Act enables applications to be made to the Commission for relief in respect of termination of employment. It is found among the operative provisions of Div 3 of Pt VIA of the Act. That Division is concerned with termination of employment. The objects of the Division are set out in subs 170CA(1), which reads:

> ''170CA Object
>
> (1) The principal object of this Division is:
>
> (a) to establish procedures for conciliation in relation to certain matters relating to the termination or proposed termination of an employee's employment in certain circumstances; and
>
> (b) to provide, if the conciliation process is unsuccessful, for recourse to arbitration or to a court depending on the grounds on which the conciliation was sought; and
>
> (c) to provide for remedies appropriate to a case where, on arbitration, a termination is found to be harsh, unjust or unreasonable; and
>
> (d) to provide for sanctions where, on recourse to a court, a termination or proposed termination is found to be unlawful; and
>
> (e) *by those procedures, remedies and sanctions* and by orders made in the circumstances set out in Subdivisions D and E, *to assist in giving effect to the Termination of Employment Convention*.'' (Emphasis supplied.)

22 Subsection 170CE(1) reads:

> ''170CE Application to Commission to deal with termination under this Subdivision
>
> (1) Subject to subsection (5), *an employee whose employment has been terminated by the employer* may apply to the Commission for relief in respect of the termination of that employment:
>
> (a) on the ground that the termination was harsh, unjust or unreasonable; or
>
> (b) on the ground of an alleged contravention of section 170CK, 170CL, 170CM or 170CN; or
>
> (c) on any combination of grounds in paragraph (b) or on a ground or grounds in paragraph (b) and the ground in paragraph (a).'' (Emphasis supplied.)

Subsection 170CE(5) in effect provides that an application under subs 170CE(1) may only be made on certain grounds by specified classes of employees or in specified circumstances. Those circumstances are the reference by which the application of subdivisions of Pt VIA is prescribed in s 170CB. We do not set out s 170CB, but its effect is that, so far as relevant to Mr Sammartino's application, subs 170CE(1) applies to an application for relief, if the employee concerned was: before the termination, a Federal award employee who was employed by a constitutional corporation;[61] or an employee in Victoria.[62]

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[61] Par 170CB(1)(c).

[62] Section 492.

Insofar as the application relies on a claim that the termination of employment was unlawful in contravention of par 170CK(2)(e), it is sufficient that the applicant be an employee.[63]

23 Some expressions used in Div 3 are defined for purposes of the Division. Section 170CD provides:

> ''170CD Definitions
>
> (1) In this Division:
>
> *Commonwealth public sector employee* means a person in employment:
>
> (a) as an officer or employee of the Australian Public Service; or
>
> (b) by or in the service of a Commonwealth authority; or
>
> (c) by authority of a law of the Commonwealth.
>
> Note: Commonwealth authority is defined in subsection 4(1).
>
> *Federal award employee* means an employee any of whose terms and conditions of employment are governed by an award, a certified agreement or an AWA.
>
> *Termination or termination of employment* means termination of employment at the initiative of the employer.
>
> *Territory employee* means any person employed in a Territory other than Norfolk Island.
>
> (2) An expression used in Subdivision C, D or E of this Division has the same meaning as in the Termination of Employment Convention.
>
> (3) For the purposes of this Division, an employee is taken to be employed under award conditions if both wages and conditions of employment of the employee are regulated by awards, certified agreements or AWAs, that bind the employer of the employee.''

24 It is to the meaning of ''employee'' in s 170CE in that context that the Full Court decision in this matter seems to require us to first direct our attention. We say ''seems'' because a threshold question to that inquiry may exist. For an application to be made under s 170CE, the Act in subs 170CE(5) and 170CB(1) and (3) requires that the application be instituted by a federal award employee, or by an employee in Victoria. Each of those expressions has a statutory definitional context. Each also has an overlay of meaning consistent with the common law meaning being the intended reading of the use of the word ''employee'' in the expression.

25 The expressions ''employer'' and ''employee'' are defined generally, but in non-exhaustive terms, in s 4 of the Act. References to employers and employees appear elsewhere and ubiquitously throughout the Act. We note that several of the references to ''employee'' appear in a context that implies a distinction between a person who is an employee and a person who is an independent contractor.[64] That juxtaposition suggests that the reference to an employee in the general context of the Act is not intended to subsume an independent contractor engaged under a contract for services.

26 However, it is necessary for several reasons to consider the current provisions of the Act, and particularly s 170CE, in perspective with the objects of the Act and the purpose of amending legislation. For that reason, and as an aid to construction of the Act in context, we shall examine first under the next heading the usage and construction of the notion of employee in applications of

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[63] Subs 170CB(3) read with subss 170CE(1) and (2).

[64] Pars 188(1)(b) and (c); subs 127A(4), s 298A, subs 298K(2), s 298N.

the Act or its predecessors. It will become apparent that the High Court resolved some early ambiguity about alternatives by fixing upon a common law meaning equating employment with a master servant relationship and the existence of a contract of service. Before returning to questions as to how the specific use of ''employee'' in s 170CE should be construed, under Heading 8, we set out our understanding of what is involved in a proper application of the common law test for a contract of service. Intrinsic to the application of that test are several difficulties that can arise in identifying and characterising particular contracts. Under Heading 9, we then set out our conclusions about the construction of s 170CE and the test to be applied for the purpose of establishing whether Mr Sammartino was an employee within the meaning of that section.

7. The concepts of employee and employment in federal industrial legislation

27 The ordinary meanings of the concept of ''employee'' and the related concept of employment have long been part of the operational context of the *Workplace Relations Act* 1996 or its predecessors. Those expressions have generally been construed as intended to import the common law meaning of employee and the associated tests for that status relationship. In essence, the common law meaning connotes the array of tests that have been applied for a contract of service as distinct from many other relationships including a contract for services. That distinction, ostensibly founded upon analysis and categorisation of the contractual relationship, appears to have been developed as a tool by which to differentiate the master-servant relationship from other relationships involving differential incidents of status, capacity or liability.

28 Federal constitutional power allows laws to be made for the prevention and settlement of industrial disputes extending beyond the limits of any one State, by conciliation and arbitration. The exercise of that power has been founded upon notions of what constitutes an ''industrial dispute''. The first legislation made in exercise of the power defined industrial dispute and the related concept of industrial matter. The statutory definition of industrial dispute later limited that concept to matters pertaining to the relationship between employers and employees, but only from 1947. However, pertinence to that relationship was a core requirement of the definition of ''industrial matters'' from its inception in 1904. None of the serial statutory definitions of industrial dispute overlap entirely the meaning that the High Court has most recently given to that expression in the Constitution,[65] the ''constitutional meaning''. An industrial dispute in the constitutional meaning was accepted in the earliest cases to demand a dispute that in kind is a dispute between ''master and workman in relation to any kind of labour''. Thus in *Jumbunna*[66] O'Connor J pointed to the linkage of the definition of ''industry'' in pre-federation statutes to ''any kind of employment''. He concluded:

> ''. . . it is certainly fair to assume that the expression 'industrial disputes' was at the time of the passing of the Acts commonly used in Australia to

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[65] *R v Coldham; Ex parte Australian Social Welfare Union* (1983) 153 CLR 287 at 312-315.
[66] *Jumbunna Coal Mine, NL v Victorian Coal Mines Association* (1908) 6 CLR 309.

cover every kind of dispute between master and workman in relation to any kind of labour.'' [67]

29 That limitation of the scope of industrial disputes to matters pertaining to the relationship of employers and employees in a broad sense has been, and remains still, a constant feature in the statutory definition of the classes of dispute upon which the arbitration powers of the Commission and its predecessors operate. The principal exceptions to that limitation are demarcation disputes and a limited class of ''non-employer party'' disputes.

30 The first enactment, under item 51xxxv of the Constitution, was the *Commonwealth Conciliation and Arbitration Act* 1904 (the 1904 Act). It defined ''employee'' to mean ''any employee in an industry'', [68] but offered no other assistance. The words ''and includes any person whose usual occupation is that of employee in any industry'' were added in 1910. The concept of ''employee'', like the concept of ''employer'', was integral to processes and outcomes of many of the primary functions of the system created by the original legislation. That was most particularly so in the linkage of ''industrial matters'' with ''all matters pertaining to the relations of employers and employees'', [69] and in the provisions for registration of organisations of employers and employees. [70] Similarly, the commands of several provisions prohibiting strikes and lockouts, in relation to industrial disputes or similar conduct, were directed to employers and employees. [71]

31 Thus, the relationship between employer and employee was one touchstone, although not the only one, by which ''industrial'' character was discerned for various purposes under the Acts that were the predecessors of the legislation now in force. The relevant case law developed most around questions of whether a dispute or matter pertained to the employer-employee relationship. An established pattern of construction of the concept of employment emerged from decided cases.

32 The common law notion of employment, it seems, is a hybrid derived from the personal law of status, the master and servant relationship, and the law of contract, the contract of service. [72] The reference in the 1904 Act to ''employee'' was assumed in the early cases to connote a person in a master-servant relationship. That much appears from Piper CJ's analysis in one of the life assurance agent cases. In the leading case on the subject, he discussed the difference between the notions of the master-servant relationship, a contract of service, and employment under a contract (for services). In relation to an issue

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[67] *Jumbunna* ibid at 366-367; see Griffith CJ to similar effect at 333; similarly Isaacs J accepted that industrial connoted forms of employment albeit he accepted that disputes referable to industrial conditions need not be confined to disputes between employers and employees:
''. . . An industrial dispute under the Act, and within the constitutional power, is a dispute in some 'industry.' It may be between employers and employés, or employés and employés, as, for instance, the well-known 'demarcation' disputes in the ship-building trade. It must, of course, have reference to industrial conditions. The connecting link is the industry, and not the particular contract of employment between specific employers and specific employés.'' at 372-373; a view reaffirmed in *FEDFA v BHP* (1911) 12 CLR 398 at 446.

[68] Section 4 of the *Conciliation and Arbitration Act* 1904, No 13 of 1904.

[69] Ibid s 4.

[70] Ibid s 55.

[71] Ibid Pt 11, ss 7, 9 and 10.

[72] McCallum and Pittard *Australian Labour Law; Cases and Materials* 3rd Ed at 48-52.

about whether insurance canvassers, ostensibly engaged under a contract of agency, were employees, his Honour observed:

> ''... The position of these canvassers has received judicial consideration on several occasions. The definition in the *Commonwealth Conciliation and Arbitration Act* of an employee is 'an employee in any industry and includes any person whose usual occupation is that of employee in any industry'. In the *Industrial Peace Act* 1912 of Queensland the definition is practically the same and came up for discussion but not decision in the case of *Addar Khan v Mullins* ([1920] AC 391) on appeal to the Privy Council. In that case it was argued that this definition denoted the relationship of master and servant to the exclusion of a person working on contract. Their Lordships stated that owing to subsequent legislation it was not necessary to determine the question but that it must not be assumed that they would be prepared to assent to the argument.
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> Mr Lewis submits that the word 'employment' does not necessarily connote the relationship of master and servant and Mr Smith submits the contrary. McNaughton J, in the Queensland case above referred to, stated that it was common ground that in order to give the Court jurisdiction to make an award the relationship of master and servant must exist. For this proposition his Honour cited the words of Griffith CJ in his judgment in the case of the *Amalgamated Society of Carpenters and Joiners v Haberfield Pty Ltd* ((1907) 5 CLR 33). Reference to that judgment shows that the learned Chief Justice did not actually decide the point — he said that the learned President of the Commonwealth Arbitration Court had apparently thought that the question whether the relationship of employer and employee existed was substantially the same as the question whether that of master and servant subsisted and that he (the learned Chief Justice) was strongly disposed to think that that was the correct view. The question as to whether the latter relationship exists is of importance for the purposes of other Statutes, such as Workmen's Compensation Acts and in other jurisdictions, but, without, with respect, suggesting any doubt on the views expressed by the learned Chief Justice and the learned President, and which in fact I adopt, I do not regard it as necessary for me to decide whether, under the *Commonwealth Conciliation and Arbitration Act*, the terms 'employer' and 'employee' are synonymous with the terms 'master' and 'servant' respectively, and that a person cannot be regarded as an 'employee' unless he is a 'servant'. My duty is not to decide whether these canvassers are 'servants', but whether they are 'employees'. But it may, of course, be a distinction in terms with no difference in substance, because I cannot decide the latter question except by applying to the facts of this case substantially the same legal tests and principles as are relevant to the question of the existence or otherwise of the relationship of master and servant.[73]
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> The onus is therefore on Mr Lewis to establish that the written agreement does not contain the real relationship between the parties ... Any variation from the written agreement must therefore be established by the acts and conduct of the parties, but I do not think it necessary for

[73] Appeal against registration of an organisation — *Industrial Life Assurance Agents Association* (1942) 46 CAR 578 at 583-584.

present purposes for me to find as a fact that some agreement other than the written agreement has been entered into which could be enforced in an action at law or what the specific terms of that other agreement are. The question for my decision is whether the written agreement contains the real relationship of the parties and, if not, is that real relationship one of employer and employee . . .

My conclusion on the evidence is that, notwithstanding the terms of the written agreement, the real position is that the canvasser performs his duties under the control, supervision and direction of the company and that the company gives orders as to the work to be done and the manner and time in which it is to be done, and that the canvasser obeys such orders. The position thus created is one enforced by the companies and accepted by the canvassers and my conclusion on these facts is that *the real relationship between the parties, for the purposes of the Commonwealth Conciliation and Arbitration Act, is that of employer and employee*.'' [74] (Emphasis supplied.)

33 Piper CJ's reasoning reflected an ambivalence about the formulation of the character of the employment relationship. He did not regard the relevant tests, and particularly the control test, as being solely for the purpose of the characterisation of the contractual relationship as a contract of service; the identification of a master servant relationship appears to have been considered to be an alternative or overlapping basis of a characterisation in which the only question that had to be decided was: were the persons concerned employees for purposes of the 1904 Act?

34 A similar ambivalence about some tests for employee status was reflected in submissions later put to the High Court in *R v Foster; Ex p Commonwealth Life Amalgamated Assurances*.[75] The High Court disposed of the arguments in a way that seems to have been intended to dispense with fine distinctions between contractual forms and the status of servants declaring:

''. . . if in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual. But there is a more important clause. Clause 27 provides that the duties of the agent under the agreement may be performed by his clerks or servants or by himself personally and that nothing in the agreement is to prevent him from engaging in any other business or employment while the agency continues. If this clause is in fact allowed any operation it goes a long way to exclude the relation of master and servant. It was not contended for the respondent union that the document considered alone amounted to anything but an independent contract for services: it was readily conceded that its provisions contained no contract of service.

The case for the respondent union simply is that it does not represent the reality of the relation in practice of the agents and the prosecutor company. For the Commonwealth intervening an argument was presented

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[74] Ibid at 585-586.
[75] (1952) 85 CLR 138.

to the effect that the relation of employer and employee to which the definition of 'industrial matters' in s 4 refers does not require a contract of service, a relation of master and servant. A similar question seems to have been raised upon the *Industrial Arbitration Act* 1901 (NSW) in the case of *Ex p Haberfield Pty Ltd*) [1907] AR (NSW) 248). The Supreme Court of New South Wales assumed that the relation must be, in effect, that of master and servant and decided that in the particular case such a relation did not exist in fact. In this Court it was held that the existence of the particular relation was a question upon which the Arbitration Court might, in the proceedings there under attack, decide finally. Accordingly the correctness or incorrectness of their decision was not a matter arising in prohibition, which was the remedy sought. But Griffith CJ said that he was strongly disposed to think that it was a correct view that the question whether the relationship of employer and employee existed was substantially the same question as whether the relationship of master and servant existed. O'Connor J expressed his concurrence in the view of the Supreme Court that no relationship of employer and employee existed in that case, and this view necessarily implied the substantial identity of the relationship with that of master and servant. The legislation of New South Wales, although in pari materia with the *Commonwealth Conciliation and Arbitration Act* may conceivably be distinguished on the ground that it possessed a definition of 'employee' which contained indications that the draftsman had so understood the expression. But not much importance appears to have been attached to them and both in New South Wales and in Queensland the view seems to have been adopted that there must be a contract of service, or a relation of service, if a man was to be an employee: see, for instance, *Yellow Cabs of Australia Ltd v Colgan* ([1930] AR (NSW) 645); *Gaskin Bros v McGowan*; *Thiel v Mutual Life & Citizens' Assurance Co Ltd*; *Ex parte Thiel* ((1919) 27 CLR 187).

In *Austine v Retchless* ((1941) 35 QJP 117) the conception was slightly extended on the authority of *Addar Khan v Mullins*, which the Court said indicated that the definition of employee in the *Industrial Conciliation and Arbitration Act* 1932 to 1941 (Q) covered a wider class than servants because it extended to persons employed under contracts for labour only or substantially for labour only.

The view that there is no material distinction between what is described as the relation of employer and employee and that of master and servant accords with the interpretation which this Court placed on the expressions in the *Pay-roll Tax Assessment Act* 1941-1942; . . .

We think that the kind of relationship to which the definition in s 4 of 'industrial matters' refers by the expressions 'employer' and 'employee' is, under another name, in substance the relation called at common law master and servant. But this only means that in the interpretation of the Act the prosecutor company has a sound commencing point from which to proceed in its contention that the Arbitration Court acted without jurisdiction. It by no means establishes that contention.''[76] (Emphasis supplied.)

35 Several points emerge from the decision in *Commonwealth Life Amalga-*

[76] Ibid at 151-153.

mated Assurances. The first and most important is that it crystallised a test for the master-servant relationship that was consolidated in virtually all subsequent case law until the decision in *Konrad v Victoria Police*. The test as expressed by Dixon CJ in *Commonwealth Life Amalgamated Assurances* requires in effect the presence in truth, as distinct from form, of a contract of service. A contract so characterised is essential to the identification of the relationship between employers and employees. A second point to note is that in arriving at that conclusion, the Court distinguished persons engaged under ''contracts for labour only'' as a wider class than servants. Coverage of that wider class of persons as ''employees'' was deemed to be dependent upon the express wording of a particular Queensland statute. Moreover, and it is a third point to emerge from the decision, the Court dispensed with the possibility that Piper CJ had entertained that the terms ''employer'' and ''employee'' are not synonymous with the terms ''master'' and ''servant''. That possibility, and a distinction between ''employment'' and ''service'' had some foundation in at least some early cases, references to which may now be found in McCallum and Pittard,[77] or in O'Connor J's apparent preference for the term ''workman in relation to any kind of labour''.[78]

36 The decision in *Commonwealth Life Amalgamated Assurances* consolidated but perhaps narrowed the principles thereafter followed by the industrial courts and tribunals to determine a broad issue: was the relationship between two parties that of employer and employee, or was it a relationship between a principal and an ''independent contractor''?[79] We shall discuss under Heading 8 the way in which the answer to that question has been affected by the evolution of principles and concepts into a contemporary common law meaning of employment.

37 Before doing so, it is convenient to contrast the recent emergence, in *Konrad v Victoria Police*, of a construction of one use of the term ''employee'' in the Act that is divergent from the now engrained common law meaning. Albeit for different reasons, the emergent construction revives some of the options for enlarging the class of persons who are employees, dispensed with in *Commonwealth Life Amalgamated Assurances*. In 1993, the inception of the *Industrial Relations Reform Act* (the 1993 Act) extended the constitutional basis for some of the functions undertaken by the Commission. The external affairs and the corporations powers were invoked for that purpose. Associated with that change, the 1993 Act relied upon several international treaties, including the ILO ''Termination of Employment Convention 1982''. That innovation gave rise to contentions that the concepts of employment and employee in the Act now have a wider scope than the previously accepted common law meaning of the traditional employer/employee master servant relationship.[80] A modified invocation of the Termination of Employment Convention is still evident in s 170CA of the current Act. The changed

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[77] McCallum and Pittard: ibid at p 51 cite Bramwell LJ in *Yewen v Noakes* (1880) 6 QBD 530 at 532-533 as having formulated the control test to differentiate a servant from what he regarded as a separate legal category, namely an employee.

[78] *Jumbunna* ibid at 367.

[79] See for a general discussion of federal case law on the question as at 1968: Mills and Sorell, *Federal Industrial Laws* (4th Ed) 1968 Butterworths.

[80] *Konrad v Victoria Police* [1998] 16 FCA 22 January 1998 at 15 per Marshall J; *Capay Holdings Pty Ltd v Slattery* (unreported, IRCA 11 December 1996).

arrangement in the current Act may provide a basis for a distinction from the 1993 Act. Mr Parry submitted that the movement away from dependence upon the external affairs power reflected in the current Act may affect the application of reasoning based on the terms in which the 1993 Act relied upon the external affairs power for constitutional validity. We incline to the view that, none the less, one effect of s 170CA, as it now stands, is to allow terms in that Division of the Act to be construed in harmony with the Convention unless a contrary intention appears.

38 In *Konrad v Victoria Police*, Finkelstein J, with whom Ryan J and Moore J substantially agreed, considered the question of whether the employee who is referred to in Pt VIA Div 3 of the *Industrial Relations Act* 1988-1993 is a common law employee. To that end, his Honour analysed Australian, Commonwealth and United States case law about the construction of similar statutory references to an employee as a party to proceedings under remedial legislation. His Honour's conclusions may be summarised in the following passages:

> ''100 Returning to the question whether the employee who is referred to in Div 3 is a common law employee it is necessary, in my view, to have regard to the following matters. First, provisions such as are to be found in Div 3 should not be given a narrow construction. Div 3 is in the nature of a human rights code and should be given an interpretation that will advance its broad purposes. It is not appropriate to minimise the rights conferred by this type of legislation and so diminish its proper impact: compare *Canadian National Railway Co v Canada* [1987] 1 SCR 1114 at 1134 per Dickson CJ; *Ontario Human Rights Commission v Simpson Sears* [1985] 2 SCR 536 at 547 per McIntyre J.
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> 101 Secondly, there has been much informed criticism of the common law notion of employee. I have already mentioned the article by Professor Kahn-Freund. Reference might also be made to P S Atiyah 'Vicarious Liability' (1967), especially ch 5. Further, in 1985 Professor H W Arthurs wrote an influential article entitled 'The Dependent Contractor: A Study of the Legal Problems of Countervailing Power' (1965) 16(1) University of Toronto Law Journal 89, criticising the manner in which the common law distinguished an employee from an independent contractor. He argued that workers were being denied rights afforded by various labour relations and like legislation because they had been transformed from employees into independent contractors 'by the magic of contractual language', but that their working environment remained unchanged. He proposed that those he classified as 'dependent contractors' should be regarded as employees and entitled to the benefits of legislation designed to protect workmen. The terminology of the 'dependent contractor' has now found its way into the labour legislation of a number of Canadian jurisdictions: see for example, s 107 of the *Canada Labour Code* 1972 (Can).
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> 102 Thirdly, remembering that the purpose of Div 3 is to give effect to the Convention, in the absence of a clear indication to the contrary, the Division should not be construed more narrowly than the Convention. In that regard there can be no doubt that the expressions 'employed person' and 'worker' in the Convention do not bear their common law meaning. The overwhelming majority of States who adopted the Convention are not common law countries. There can also be no doubt that the Convention

intended to include public employees within its scope. Further, it follows from the fact that all public employees are covered by the Convention, that the Convention is not concerned to distinguish between holders of public office on the one hand and public employees on the other.

103 In my view, bearing the foregoing factors in mind, I can see no reason why the word 'employee' when used in Div 3 should be confined to its common law meaning. If it was so confined, it would bring about the following unintended consequences. In the first place, it would exclude from the operation of the Division persons who are just as vulnerable and in need of protection as common law employees. In the second place, adopting a narrow meaning of the word 'employee' would place Australia in breach of its obligations under the Convention which it has ratified. In the third place, a narrow construction of the word 'employee' would defeat the object of the Division which is to give effect to the Convention.

104 *In the context of Div 3 it is my view that, speaking generally, an employee is a person who performs work or labour (personal services) for another; that is to say, a person who sells his labour and not the product of his labour*. Further, once it is accepted that the common law meaning of the word 'employee' does not control Div 3, in my opinion it necessarily follows that a constable is an employee who is entitled to the protection of the Division. . . .'' [81] (Emphasis supplied.)

39 The reasoning in *Konrad v Victoria Police* poses the question of whether a ''dependent contractor'' may be an employee within the extended meaning of Div 3 of the 1993 Act. The Court did not need to answer that question. Certainly the reasoning in *Konrad v Victoria Police* is predicated upon a construction of the word ''employee'' to embrace a wider class of workers than those who fit within the common law notion of employment. Finkelstein J's identification of an employee as a person who performs work or labour for another points toward a class of employee similar in width to a class comprised of persons under contracts for labour or substantially for labour only. *Commonwealth Life Amalgamated Assurances* identified the extension of employment to that class as peculiar to the statutory definition used in the then Queensland statute. The extension to a broadly similar class arrived at by Finkelstein J is based upon a general reference to the Convention against Termination of Employment linked with the objects of Div 3 of Pt VIB of the 1993 Act. It may be relevant to add reference to a similar extension of the class of persons treated as employees. In several instances, regulatory or revenue legislation makes provision to the effect that a payment for work under a contract wholly or principally for labour is covered by statutory definitions of wages and salary paid to an employee, [82] causing the payee to be an employee for the purposes of the relevant legislation.

40 Our task is to construe the term ''employee'' in context with s 170CE. As we have seen, there is a long trail of precedent in the operational application of similar terms in or for the general purposes of the Act or its predecessors. Through that precedent the common law test for a contract of service has been established as the appropriate means of determining whether a person is in an employer-employee relationship. There are practical consequences and diffi-

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[81] *Konrad v Victoria Police* [1999] FCA 98 at pars 100-104.

[82] See within par 96.

culties associated with applying that test. We consider that an outline of those consequences and difficulties may assist in the construction of the expression used in the Act having regard to the purposes and objects of particular provisions. For that reason, under Heading 8, we discuss several aspects of the application of the test for a contract of service.

8. Applying the common law test for a contract of service

41 The application of the common law test founded upon the presence in law of a contract of service has been far from simple. One reason is the difficulty of isolating the terms of any contract at all from the circumstances of particular cases. Creighton and Stewart have pointed out that the forms and content of a contract of employment vary greatly from place to place and time to time:

> ''. . . The latter-day Australian variety is a curious creature. In theory, and occasionally in practice, it embodies the norms upon which employer and employee expressly agree to base their relationship. For the most part, however, these norms are supplied by sources more or less external to the parties: the notion of 'agreement' is largely a legal fiction. These external sources include legislation, common law principles developed by the judiciary, awards made by industrial tribunals, and collective agreements negotiated between employers and worker representatives. The ways in which these sources combine to shape the modern employment relationship pose some of the more interesting and difficult challenges for those studying Australian labour law.'' [83]

42 There is also considerable practical difficulty in meeting that challenge in the hearing and determination of a particular case. Techniques and legal principles may need to be applied to establish what are the terms that the parties to a ''contract'' have agreed to. Often those techniques or principles require a view to be formulated around what has been called the ''factual matrix'' of the transactions said to constitute less formally evidenced contracts. It is convenient to mention at this point the technique and principles involved. A limited application of them will be required in this matter because no written contract executed or signed by the parties exists. As we understand the current law relating to the identification and construction of contractual terms, it is proper in the circumstances to have regard to the entire conduct and course of dealings between the parties. [84] The general approach was summarised by McHugh AJA, as he then was, in the following passage:

> ''It is often difficult to fit a commercial arrangement into the common lawyers' analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into a slots of 'offer', 'acceptance', 'consideration' and 'intention to create a legal relationship' which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship: compare P S Atiyah, 'Contracts, Promises and the Law of Obligations', *Law Quarterly Review*, vol 94, 178,

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[83] B Creighton and A Stewart *Labour Law: An Introduction* (3rd Ed), Federation Press 2000, at p 9.

[84] See generally Carter and Harland *Contract Law in Australia* (2nd Ed) at par 205; Cheshire and Fifoot's *Law of Contract* (6th Australian Ed) at pars 119 and 136.

p 194. A bilateral contract of this type exists independently of and indeed precedes what the parties do. Consequently, it is an error 'to suppose that merely because something has been done then there is therefore some contract in existence which has thereby been executed': Howard, 'Contract, Reliance and Business Transactions', [1987] Journal of Business Law, p 127. Nevertheless, a contract may be inferred from the acts and conduct of parties as well as or in the absence of their words: *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* [1988] 14 NSWLR 523. The question in this class of case is whether the conduct of the parties viewed in the light of the surrounding circumstances shows a tacit understanding or agreement. The conduct of the parties, however, must be capable of providing all the essential elements of an express contract; cf *Baltimore and Ohio RR Co v US* 261 US 592 [1923]; *Pincke v US* 675 F2d 289 [1982]. Care must also be taken not to infer anterior promises from conduct which represents no more than an adjustment of their relationship in the light of changing circumstances.

Research in the United States and Great Britain suggests that probably the majority of people in ongoing business relationships regulate their relationships in accordance with what they consider is fair and or commercially necessary at particular points of time rather than by reference to a priori rights and duties arising under a contract: Beale and Dugdale, 'Contracts Between Businessmen', British Journal of Law and Society, [1975] p 45; Lewis, 'Contracts Between Business', Journal of Law and Society, [1982] p 153. This is the case even where their relationship is governed by a written contract. There is no reason to suppose that the position is any different in Australia. For this reason 'action and conduct before the inception of a controversy is of much greater weight than what they said or did after a dispute arise': *Fincke v US* (at 295).

Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties' subsequent conduct become sufficiently specific to give rise to legal rights and duties. In a dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.'' [85]

43 The question of whether the parties to a transaction intended there to be a contractual liability in respect of a representation or matter will often arise as part of the exercise of discerning whether a contract exists and establishing the terms. It may be necessary to have regard to the conduct and course of dealing between the parties and to the ''factual matrix'' within which any agreement should be construed. [86] The sources upon which a tribunal may draw and the approach that should be adopted, for purposes of identifying the terms of a

[85] *Integrated Computer Services v Digital Equipment Corporation* NSW(CA) 5 BPR 11, 110, at 111, 117-118, per Hope, Mahoney JJ and McHugh JA.

[86] Cheshire and Fifoot's *Law of Contract* 1992 (6th Australian Ed) at 49, 60-61; Carter and Harland, *Contract Law in Australia* 1991 (2nd Ed) at 184-185.

relevant contract, are well delineated by authority.[87] It is only when those terms of a relevant contract have been established that the question of whether the terms amount to a contract of service can be addressed. That is the task of characterising the contract by the test for a contract of service.

44 The nature of that task is the second reason why the contract of service test has been difficult to apply. What is required is a characterisation of a kind of contract, by reference to indicia. Few, if any at all, of the indicia used are definitive of any particular type of contract. The weighting of particular indicia appears to be subjective and arbitrarily relative. There is no longer even a well defined ascending or descending order of cogency of indicia in determining the characterisation issue. Thus, recent cases suggest there is no measurement relative to the indicia by which to mark those most proportionate to establishing the practical limits and nature of the juridical concept of the relationship at issue. The rationality of the ostensibly static juridical concept of the master servant relationship is increasingly stressed by the need to apply it as the determinant of access to relief or liability for diverse purposes. The overlay of a contract of service on a particular relationship to establish or negate the vicarious liability of the principal for the negligence of an operator has driven much of the case law. Manifestly, the higher the degree of control over work, and perhaps the greater the degree of ''integration'' of the worker, the greater the justification of a burden of vicarious liability being imposed on the principal for whose benefit the work is done. For some other purposes, a better and more practical test of economic interdependence between principal and worker might seem to be appropriate. However, the purpose for which the characterisation of the relevant contract is necessary seems to be immaterial to the common law meaning of employee. The characterisation based on a consideration of the totality of the relationship between the parties is not to be guided, it seems, by the purposes for which the characterisation is required. The relative inability to have regard to the assessable substance of the operational arrangement by reference to the policy objectives of the statute or legal cause of action for which the characterisation is being made places under tension the characterisation process.

45 The decision in *Konrad v Victoria Police* is an instance of an attempt to resolve that tension by an extended statutory construction of ''employee'' in its context. In contrast, *Hollis v Vabu Pty Ltd*[88] concerns an issue that arose about the vicarious liability of the operator of a bicycle courier business. The cause of action was an injury caused by an individual courier performing work under a contractual arrangement with Vabu. The New South Wales Court of Appeal had earlier held that, for purposes of determining Vabu's liability to superannuation guarantee levy, the relevant arrangement covering both vehicle and bicycle couriers was an independent contract for services.[89] In the later case, concerned only with a bicycle courier's contract, the precedent was followed. The operator of the courier business was held not to be vicariously liable for a courier's negligence. Davies AJA, in a dissenting judgment,

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[87] In particular *Hospital Products Ltd v Surgical Corporation* (1984) 156 CLR 41 at 61-62 per Gibbs J; see also *Reardon Smithline v Hansen Tangen* [1976] 1 WLR 989 at 995-997.

[88] *Hollis v Vabu t/a Crisis Couriers* [1999] NSWCA 334.

[89] *Vabu Pty Ltd v Commissioner of Taxation (Cth)* (1996).

commented on the variety of purposes and benefits for which categorisation of the relationship under which work is performed may become relevant:

> ''37 In past years, when Smiths' *Law of Master and Servant* was a standard textbook to be found on the shelves of Sydney's lawyers, it is likely that the bicycle couriers would have been employees of the courier company. That is because, in those days, there was a benefit to be perceived from the relationship of employer and employee. Servants were bound to comply with the lawful directions of their masters and could be disciplined or dismissed for failing to do so. At the present time, however, there are sound commercial reasons why business proprietors may prefer to conduct their business through the instrument of independent contractors. In doing so, the business proprietors may avoid the necessity of paying group tax, of putting aside amounts by way of superannuation guarantee, of providing for holiday pay and long service leave, of complying with award conditions of employment, of complying with unfair-dismissal laws and, lastly, of accepting responsibility for the acts of those engaged in the business. Presumably, those who were responsible for structuring the respondent's business had some of those factors in mind. There is nothing wrong with that. But because there is a trend for commercial enterprises to do what the respondent did, namely to engage independent contractors, there is also a trend for cases to arise which involve consideration of that part of the law which concerns, not vicarious responsibility for the acts of employees, but liability for the acts of independent contractors. There has also been development in the principles of negligence: see *Kondis v State Transport Authority* (1984) 154 CLR 672; *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 and *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.'' [90]

46 Davies AJA briefly canvassed in that passage the use to which a contractual embellishment or manipulation of the conditions under which work or a job is performed may be put. We note that his Honour may have overlooked the rapidly growing use of labour hire services. In making such arrangements the person for whom work is performed is not in contractual relationship at all with the person who performs the work. However, Davies AJA in the passage quoted points to the scale on which evasion of remedial legislation attaching to employment has developed. Anomalous effects are caused by legal obligations and duties being made dependent upon a collateral concept of employment as a personal legal relationship. The existence of that relationship as a matter of general law is determined as much by form as by substance. As Deane J observed in *Stevens v Brodribb*:

> ''The distinction between 'employee' and 'independent contractor' has become an increasingly amorphous one as the single test of the presence or absence of control has been submerged in a circumfluence of competing criteria and indicia.'' [91]

As a counter to that problem, some State industrial legislation includes some classes of industrial contractors among a class of employees as defined. [92]

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[90] Ibid at par 37.

[91] Ibid at 49.

[92] Creighton and Stewart refer to the definitions of ''industrial matter'', ''employee'' and ''employer'' in IR Act 1996 (NSW) ss 5, 6 and Dictionary; IR Act 1999 (Qld) ss 5-7; IER Act

However, the case law and the academic sources to which we have referred, suggest that, generally, statutory provisions fail to inhibit resort to distinctions in contractual form to evade regulatory effects. Toleration of an amorphous contractual distinction being used to shield arrangements that are not materially different, serves to encourage anomalies in the operation of the regulatory regime. Such anomalies are magnified by the differential approaches now manifest in legislation. Thus, for taxation purposes, it is proposed that ''contractors'' earning more than 80 per cent of their income from one ''employer'', it seems, may soon be taxed as an employee.[93] Revenue and superannuation guarantee statutes of the Commonwealth use a statutory formula that effectively deems that work under a contract wholly or principally for the labour of the person is an employment.[94] For that purpose, it seems a contract may be accepted to be principally for the labour of the person if payments under it for labour are more than 50 per cent of the total value of the contract.[95]

9. Conclusion: the meaning of ''employee'' for purposes of s 170CE

47 The cases and sources to which we have referred contain much that would justify a generous construction of the concept of employment covered by s 170CE. However, we are obliged to apply the law as we understand it. We can find no plausible basis upon which to found a proposition that the references to employee in s 170CE(1) or par 170CK(2)(e) are intended to subsume a person performing work as an independent contractor for the services involved. In expressing that view, we have assumed, for reasons that we will develop, that it is not open to sub-divide a contract into a part that is a contract of service in respect of the labour or work performed, and a part that is a contract for services in respect of goods or resources supplied. In other words, although a contract for work may be characterised in different ways for different statutory or perhaps judicial purposes, the contract may only be characterised as a contract of service, or a contract for services, or perhaps neither of them, for purposes of the common law meaning of employment in the sense of a master-servant relationship.

48 We are disposed to accept that our primary task may best be expressed as the determination of whether or not Mr Sammartino is an employee for purposes of the *Workplace Relations Act* 1996. We are also disposed to accept that the expression ''employee'' in subs 170CE(1) and par 170CK(2)(e) extends beyond the common law meaning of the term to be capable of applying to a person who performs work or labour for another as an employee. Application of the authority, or at least the reasoning, of *Konrad v Victoria Police* requires an acceptance that a wider class of employment comprising persons who perform

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92 *continued*
1994 (SA) ss 4, 6; IR Act 1979 (WA) s 7(1); IR Act 1984 (Tas) s 3(1). Some of the definitions exclude workers who might otherwise be regarded as employees: those who perform work for spouse or parent (NSW, SA), or domestic service (WA); ibid at 203.

93 New Business Tax System (Alienation of Personal Services Income) Bill 2000. Some State industrial legislation includes some classes of independent contractors in a class of employees as defined for purposes of workers compensation.

94 *Vabu Pty Ltd v Commissioner of Taxation (Cth)* (1996) 81 IR 150 at 152 per Meagher AJA.

95 See *Neale v Atlas Products Pty Ltd* (1955) 94 CLR 419; *World Books Australia Pty Ltd v Commissioner of Taxation (Cth)* 92 ATC 4327; (1992) 23 ATR 412; and see also Australian Taxation Office Superannuation Guarantee Ruling SGR 93/1 at par 12.

work or labour for another may be covered by subs 170CE(1) than is covered by the common law meaning. None the less, we can find no adequate basis upon which we can construe ''employee'' in its context in s 170CE, or in par 170CK(2)(e), to mean a person who is, as a matter of law, an independent contractor for services. Nor can we apply the extended meaning developed in *Konrad v Victoria Police* to an effect which would include such independent contractors. We have several reasons for this view.

49 The first is the general context of the Act itself. Associated with that consideration is the history of use in the Act of the concepts of ''employee'' and ''independent contractor''. In the Act and its predecessors, each of those expressions has been used, and at times juxtaposed. One such juxtaposition can be found in the current provisions at pars 188(1)(b) and (c). Others appear in subs 298K(2) and ss 298A and 298N in Pt XA. The contracts for services mentioned in ss 127A and 127B are also predicated on a distinction, expressed in subs 127A(4), between contractors and employees engaged as such. That differentiation manifests an adherence to the common law distinctions of meaning in the wording of the Act generally. The repetition of the distinction is not consistent with the word ''employee'' in s 170CE being expanded beyond its ordinary meaning, albeit a term of art meaning, to cover independent contractors for services. Independent contractors are a class of persons that the Act itself consistently differentiates from employees. The effect of *Konrad v Victoria Police* is that a holder of a public office, a police officer, has now been held to be an employee for purposes of the 1993 Act. Perhaps, by extension of that reasoning, police officers and other classes of public sector workers may also be employees within the meaning of s 170CE of the Act. But that fact merely reinforces the construction we place on the use of the word ''employee'' in s 170CE. Many such public sector workers and officers are commonly held to be employees. The Act, and other relevant legislation, contain provisions compatible with an acceptance that many public sector personnel are ''employees''. Paragraphs 5(3)(d) and (e) of the Act illustrate the point. Conversely, there is no recognition in the Act or associated Commission jurisprudence that engagement under a contract for services is within the class of relationships included in the concept of employment to which the Act applies.[96]

50 The ILO Convention whose objects are to be served by Div 3 of Pt VIA of the Act does not differentiate between employees in the public and private sectors. However, the Convention contains nothing to indicate that references to ''workers'' or ''employed persons'' are intended to include the class of persons who meet the description of independent contractors for services. Article 2 of the Termination of Employment Convention applies it to all branches of economic activity and to ''all employed persons''.[97] Those references, it seems, are extended ''to all categories of workers'' by Art 2 of Recommendation 166. However, there is nothing in the Convention or Recommendation expanding the worker or employed person references to persons not engaged under a ''contract of employment''. That latter expression may have a wider connotation internationally than it does under Australian law. Even if it does, we are unable to conclude that the possibility of such wider scope is a sufficient

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[96] See cases referred to par 28 above.

[97] Schedule 10 of the Act, Art 2 and see also Art 2 Recommendation No 166 Sch 11 of the Act.

basis for giving the expression ''employee'' in s 170CE a meaning that includes a class of relationship which has hitherto been excluded from the concept of employment as used in the Act.

51 In this instance, as we have noted, we incline to the view that we would be bound to apply the reasoning in the decision in *Konrad v Victoria Police*. We therefore adopt the view that ''employee'' in s 170CE when read in conjunction with par 170CK(2)(e), is intended to extend to ''a person who performs work or labour for another; that is to say a person who sells his labour and not the product of his labour''.[98] In that context we note that, for the purposes of par 170CK(2)(e), the Convention Concerning Discrimination in respect of Employment and Occupation is relevant. Article 1.3 of that Convention explains that the term employment ''includes access to vocational training, employment and to particular occupations, and terms and conditions of employment''.[99] None the less, neither that extension or the construction applied in *Konrad v Victoria Police* justifies the inclusion of independent contractors for services among employees for purposes of par 170CK(2)(e). Many such contractors perform work or labour for another. But to include such contractors as employees, it would be necessary to segment the relevant contract. The part that relates to the performance of work could be severable if such an approach were permitted. The part or parts that concern provision of resources or goods, or are inimical to performance of work in a manner consistent with the normal incidents of the employee relationship, would be another part. We can find no basis in authority, or in the Act, to justify such a departure from the orthodox characterisation of contracts of service and contracts for services as mutually exclusive for purposes of identifying an employee in a master-servant relationship at common law. Multiple characterisation or segmentation of parts, of a contract appears to be precluded by the common law dichotomy between contracts of service and contracts for services. The direction in the decided cases ''that it is the totality of the relationship that must be considered,[100] reflects that dichotomy of characterisation.

52 Finally, in support of the construction we would apply to s 170CE, weight must be given to the limitation of applications under subs 170CE(1) to federal award employees, or Victorian employees as defined. For purposes of that application of subs 170CE(1), there is either an implied or an express exclusion of persons engaged under contracts for services. The same limitation does not operate in respect of an application based on the ground in par 170CK(2)(e), but for the reasons we have given, we consider that a similar exclusion of independent contractors for services operates.

53 For the reasons we have set out, we conclude that a person supplying resources or goods as well as services in the nature of work or labour as an independent contractor for services is not capable of being an employee within the meaning of s 170CE.

10. The principles to be applied in the common law test for an employment relationship

54 In the circumstances, it is necessary to set out what we understand to be the

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[98] *Konrad v Victoria Police* ibid at pars 100-104.

[99] Section 170CK and *Human Rights and Equal Opportunity Commission Act* 1986 Sch 1.

[100] *Konrad v Victorian Police* per Mason J ibid at 29.

principles which we are to apply to establish whether or not Mr Sammartino was an employee for the purposes of s 170CE of the Act. We emphasise in this context a point we made under the preceding headings. The decided cases all appear to proceed upon the notion that the characterisation of a contract for work is a polarising process. It seems that the common law dictates an all or nothing approach. A contract for work to be performed is a contract of service or it is a contract for services: it cannot be both. We are aware that some academic opinion, and some judicial analysis, suggest that the characterisation of work contracts into contracts of service or contracts for services involves a false dichotomy.[101] Our examination of the cases to which we were referred does not disclose any ready answer why such strict compartmentalisation is necessarily so. It seems that instances can be found of a work contract that is neither a contract of service, or for services.[102] Some labour hire arrangements appear to function on a basis that involves work being performed at the direction of an operator who is in no contractual relationship at all with the worker. There does not seem to have been any consideration given in decided cases to the possibility that a relationship is founded upon a contract that has elements of both a contract of service and a contract for services. We have not found any case which supports a view that, for purposes of establishing an employment relationship at common law, a contract may be susceptible to multiple categorisations, or sub-divisible into parts that justify characterisation as different kinds of contracts, or as the source of different kinds of juridical relationships that include employment as a servant.

55 Some of the cases appear to grapple with such questions as whether the relationship of agency can co-exist with a master-servant relationship, each being evidenced in a single contract. However, we can find no authoritative basis upon which it would be sound to inquire whether an engagement to perform particular work, and to provide particular resources related to such performance, might involve both a contract of service in relation to the work and a contract for services in relation to the residue. In the circumstances we shall undertake the task of characterising Mr Sammartino's contract as one or the other. None the less, were the common law meaning of ''employee'' to admit a more flexible approach to characterisation, or at least the meaning of ''employee'' in s 170CE to do so, closer regard could perhaps be paid to the purpose of the statute for which the characterisation needs to be undertaken. No proposition has been put to us in this case that Mr Sammartino was engaged under a contract that had the elements of both a contract of service and a contract for services, or that it was neither.

56 *Stevens v Brodribb Sawmilling Company*[103] is accepted to be still the leading case setting out the determinants of the existence of a contract of employment

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[101] Powe R ''Two Bob Each Way'' Employee or Independent Contractor March 1986 Journal of Industrial Relations 86 at 87 citing Woodward J in *Narich Pty Ltd v Commr Pay Roll Tax (NSW)* (1981) 12 ATR 478 at 502; see also Howe J and Mitchell R *The Evaluation of the Contract of Employment in Australia* Australian Journal of Labour Law 1999 Vol 12 113 at 129; and Creighton B *The Forgotten Workers: Employment Security of Casual Employees and Independent Contractors* in *Employment Security* McCallum R, McCarry G and Ronfeldt P, The Federation Press.

[102] See *Dare v Dietrich* (1979) 26 ALR 18 at 27, 36; *Odco Pty Ltd v Building Workers Industrial Union* (1989) CLR 1989 87; see also *BWIU v Odco* (1991) 29 FCR 104.

[103] (1986) 160 CLR 16.

service. In that case, the High Court consolidated several propositions about the weight given in earlier cases to the nature and degree of detailed control over the person alleged to be a servant, and a competing test of whether the alleged employee is ''part and parcel'' of an employer's organisation. Mason J, as he then was, and Wilson and Dawson JJ were at one in concluding that the question of whether the relationship is one of employment is a question of degree for which there is no exclusive measure. Both judgments gave priority to the control test. Thus Mason J stated:

> ''... 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; *Commissioner of Taxation (Cth) 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:
>
> > '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* (1973) 129 CLR 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.'' [104]

57 Wilson and Dawson JJ, in a separate joint judgment, held that the control test in the first instance remains the surest guide to whether a person is contracting independently or serving as an employee. They listed other indicia of the nature of the relationship, variously stated in the following passage:

> ''... 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

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[104] *Stevens v Brodribb* ibid at 24,25.

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.'' [105]

58 With minor exceptions, later cases may properly be considered to be applications of the ''multiple factor'' or balance of indicia test formulated in *Stevens v Brodribb*. [106] It is not necessary for us to review those cases for present purposes. We note however that it now seems accepted that there are no ''hard and fast rules'' as to the nature and weighting of indicia. Moreover, there is a great variety of instances in which the rules have been applied to test whether a transaction may be characterised as a contract of service. We consider it is appropriate in applying any of those cases to bear in mind a point made by Deane J in *Dare v Dietrich*: [107]

> ''A contract of service is that form of contract which embodies the social relationship of employer and employee. It cannot be identified by reference to the presence of any one or more static characteristics. The relationship is a dynamic one which needs to be accommodated to a variety of different and changing social and economic circumstances. . . .''

11. Applying the common law test for a contract of service to the evidence about Mr Sammartino's contract

59 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''. [108] 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 (1986) 160 CLR 16 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]. . . .'' [109]

60 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

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[105] *Stevens v Brodribb* ibid at 36-37.

[106] See generally for discussion Creighton and Stewart ibid at pars 7.18-7.19.

[107] *Dare v Dietrich* ibid at 36.

[108] *Re Family Day Care Providers* (unreported, Print J7216, 5 April 1991 per Boulton and Munro JJ and Donaldson C) at pp 2-4.

[109] *Re Family Day Care Providers* ibid at p 3.

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

12. The evidence

61 The evidence and evidential material before us was described generally in Foggo C's decision. Mr Sammartino gave sworn evidence before Foggo C, and attested to a written outline of evidence. Attached to that document were a copy of the Transport Workers Award 1983, a copy of the 1997 Industrial Agreement, and a miscellany of documents relating to working conditions, to the termination of Mr Sammartino's service, to Mayne Nickless' requirements that Mr Sammartino be removed from his established and preferred St Kilda ''run'', and references from customers. Mr Sammartino was cross-examined on that sworn evidence by Mr R Ironmonger, who appeared for Mayne Nickless in the proceeding before Foggo C.

62 At the second hearing of his appeal, Mr Sammartino sought to tender additional documentary evidence. Mr Parry objected to the tender. We have decided that the additional material should be received in evidence. We reserved the question of whether we would issue further directions as to how that material should be covered by additional submissions. Having regard to the nature of the material, and to our view of the substance and nature of the factual issues in the case generally, we have not found it necessary or appropriate to require further submissions. We agree that some documents tendered may be of scant relevance or little weight. Also, some of them could have been presented, perhaps, at the first instance hearing if more diligent search had been made. However, we make allowance for the nature of the issue of jurisdictional fact and that Mr Sammartino appeared in person at critical stages. Some of the documents simply add detail to points that are already covered in the evidence generally. Thus, the documents provide details of work rosters for public holidays, rostered day-off entitlements for airfreight drivers, and details of some more or less automatic adjustments of the labour rate component of the prevailing owner-drivers' rates of remuneration in line with variations of the relevant driver classification in the Transport Workers Award 1983. Other documents provide details of Mr Sammartino's membership of the TWU Superannuation Fund. Wards Skyroad is listed as an Employer Sponsor/Prime Contractor for purposes of that fund. Other material evidences warnings or disciplinary action proposed against Mr Sammartino during his

service, and occasional but far from compelling references to him as an employee. The remainder of the material is comprised of copies of material distributed from 1989 onwards about negotiation of various general or yard specific agreements; various decisions of the Commission demonstrate among other points Mayne Nickless' respondency to the Transport Workers Award 1983. The tender includes a part copy of Doc L5594, an agreement certified under s 170MC of the *Industrial Relations Act* 1988 between the Transport Workers' Union of Australia (the TWU) and Mayne Nickless trading as Wards Skyroad. It appears from the part copy of that agreement tendered that the 1994 Agreement had a separate section applicable to TWU Award employees, and another section appended headed ''Air Freight Owner Driver Agreement''. We treat some of the latter material as a form of submission about the existence and references to such sources. We do not consider that any of it opens new matters or adds substantially to matters or points not already covered in some detail in the evidence before Foggo C. Although it adds clarifying detail to some of those matters, the information supplied in some respects corroborates aspects of Mayne Nickless' evidence.

63 For Mayne Nickless, Mr D B Byrne gave sworn evidence by affidavit and was further examined before Foggo C. He was cross-examined by Ms Doyle, of counsel, who appeared for Mr Sammartino before Foggo C. In that evidence, Mr Byrne challenged some of the evidence given by Mr Sammartino, particularly that in which Mr Sammartino asserted he was an employee of Mayne Nickless. Evidential material presented by Mr Byrne included an ''original agreement'' between Skyroad Express, (including couriers), and the contracted owner-drivers (for whom the TWU apparently acted as agent or delegate); a documentary trail covering meetings and negotiations between Wards Skyroad and the TWU representing its contract carrier and courier owner-driver members; material demonstrating that Mr Sammartino was at all material times held out to be one of a class of ''permanent contract-carriers'', as distinct from another class, ''TWU Award Employees — Permanent''; and a set of confidential documents personal to Mr Sammartino. The latter include: applications for ''approved periods of absence'' as contract carrier; a signed Prescribed Payments System Payee Declaration, (PPS Declaration), signed by Mr Sammartino for a tax deduction rate of 20 per cent of tax against amounts payable under his contract; and Mr Sammartino's Taxation Returns or Assessments for financial years ending 1992 to 1997. It appears from that material that Mr Sammartino was paid and taxed at all material times as an individual natural person. Another document evidences an authorisation of an approved subcontractor driver during Mr Sammartino's annual leave in September 1993, and January 1995.

13. The work performed

64 Mr Sammartino started work on a casual basis in 1986 for Mayne Nickless Express trading as Wards Skyroad. He already had his own vehicle, a Toyota van, and he used it for his work with Wards Skyroad. From early 1987 he was engaged as a ''courier driver'' or ''airfreight carrier'', required to supply and use his own vehicle, a van, to pick up and deliver parcel items on a set ''run'' between particular enterprises using the service. The Operational Procedures and Code of Conduct applied by Mayne Nickless to ''contract carrier'' drivers sets out in detail the duties and responsibilities of the drivers as at the time of

the termination of Mr Sammartino's service. It is not in issue that at that time the work requirements were broadly aligned with the specification in an Appendix to the May 1997 version of an Industrial Agreement between Mayne Nickless and the Victorian Branch of the TWU (the 1997 Industrial Agreement). Clause 4 of that Agreement obliged the contract carrier to perform all duties and responsibilities in accordance with the Operational Procedures/Code of Conduct set out in an Appendix, as varied from time to time by agreement between the TWU and Mayne Nickless. The carrying work performed by Mr Sammartino was required to be under Mayne Nickless' conditions of carriage, in a vehicle suitable to Mayne Nickless, on runs allocated at the discretion of Mayne Nickless to meet its operational requirements. The operational procedures and code of conduct constitute a detailed statement of work and processes. The overall effect is adequately summarised in the following extract from cl 23 of Appendix 1 of the 1997 Industrial Agreement:

> ''23. Work procedures/discipline procedure
>
> All current work procedures must be adhered to at all times. Work procedures include, but are not limited to, the appropriate completion of all paperwork as directed, effective pick-up and delivery of freight as directed and Contract Carrier/vehicle presentation and the Code of Conduct. Failure to observe and follow the recognised work procedures or adherence to the Code of Conduct will result in the following discipline procedure being implemented:
>
> (a) Verbal warning . . .
> (b) Written warning . . .
> (c) Final Written Warning . . .'' [110]

65 From those findings and materials, it is manifest that Mr Sammartino was engaged to provide services. Those services included the provision of a vehicle, his driving the vehicle generally, his personal attendance to collection and delivery at client's premises, and his observance of procedural requirements for receipting and invoicing deliveries and collections.

14. The existence of a contractual relationship

66 It is not disputed that Mr Sammartino was in contractual relationship with Mayne Nickless. An offer was made of work of the kind performed by an owner-driver. There was an acceptance. Consideration was exchanged on a continuous basis between 1986 and 1998. No written contract signed by Mr Sammartino exists. Neither party contended that a contract in that form existed. We consider that Foggo C was mistaken in concluding that Mr Sammartino ''signed off'' on all agreements. He did not dispute he was bound by the industrial, site or yard agreements, but he was never a signatory. No evidence exists of a formal written agreement incorporating the terms of the 1997 Industrial Agreement. Mr Sammartino was given a copy of it, and it may be inferred, was party to a collective approval of it by TWU members.

67 Mayne Nickless contended that Mr Sammartino was engaged as a contract carrier under the terms of the Industrial Agreement from time to time in force. On that contention, based on the evidence given by Mr Byrne, the 1997 Industrial Agreement supplied the principal terms of the contract between

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[110] Federal Court Appeal Book at pp 274-275.

Mr Sammartino and Mayne Nickless. Mr Sammartino, in his evidence, accepted that his engagement was subject to the terms of the 1997 Industrial Agreement. However, Mr Sammartino also stated that he always understood his employment was subject also to the terms of the Transport Workers Award 1983. He asserted his employment was covered by that award and also by ''the Enterprise Bargaining Agreement'' or the industrial agreement in force and applicable to the site. He stated that award employees, formerly known as company drivers, and contract carriers, formerly known as contract couriers, were all treated in the same manner except that the contract carriers owned their vehicles. Mr Sammartino did not dispute that he was styled and paid as a contract carrier. Nor, through his counsel before Foggo C, Ms R Doyle, did he dispute that, at all material times, the industrial agreements negotiated by Mayne Nickless with the TWU on behalf of relevant owner-drivers were incorporated into the terms of his contract. His contention, through Ms Doyle, was that the terms of his employment included also provisions drawn from the award pertaining to employees and that, in law, the relationship created by his contract was that of employer and employee.

68 Mr Sammartino's evidence was that he was made ''permanent'' in around 1988. He stated that:

> ''From when I first started I was aware that I was under the terms of the agreements that were in the yard. And any inconsistency was covered by the award. And so I basically thought I was covered by both of those documents. When I was made permanent I was told I was eligible for holiday pay, superannuation, and all the benefits under the award.'' [111]

69 In cross-examination, Mr Sammartino specified that rates of remuneration for owner drivers were adjusted in line with the award and his understanding was that: ''we got paid as per the award.''

70 Having reviewed the evidential material, we find that Mr Sammartino's contract with Mayne Nickless was not evidenced in any comprehensive written document signed by him. The terms of his contract must be derived from the surrounding factual matrix. That task is less difficult because he was employed on virtually the same terms as were applied collectively to couriers, airfreight drivers, or contract carriers as the owner-drivers were variously and sequentially described. The terms and conditions of Mr Sammartino's contract were effectively resolved by the incorporation into his individual contract of the collective agreements that applied to owner-drivers of his class at Mayne Nickless from time to time. Those agreements were negotiated by the TWU on behalf of owner drivers.

71 The initial form of agreement was not proved with much particularity. Perhaps a general industrial agreement known as the VRTA (Victorian Road Transport Association) — TWU Agreement may have been adapted for application to the site. Mr Byrne's evidence included versions of what he labelled as the ''original Skyroad Agreement'' entitled ''Skyroad Express: Victorian Owner-Drivers Agreement''. But the copy is unsigned and undated. More specific forms of agreement entitled ''Courier Driver Remuneration Agreement'' were in evidence. They seemed to be attached to the first mentioned document, but why they were is not clear. Two documents with that latter title had terms that applied from February 1989, and February 1991

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[111] Transcript of 18 June 1998 at p 11.

respectively. Each appears to have been prepared by Mayne Nickless in negotiation with a TWU delegate on behalf of owner-drivers. The rates of remuneration section appears to have been prefaced by a statement: ''Standard of work practices. That statement referred to ''Hours of Employment'': requiring the courier to ''on the road and available for work from 0800 to 1800 Monday to Friday''. It stipulated also that ''other work practices from the Airfreight Agreement apply''. Both piecework rates and hourly rates of hire were specified. In addition, an hourly rate was specified to apply for ''In House Rates'' when a courier was requested to work within the Depot, or allowed to drive a company vehicle.[112] As at 1994, the terms of Mr Sammartino's contract incorporated at least that part of the certified agreement in Commission Print Doc L5594 entitled ''Air Freight Owner-Driver Agreement'', (the 1994 Certified Agreement). No doubt his contract included other terms preserved from various sources, but it is not necessary to identify those terms in this context.

72 At the time of the termination of his services, the terms and conditions applicable to Mr Sammartino were substantially to the effect set out in the 1997 Industrial Agreement. On the evidence available to us none of the site or yard agreements were individually signed or endorsed by Mr Sammartino. But each of them was negotiated by the TWU through yard delegates on behalf of owner-drivers. The 1994 certified agreement appears to have been voted upon by all Mayne Nickless drivers, both award employees and contract carriers. The inference is open, and we draw it, that Mr Sammartino joined in, or at least did not dissociate himself from, the collective approval of the 1997 Industrial Agreement.

73 The Award was not in terms incorporated generally into Mr Sammartino's contract. That is not to say that it did not apply to the extent that he or any owner-driver is or was an employee. However, the rates of remuneration would appear to have exceeded award rates at most times or were soon adjusted to match award increases. The primary entitlements of award employees were acknowledged by Mayne Nickless to be applicable to owner-drivers in the sense that they were adopted for the purposes of arriving at the level of remuneration and entitlements. For instance, cl 17 of what was described as the original Skyroad Express Agreement provided that: ''Bereavement leave is available to permanent Owner Drivers as per the Transport Workers Award 1983''. In the first years of Mr Sammartino's contract, the translation to him and other owner-drivers of award entitlements to annual leave, public holidays, and base pay rate for purposes of calculating hourly labour rates was relatively direct. The process is not clear. We draw the inference that adjustments to match award entitlements were based upon an understood administrative custom and practice enforced by TWU negotiations. Moreover, cll 8 and 11 of the 1989 and 1991 Courier Driver Remuneration Agreements imply that award rates at least will apply to couriers required to perform ''Country Line Haul'' or In House driving at the requirement of the Company.[113] The 1997 Industrial Agreement covered entitlements, using terminology specific to the contract-carriers. However, the actual benefit may have been based on, or calculated by

[112] Exhibit B1, Tab 2, Document 1 — Appeal Book at pp 360 and 363.

[113] Ibid Appeal Book at pp 359 and 362.

a formula using the standard award entitlements of drivers engaged as employees.

74 The terms of cll 3 and 24 of the 1997 Industrial Agreement are important. Those clauses purport to be an engagement and acceptance of appointment or continuation of engagement as a contract carrier, on the terms and conditions of the 1997 Industrial Agreement as ''the entire agreement or understanding between the parties'', although ''both parties acknowledge that changing circumstances may require changes to this Agreement''.[114] That wording is not in our view adequate to limit the terms of the personal contract between Mr Sammartino and Mayne Nickless to the 1997 Industrial Agreement. The parties to the latter agreement are distinct; the TWU and Mayne Nickless. Mr Sammartino was a party principal to his own contract with Mayne Nickless. His contractual terms included the terms of the 1997 Industrial Agreement but were not restricted to those terms. For present purposes, it is not necessary to identify what other additional terms may have existed, or have to be read in conjunction with the 1997 Agreement. We shall give consideration, only if need be to what supplementary terms may have existed and been carried over as part of Mr Sammartino's ongoing relationship. For immediate purposes, the main terms and conditions of Mr Sammartino's contract are those set out in the 1997 Industrial Agreement.

15. Applying the indicia of a contract of service

75 One of the terms of the 1997 Industrial Agreement stipulates:

> ''26. Legal relationship
>
> The Principal Contractor and the Contract Carrier agree that the legal relationship between the Principal Contractor and the Contract Carrier is that of principal and independent Contract Carrier and not that of employer and employee and no term of this Agreement shall be construed as creating the relationship of employer and employee between the Principal Contractor and the Contract Carrier.''

76 That term, along with other relevant provisions of the 1997 Industrial Agreement negotiated by Mayne Nickless and the TWU, was incorporated into the terms of Mr Sammartino's personal contract with Mayne Nickless. None the less, he disputed that the relationship established under his contract was in truth that of an independent contractor. He asserted that the proper characterisation of his contractual relationship is that he was an employee. In that contention, he relies upon the well established acceptance by the courts that at common law the way in which the parties to a contract themselves describe or label their relationship is not conclusive. We have quoted at par 30 above authority to that effect. More recent authority was summarised by Woodward J in *Odco Pty Ltd v BWIU*.[115]

77 Mr Sammartino reinforced his contention by his assertion that at the time of his first appointment as a ''permanent airfreight courier'' he was not labelled as an independent contractor. Moreover, in the documentation about negotiation of the agreements supplied by him, there is evidence that in September 1990, the Victorian Branch Secretary forwarded a written response to the VRTA, one point of which objected to the inclusion of a proposed cl 9:

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[114] Exhibit B1, Table B2 at pp 1 and 12.

[115] Ibid CLS 1989 FED 308.

''CLAUSE 9

(a) The Union is concerned about the wording of this clause, it is our belief that there is certainly an employee/employer relationship between permanent owner drivers and Prime Contractors.''

78 It is not clear that the reservation applied to Wards Express particularly. Even if it did, it does not carry any weight in the absence of a fuller picture as to how, why and when the reservation was resolved, if it applied to Mr Sammartino. We have observed already that we are unable on the evidence to establish how fully the terms of the VRTA-TWU Owner Driver Agreement were adopted and may have been incorporated into the contracts of owner-drivers engaged by the relevant Mayne Nickless trading operations in 1990. The evidence does demonstrate that the rates adjustments established through the negotiations with the VRTA were applied by Mayne Nickless as though under a binding obligation. The evidence quoted shows at least that the contractual relationship of owner-drivers in 1990 was thought by the union negotiating collectively on their behalf to be in issue. The true nature of the relationship may have been ambiguous, and appears to have been. No detailed written material seems to exist, and none is in evidence, to show the initial terms of engagement of Mr Sammartino as a permanent airfreight carrier and owner-driver. The fact that the terms of the 1989 and 1991 Courier Remuneration Agreements leave open possible interposition of direct employment ''In House'' or on ''Country Line Haul'' is a consideration of some weight in that tentative conclusion about the ambiguity of the contractual relationship around that time. On the other hand, an inference against Mr Sammartino ever having been perceived to be an employee owner-driver arises from his participation in, or at least acceptance of the PPS mode of paying tax. We shall consider that point at a later stage. Among countervailing considerations suggesting some ambiguity about employment is the fact that in May 1994, the draft Enterprise Bargaining Agreement was submitted to both Airfreight Drivers and TWU Award employees by Skyroad Express, the then Mayne Nickless operator, for approval through a joint ballot of both classes. The agreement was subsequently certified under s 170MC of the then Act, presumably on the basis that it applied to employees. A section of that agreement entitled ''Air Freight Owner-Driver Agreement'' is appended to the section that deals with TWU Award employees. The structure of the Agreement indicates that arrangements agreed were to be applied to both classes of worker, albeit the classes were clearly separated. Thus, allocation of afternoon air freight runs, conditions as to annual leave and rostered days off, and the adoption of a wage increase to the hourly base rate seem to be common to both classes of workers.

79 We consider that all of that background may be applied to inform our mind about how the terms of the 1997 Industrial Agreement are to be construed and applied when transposed to the personal contract between Mr Sammartino and Mayne Nickless. Some doubt and ambiguity exists about the characterisation of at least the initial stages of the relationship between Mr Sammartino and Mayne Nickless. At least that is so from when he was engaged as a permanent airfreight courier and owner-driver through till the expiry of the certified agreement in 1995. That original ambiguity is a consideration to be assessed when weighing in the balance the apparent intention of the negotiating parties to the 1997 Industrial Agreement to create indelibly a contract for services. The

term reflecting that intention was incorporated into Mr Sammartino's individual terms of engagement along with other provisions of the collective agreement. We see no reason to refuse to accept that it was the intention of both Mr Sammartino and Mayne Nickless to create a contract that was in form appropriate to the relationship of independent contractor.

80 It may be appropriate to observe that in our first consideration of the appeal against Foggo C's decision we gave substantial weight to that consideration, as did Foggo C. We also attached weight, as did Foggo C, to the associated practice within Mayne Nickless of classifying its workers as contract workers or TWU Award employees. So also, to Mr Sammartino's identification with that latter classification. However, on close consideration of the evidential material in this rehearing, it is our view that the antecedent and surrounding circumstances justify an examination of the provisions of the contract to assess whether the common law should be applied to classify the effect of the contract differently. Guidance from the Courts can be found to support either a close adherence to the expressed intention of the parties or a testing for the true relationship. As Denning LJ once observed: ''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 on it. . . .'' [116] Cases reflecting another view of the importance and relative priority of the intention reflected in the contract are discussed in *BWIU v Odco*. [117] As the Full Court of the Supreme Court of Victoria observed in *Morgan Research Ltd v Commissioner of State Revenue*, [118] the resolutions by the Courts of questions on this issue turn upon points of ''fact and degree in respect of which views might legitimately differ''. In that case opinion research interviewers were held, both at first instance and on appeal to be common law employees. That characterisation of the relevant contract was made despite evidence that the interviewers engaged by Roy Morgan Research Centre: were advised they were not employees; were able to a high degree to determine their hours of work; were not guaranteed work or required to accept work; were only paid a fee for each completed assignment without regard to time taken for the assignment; and had to provide their own transport for which they were paid an allowance. The Court gave greatest weight to considerations based on the degree of control over the manner in which they performed their tasks and on the requirement to perform the work personally. [119]

81 We have weighed carefully the propositions about the relative priority of the intention reflected in the contract in the overall task of weighing factors capable of pointing in one direction or another. We consider that having regard to the circumstances of this case the expressed intention should not be accorded conclusive weight. It is appropriate to examine and apply the indicia used to test whether Mr Sammartino's contract was in truth a contract of service. The intention of the parties expressed in the terms incorporated into Mr Sammartino's contract must be given weight. However, it is the personal

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[116] *Massey v Crown Life Insurance Co* (1978) 1 CR 590 at 594; and see *AMP Society v Chapter* (1978) 18 ALR 385 at 389-390.

[117] (1991) 99 ALR 735 at 755-756.

[118] (1997) 37 ATR 528; at first instance (1996) 33 ATR 361.

[119] Ibid (1997) 37 ATR 528 per Winneke CJ with whom Phillips and Kenny JJA concurred at 531-534 and 536-537.

contract that must be assessed in perspective with the totality of the relationship associated with it. That assessment of the individual contract and relationship should not be effectively displaced by giving determinative weight to a consideration derived from implementation of a collective agreement manifestly intended to apply to an array of circumstances associated with the entities constituting the group of contract carriers from time to time in contractual relationship with Mayne Nickless.

16. Control of work

82 The degree of control over what shall be done in the course of a work contract, and as to how what is done shall be done, has long been accepted to be at least a significant test for the existence of a contract of service. That formulation of the test is derived from what Wilson and Dawson JJ in *Stevens v Brodribb* described as the classic test for determining whether the relationship of master and servant exists.[120] But as the judgment in that case acknowledged, that test and other indicia are no more than a guide to the existence of the relationship of master and servant and the answer may be elusive.[121]

83 We find that the degree of control exercised by Mayne Nickless over what service was to be performed by Mr Sammartino and how it was to be performed was much the same as that exercised by Mayne Nickless over the TWU Award employees. Mayne Nickless did not attempt to determine how any driver carried out the task of driving the vehicle used in the delivery and pick up services. All drivers were expected to drive in accordance with the Code of Conduct. The owner-drivers had some liberty to determine for themselves the maintenance and upkeep of their vehicles. In other respects, the owner-drivers appear on the evidence to have been under much the same direction and control as to compliance with Mayne Nickless work procedure requirements and service standards. Those requirements were much the same as were applied to the TWU Award employees who also provided pick up and delivery services.

84 Both classes of workers were part of what the customers would have taken to be the same service fleet. Clause 23 of the 1997 Industrial Agreement, set out above, is a concise statement of control and disciplinary powers. Other provisions elaborated on the practices required and the power to terminate services. The provision demonstrates that any failure by a contract carrier to observe the recognised work procedures or to adhere to the Code of Conduct could result in disciplinary warnings followed by termination of the carrier's engagement. The Code of Conduct is in Appendix 1 to the 1997 Industrial Agreement. The evidential material presented by Mr Sammartino on the rehearing of the appeal includes two memoranda from the Chief Operating Officer of Mayne Nickless. They confirm what would otherwise be a matter of inference. Each memorandum is dated 31 July 1998. Thus, the evidential material came into existence after the date of Mr Sammartino's termination, but within the life of the 1997 Industrial Agreement which remained in force until a new agreement was executed.[122] Each memorandum directs that the Code of Conduct be adhered to. The memoranda are identical except that one is directed to all contract carriers, and the other is directed to all award employees. We

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[120] *Stevens v Brodribb* ibid at 35.

[121] Ibid at 37.

[122] Ibid 1997 Industrial Agreement, cl 28.

draw the inference that such requirements were common to both classes of drivers at all material times. The same inference is available from other aspects of the evidence, and was the subject of direct evidence from Mr Sammartino to Foggo C.

85 The virtual equivalence between award employees and contract carriers in respect of the degree of control actually asserted by Mayne Nickless features prominently in the totality of the circumstances associated with Mr Sammartino's contract. The evidence discloses that he was occasionally warned about timekeeping lapses, or transgressions of operational procedures. Although not specific to the nature of the control exercised over work, the relative equivalence is reflected in another feature of the 1997 Industrial Agreement. Clause 11 reserved to Mayne Nickless as Principal Contractor a unilateral right to ''transfer some or all of the Contract Carriers engaged under this Agreement to TWU Award Employees''. Exercise of that right is subject to conditions including: two months notice to the union and the carriers involved, permanent carriers having ''first offer of refusal of employment''; selection principles based on voluntary acceptance or seniority; and, measures to alleviate the effect of sale or disposal of the owner-driver's vehicle.

86 In many respects, the nature and degree of the control over the manner of performance of work expected of Mr Sammartino was indistinguishable from that exercised over contemporarily engaged employees performing similar services. We are obliged to accept that the degree of control exercised over the work performed and the way in which it was performed is a significant factor indicating that Mr Sammartino's contractual relationship was in substance that of an employee to an employer, a relationship of service.

17. Mode of remuneration

87 Over the course of Mr Sammartino's engagement in Mayne Nickless' operations, there were several variations in mode of remuneration. It appears that throughout Mr Sammartino's engagement his remuneration was based on payment of minimum rate for a prescribed or imputed weekly standard hours equivalent. To outline the mode of remuneration at the time of termination, it is sufficient to draw upon the 1997 Industrial Agreement cls 3, 5 and 6. Those clauses respectively provided for hours of work and starting times, pay rates in accordance with a Schedule to the Agreement, and payments each Wednesday of amounts due in respect of the preceding weekly pay period from Friday to Thursday each week. Clause 6 also required a superannuation contribution to be paid by Mayne Nickless to the TWU Superannuation Fund. The contribution rate specified is 6 per cent of the ordinary time 38 hours labour rate for the equivalent vehicle classification. The relevant labour rate was $11.53 per hour at the time the 1997 Industrial Agreement was struck. It was set at 17 per cent above the October 1991 award rate for a Grade 2 classification under the Transport Workers Award 1983.

88 Mr Sammartino's evidence was to the effect that whenever the relevant award classification got a pay rise, the labour rate component of the contract carriers' agreements would be adjusted, albeit perhaps not automatically. This, he said, led to a belief that in relation to labour rate they ''got paid as per the award''.[123] Some qualification to that evidence is necessary, to take account of

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[123] Transcript 18 June 1998 at pp 38, 45 and 54-55.

non-award movements in rates payable to Mayne Nickless ''award employees'' and timing of adjustments. However, the substance of the claim that there had been a broad correspondence between award employees rates and the contract labour rate component is accurate.

89 The labour rate was the third component of an overall remuneration package that included calculated components for fixed costs recovery on a suitable vehicle over a four year period, and a variable cost recovery component. Remuneration was paid by reference to a formula intended to ensure that the latter two components were payable in weekly instalments under one of the two options available. The labour rate was applied to ensure a minimum return for 38 hours engagement but with ''every effort'' to provide 50 hours engagement per week. Schedule G of the 1997 Industrial Agreement provided also for incentive payments above standard twice daily run rates. The incentive payment applied per ''stop'' when the number of stops on a particular morning or afternoon run exceeded a benchmark. The effect is represented in Table 1 below. It is a slightly modified extract from Schedule H of the 1997 Industrial Agreement. The payment set out is not the actual rate at end 1997, but it is near enough. The payment is calculated for a twice daily run within a 7.5km radius from the depot for a contract carrier opting to recover fixed costs over 52 weekly instalments for the year:

Table 1 [124]

Nickless Express — Contract Carrier
Run Rates

Zone	$ Rate	Application
1	$202.90 pw	Fixed Cost
	$193.22 pw	Variable Costs
	$645.68 pw	Labour 5 × (7.6 × Rate/Hr + 2.4 × 1.5 × Rate/Hr)
	$1041.80 pw	
	$2.62 ea	''Over Stops'' each [Benchmark: 61 stops per AM run; 30 stops per PM run.]
Per Run	$104.18	$1041.80 ÷ 10

90 It will be seen that the formula results in payment for an imputed 50 hour working week based on ordinary time rate for 38 hours and 12 hours at time and a half plus fixed cost and variable cost components. The evidence does not disclose whether Mayne Nickless in fact ''reviewed'' with Mr Sammartino the rates prescribed in the Schedules for the ''appropriate vehicle type'' as required by cl 5 of the 1997 Industrial Agreement. Rather, the reviews to have occurred seem to have been with the TWU, to adjust for movements in award employees award or over-award rates. The fixed and variable cost calculated components seem to have become standard for each owner-driver. In other words, the rates for those components were paid as per the 1997 Industrial Agreement. The specified rate was varied only by reference to the option selected by each contract carrier for the weekly instalment payments to be based on a 44 week

[124] Extracted from Sch H, Option 2, 1997 Industrial Agreement.

or 52 week annual recovery period. The fixed and variable cost components were determined without individual differentiation to take account of actual personal vehicle and operational costs. Hence, in practice, the ''Per Run'' rate was the effective rate for each morning or afternoon run completed unless there was some departure or addition from the standard run. Mr Sammartino's evidence was that in fact he was paid at the labour rate for 11 hours per day. His assertion was not challenged. It appears to be based on the effect of a time and a half loading to the 10 hours per day for five days which was the nominal ''ordinary hours'' working day.

91 The Mayne Nickless system required submissions of invoices at the end of each day setting out hours worked and transaction records for each pick-up and delivery. That system was the subject of some evidence and much debate in the proceeding before Foggo C. As we understand the operation of the system, the completion and presentation of invoices was mandatory. It constituted a condition for payment of remuneration for the week to which the invoices and receipts related. However, the particular invoices affected remuneration under the 1997 Industrial Agreement directly only in relation to providing evidence of excess freight weight, (where extra ''stops'' were deemed), or in relation to extra payment for ''over stops'' when the area run benchmarks were exceeded on particular morning or afternoon runs. Mr Sammartino's evidence was that in general, ''no matter how many pick ups were done during a morning or afternoon shift we were always paid the minimum; in other words, 11 hours pay at the hourly rate. My average wage was about $1,150 gross a week''. That evidence was not challenged in cross-examination.

92 The mode of remuneration is accepted to be one of the indicia of the type of contract. It is not self-evident why such weight should continue to be accorded to it. Presumably the identification of ''wages'' or ''salary'' is conceived to be a hallmark of employee status. However, remuneration packaging for both employees and arm's length contractors may now involve novel forms of payment. Such packaging options might be thought to make the notion of a bare wage as an indicia of employment a little anachronistic. On the other hand, the notion of a linkage between the form of remuneration for service and the provision of a resource or the acceptance of a capital risk by a bicycle courier was given pivotal weight in the first *Vabu* decision. Perhaps human resource investment costs and risks integral to many forms of skilled labour might appear to have been understated in some tests for an employment relationship. In this instance, Mr Sammartino's remuneration package repaid him in wage-like instalments for the cost and risk incurred in his providing a vehicle. The package also paid him an amount corresponding to a fair return on his labour based on a rate equivalent to award rates, and an imputed standard of hours notionally worked. The remuneration system, as Foggo C found,[125] was not the same as that of a Mayne Nickless award employee. However, the payment was regulated. It was similar to that which would normally apply to a person working for wages on a ''finish and go'' basis. The presence in the payment of a recompense for vehicle hire operational and costs is not by itself determinative of the kind of contract that existed. A great variety of arrangements exist to make recompense for resources supplied in association with services. Tool allowance for award employees is an illustration. Mileage

[125] Print Q3706 at p 3.

cost for vehicles used for work purposes is another. Matters of fact and degree are involved in evaluating the significance of the provision of equipment and resources, and the entrepreneurial risk involved.

93 On balance, we conclude that the mode of remuneration for Mr Sammartino's services was marginally more indicative of an employer-employee relationship, and of a contract of service than it was of an contract for services. If the epithet ''independent'' in the expression ''independent contractor'' has any meaning, and we doubt that it does, Mr Sammartino was not independent in relation to any significant aspect of the remuneration package applied to him. The package was collectively negotiated. The labour rate was derived from award equivalents, or perhaps over-award arrangements in the later negotiations. It applied to an imputed standard of hours to be worked to guarantee an income, and to cover Mayne Nickless' operational needs. The principal contractor retained a discretion to convert any individual contractor's position into a bare employment, subject to conditions that included the purchase or retirement of the ''suitable vehicle''.

18. Provision and maintenance of equipment or resources

94 Under his contract, Mr Sammartino was obliged to provide and meet the operational expenses of a ''1.2 tonne vehicle that is suitable to the Principal Contractor''.[126] In line with Mayne Nickless' requirements Mr Sammartino supplied a Mitsubishi van, kept it in the decals and livery of Wards Express, and met operating expenses. He had replaced one in 1996 to comply with a requirement for the vehicle to be not more than five years old. His provision of the van and maintenance of it in a suitable condition was a fundamental term of his contract with Mayne Nickless. It was not a mere ancillary or incidental stipulation associated with the work performed. The negotiated recompense and return for the fixed and variable costs of providing the vehicle and meeting operating costs constituted approximately 38 per cent of the weekly payments made to Mr Sammartino for his service.

95 We consider the obligation to provide and maintain a vehicle compatible with the Mayne Nickless fleet requirements is an important indication that Mr Sammartino's contract was a contract for services. That consideration, and the associated identification of the owner-drivers as a distinct and consensually created class of contract-carriers, together command great weight in the assessment that must be made of the totality of the circumstances in order to characterise the contract.

19. Obligation to work

96 Punctuality and attendance to all operational requirements were essential conditions of Mr Sammartino's contractual obligations under the 1997 Industrial Agreement. The consistent requirement was that he be at the depot or on the road at a pre-determined, albeit sometimes varied, starting time. However it may be characterised, his contract required that he meet labour obligations in a manner not materially different from the way in which an employee performing similar services in a company vehicle might have been expected to meet work obligations. The contractual obligation was personal to Mr Sammartino. He had very restricted opportunities to substitute his own work

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[126] 1997 Industrial Agreement cl 10.

performance. We discuss that aspect of the indicia under the next heading. The obligation to work as a driver and perform associated duties accounted for about 60 per cent of the remuneration earned under the contract. The nature of the obligation indicates a relationship of service more than it indicates a relationship for services to be provided by a person not effectively obliged to act under direction of the Principal Contractor.

20. Delegation of work or exclusivity of performance

97 No express prohibition on delegation of work or express requirement for exclusive performance is to be found in the 1997 Industrial Agreement. The only express authorisation of delegation is a conditional acceptance of provision of an ''approved relief driver'' by a permanent contract carrier who loses his driving licence. In that case, the carrier must accompany the relief driver and be the only person to enter clients' premises. That term of the agreement was incorporated into Mr Sammartino's personal contract. The surrounding circumstances justify a conclusion that, subject to the loss of licence exception, the obligation to work attached to him personally. The evidence demonstrates that in practice, there was no effective room for performance by him of similar work or provision of services to persons other than Mayne Nickless if he was to comply with his obligations under the contract. A condition to that effect was either an implied term, or a practical consequence of the nature of the services performed and Mayne Nickless' operational procedures and requirements.

98 In his evidence, Mr Byrne did not contend that it remained open to Mr Sammartino to delegate his responsibilities. Rather, he sought to maintain that it was open to Mr Sammartino to provide services for others if such work did not conflict with his carrying obligations to Mayne Nickless. We consider that Mr Sammartino had no effective capacity to exercise any such licence. Any resort to outside work would have created a likelihood of conflict with the obligations to be available to meet Mayne Nickless requirements. Prior to 1993, Mr Sammartino did have a contractual term giving him an option to delegate his driving work, on occasion, to an approved substitute. That option was effectively eliminated by Mayne Nickless in later negotiated site agreements covering owner-drivers. Neither the degree of delegation available, or the degree to which provision of services was exclusive of contractors other than Mayne Nickless, indicate the presence of a contract for services. The delegation of work indicia are inconsistent with the presence of a contract of service in one only respect. The loss of licence exception permitted a delegation of driving, but not of customer contract functions. Even that degree of delegation is a circumstance that weighs against a personal service relationship. For several reasons, including the conditions that attach to any attempted exercise of the exception, that weight is not significant.

21. Hours of work and entitlements to leave

99 The contract carriers' hours of work, attendance to duty, and entitlement to paid leave of absence are all closely regulated by express terms of the 1997 Industrial Agreement. The relevant terms incorporated in Mr Sammartino's contract required him to be available for duty at the Mayne Nickless depot at a time between 5 am and 7 am as nominated by Mayne Nickless. Late attendance of 30 minutes or more resulted in loss of pay for the morning's run. The

nominal 7.6 hours ordinary time and 2.4 hours at time and a half was an imputed figure use for incentive and remuneration purposes.[127] Essentially, the mutual expectation was that runs would be completed on a finish and go basis. If extra time was needed to meet customer needs, it would be forthcoming.

100 The terms of the 1997 Industrial Agreement refer to ''Approved Periods of Absence''. In our view that nomenclature was no more than a device to disguise the almost complete correspondence between award employee's paid leave entitlements and similar entitlements to paid annual leave, sick leave, (single day absence), bereavement leave and public holidays.[128] No provision appears to have been made for an entitlement corresponding to long service leave. Rostered days off were a topic of debate and negotiation but appear eventually to have been merged in the allowance made for single day absences.

101 The degree of regulation of hours of work, leave of absence and paid leave entitlements indicates the presence of a contract of service rather than a contract for services.

22. Deduction of income tax

102 Mr Sammartino paid tax as a natural person. He supplied Mayne Nickless from time to time with a PPS Declaration. Mr Byrne explained that the effect of the Declaration was that Mayne Nickless was shielded from the obligation that otherwise it would have had to deduct tax at 48 per cent of payments. Completion of PPS Declaration allowed tax to be deducted at 20 per cent or lower if an exemption was obtained by the contract carrier taxpayer.[129] Mr Sammartino's tax returns and assessments indicate that tax deductions of about 20 per cent of gross payments to him were made throughout his engagement with Mayne Nickless. We draw inferences that: Mr Sammartino made no application for exemption of income for the purpose of lowering the amount of tax deducted; he did not resort to incorporation as a tax minimisation device; and, that he did not use a partnership or family trust for tax or business purposes. Our experience of industrial matters involving provision of road transport industry services indicates that such arrangements are commonly used by owner-drivers engaged as independent contractors.[130] A requirement by principal contractors for owner-drivers to incorporate has become relatively common.

103 The use of PPS Declarations in contrast with the Pay As You Earn (PAYE) system has been used as an indication of a contract for services. The deduction of tax at source may once have been a circumstance that pointed to the existence of a liability peculiar to employees. By 1998 similar liabilities to have tax deducted were much more commonplace. For the purpose of identifying whether an employment relationship exists, the probative significance of use of a PPS Declaration would appear to be that eligibility to use that arrangement is not available to employers in respect of employees generally under s 221C of the *Income Tax Assessment Act* 1936.[131] Mayne Nickless was required by that

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[127] 1997 Industrial Agreement cl 3.

[128] 1997 Industrial Agreement cll 16 and 17.

[129] Transcript 18 June 1998 at p 50.

[130] *Re Gerrard v Mayne Nickless* — s 127A (unreported, Prints L1480 and L1536, 28 January 1994 and 3 February 1994); *Camilleri v Finemores Pty Ltd* (unreported, Print L4930, 31 August 1994).

[131] See generally Australian Taxation Office Ruling 1999: TR 99/13.

Act to make tax instalment deductions in respect of payments under a contract that involves the performance of work. In the ordinary course, Mayne Nickless could be taken to be a ''prescribed person'' engaged in the road transport industry. Therefore it could be taken to be subject to the duty under s 221YHA of the *Income Tax Assessment Act* 1936 to deduct tax instalments from certain payments. That duty does not extend to payments of salary or wages made to a common law employee. However, payments made under a contract wholly or principally for the labour of the person to whom the payments are made, may for purposes of that Act, be treated as wages and salary subject to PAYE deduction, or as payments subject to the duty in respect of prescribed payment deductions.[132] Thus the position appears to be that, for the purposes of deduction of tax instalments, a payment of salary or wages to a common law employee is always subject to the PAYE system but a payment to an independent contractor under a contract wholly or principally for labour is only subject to the PAYE system if it is not a payment of a kind declared by the *Income Tax Regulations 1836 (Cth)* to be a prescribed payment.

104 Be that as it may, in the overall circumstances of this case, it is necessary to accept that access to PPS deductions was founded upon Mr Sammartino not being an employee. However, it would be far-fetched to attribute to Mr Sammartino an understanding of the conditions about the use of a PPS Declaration. We draw the inference that he had a willingness to avail of a means whereby he would not have tax deducted at whatever was the PAYE rate. The use of the PPS form of deduction was almost incidental to Mr Sammartino's engagement as an owner-driver and his provision of a vehicle for the purposes of the services he was to render. Mr Sammartino does not appear to have either sought or got any advantage in reduced tax payments beyond the business deductions normally available to an employee taxpayer in similar circumstances. The three most recent income years for which assessments were provided disclose substantial refunds from the total PPS deductions made.

105 We note that some recent decisions have doubted that much weight should be attributed to the use of PPS Declarations instead of PAYE arrangements.[133] In this case, we consider the use of the PPS Declarations has little independent weight as an indication of the true character of the contractual relationship between Mr Sammartino and Mayne Nickless.

23. Characterisation of relationship for purposes of regulatory provisions such as superannuation and workers compensation

106 The descriptive heading we have used for this section reflects a modification of the terms used in *Stevens v Brodribb* to list indicia of the two relevant types of contract. However, the description is intended to focus on what we take to be the reason why the respective liabilities or entitlements are treated as indicia. Generally speaking, contributions to superannuation schemes have been made in respect of employees by employers or by the employees themselves. Similarly, the obligation to take out workers compensation coverage attaches to the employer of a worker, and the benefit of accident compensation is available

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[132] Ibid TR 1999/13 at par 45.

[133] *Jackson v Monadelphous Engineering* (unreported, Decision 281/47 Moore J; and *Re Porter; Ex parte TWU* (1989) 34 IR 179 at 185.

to an employee. However, the relative simplicity of identifying those benefits and the liabilities with the relationship of employer to employee must be qualified. The definitions of eligible relationships used by State legislation to fix liability to meet workers compensation obligations do not adhere to a simple formula confined to a contract of service master-servant relationship. Similarly, access to superannuation schemes, and liability of ''employers'' for obligations under federal Superannuation Guarantee legislation are not confined to persons who fit within the common law meaning of employee engaged under a contract of service. The Courts have read some elements of the latter definitions rather narrowly but it is manifest that payments for work under a contract wholly or principally for labour are intended to be within the operational reach of the Superannuation Guarantee legislation.[134]

107 Mr Sammartino was deemed by a term of the 1997 Industrial Agreement to be an employee for the purposes of the relevant Victorian Workcover legislation then in force. Clause 21 of that agreement read:

> ''21. Accident compensation
>
> In Victoria where an unincorporated Contract Carrier who provides services solely to Mayne Nickless Ltd suffers any injury arising out of or in the course of performing these services, and where, the provisions of the *Accident Compensation Act* 1985 (the Act) as amended where applied, the Contract Carrier has an entitlement to compensation. Mayne Nickless Ltd agrees to pay to that Contract Carrier or his/her dependants the same amounts that would be pursuant to the Act as amended if the Contract Carrier was an Employee.
>
> To enable claims to be processed efficiently, all injuries suffered by the 'Contract Carrier' arising out of or in the course of services performed pursuant to his or her contract are to be reported to a Duty Manager and a claim form completed. A fresh report must be made, and another claim form completed, in the case of any recurrence, aggravation or exacerbation of injury following a return by the 'Contract Carrier' to recommence providing services.
>
> These guidelines referred to in this Clause shall not however apply to any claim by the 'Contract Carrier' or his or her dependants against Mayne Nickless Limited for damages for personal injury or death at common law. Nothing in this Clause shall be interpreted or have the effect of making the 'Contract Carrier' an employee of Mayne Nickless Limited either under 'the Act' or at Common Law and in particular the parties agree that the 'Contract Carrier' is an independent contractor and not an Employee of Mayne Nickless Limited.''

108 Mr Sammartino's evidence discloses that he made a claim for compensation. Mr Sammartino had on at least one occasion been engaged effectively on light duties as an employee in house with Mayne Nickless at the Wards Express depot during a period of rehabilitation.[135] Mr Sammartino's outline of evidence

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[134] The extended definition of ''employee'' in s 12 of the *Superannuation Guarantee (Administration) Act* 1997 (the SGAA) reflects the PAYE provisions in Pt W Div 2 of the *Income Tax Assessment Act* 1936. However, people who received prescribed payments within Part VI Div 3A of that Act, but who enter a contract wholly or principally for their labour are also employees for purposes of the SGAA. See generally for an explanation of that scheme ATO Superannuation Guarantee Ruling SGR 93/1 pars 1 to 13.

[135] Transcript 18 June 1998 at p 21.

suggested that the merits of his case include a contention that the reallocation of his St Kilda run, and the eventual termination of his engagement may have been linked with some aspect of his WorkCover record,[136] and associated complaints by him to Mayne Nickless.

109 Mayne Nickless paid superannuation contributions in respect of Mr Sammartino to the TWU Superannuation Fund pursuant to a provision in cl 6 of the 1997 Industrial Agreement. The relevant part of that provision read:

> ''6. Payments
>
> . . .
>
> The Principal Contractor shall remain a sponsor of the TWU Superannuation Fund and shall pay for each Contract Carrier the Superannuation payments as follows. The appropriate percentage as amended from time to time (currently 6 per cent of ordinary time earnings for 38 hours per week) for the equivalent vehicle classification for the ordinary time labour rate as contained in the attached Schedule C.''

110 Mr Sammartino presented evidential material to us on the second hearing of the appeal that showed he had been accepted as a member of the TWU Superannuation Fund on 16 September 1988. For that fund, his employment status by 1995 was recorded as ''permanent'' with the employer sponsor named as Wards Skyroad. A copy of Mr Sammartino's original application showed that he claimed in 1988 that he was employed. However, we note that for purposes of the TWU Superannuation Fund, ''employer-sponsor'' includes a person who makes application to the Fund, ''for the purpose of making contributions for its employees or sub-contracted owner-drivers''.[137]

111 It is clear enough that in relation to both workcover and superannuation, Mr Sammartino was treated as an employee for the respective purposes of those schemes. However, the express saving of the principal contractor's position in cl 21 must be given substantial weight. Even if it is not given conclusive effect, the workcover position does not by itself carry weight for purposes of characterising Mr Sammartino's contractual relationship for common law purposes. Nor does the superannuation entitlement. Both the superannuation and WorkCover arrangements point to a degree of economic dependency akin to an employment relationship. However, in relation to the weight accorded to the arrangements for purposes of characterising the contracts at common law, we are unable to accord them any real significance. In that respect, the indicia, like the PPS Declaration, do not assist much in the final balance of the total circumstances.

24. Assessment of total relationship and determination of appeal

112 In the preceding sections we have reviewed each of the main indicia. We have considered them, as well as others advanced by the parties in their submissions to Foggo C and taken into account by her. We have indicated that the degree of control exercised by Mayne Nickless over Mr Sammartino's work as a driver discharging his personal contract was of a degree not markedly different from that exercised over employees. That indicia weighs most heavily with us. Other indicia add weight to that consideration. They are the mode of

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[136] Page 8 Exhibit S1: Federal Court Appeal Book p 133.

[137] T J Sammartino's TWU Fund Member Statement, 31 December 1995 p 2; and Attachments to letter 29 January 1988 from Mr Sammartino to Fleet Manager Wards Express.

remuneration, the nature of the obligation to work, the overall practical exclusivity of performance of such services to Mayne Nickless, and the arrangements as to hours of work and leave entitlements. We consider that the arrangements as to tax, superannuation and workers compensation are relatively neutral or at least of an inconclusive nature in balancing the considerations in perspective with the totality of the relationship. The most significant considerations weighing against the characterisation of the contract as contract of services is the clear intention reflected in the contract to label the relationship as that appropriate to an independent contract for services, and the requirement to provide and maintain a vehicle suitable to Mayne Nickless.

113 In making our assessment, we have taken into account also several aspects of Mr Sammartino's contract of a relatively personal nature. He was the party principal. He performed the work himself. A natural person was the entity responsible for paying tax on the payments received. We have commented on those points in the narrative that precedes this assessment. We note in addition that Mr Sammartino and his vehicle were integrated to a substantial degree into the Mayne Nickless workforce and service fleet. He wore a uniform. He drove a truck with the corporate decals. He was required always to present himself as the Wards Express interface with customers. We also accept as substantially accurate the factual positions asserted by Mr Sammartino as a foundation for the points listed at subpar 10(1), (2), (4), (5), (6), (7) and (8). The points made as to factual matters are substantially in accordance with our understanding of the evidence in total, including the additional material presented on the hearing of the appeal. In the broad sense, Mr Sammartino was what O'Connor J may have described as a workman engaged in labour for Mayne Nickless. He was distinguished from a workman in relation to that labour in main effect by the form and labelling of his contract and by the collateral obligation on him to supply and maintain his own vehicle in association with his labour.

114 On our view of the balance of those indicia, in perspective with the totality of the arrangements and the relationship under which Mr Sammartino worked, we determine that he was an employee for purposes of s 170CE, and par 170CK(2)(e) of the Act, and the associated provisions of s 170CB. It follows that Mr Sammartino was not an independent contractor for services for purposes of the Act.

115 Accordingly, the determination of the appeal is that leave to appeal be granted and the appeal allowed. We set aside the decision of Foggo C and substitute a determination that Mr Sammartino is an employee of Mayne Nickless Express for purposes of subs 170CE(1) and par 170CK(2)(e). We refer Mr Sammartino's application under s 170CE to Watson SDP for allocation of the matter for conciliation or arbitration in due course.

(S6212.)