FEDERAL COURT OF AUSTRALIA

ACE Insurance Limited v Trifunovski [2013] FCAFC 3

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| Citation: | ACE Insurance Limited v Trifunovski [2013] FCAFC 3 |
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| Appeal from: | *ACE Insurance Limited v Trifunovski* [2011] FCA 1204; (2011) 200 FCR 532*ACE Insurance Limited v Trifunovski (No 2)* [2012] FCA 793; (2012) 215 IR 206*Trifunovski v ACE Insurance Limited* [2012] FCA 858 |
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| Parties: | **ACE INSURANCE LIMITED v BLAGOJA TRIFUNOVSKI****ACE INSURANCE LIMITED v FETIE DICINOSKI****ACE INSURANCE LIMITED v HERACLEA PTY LTD****ACE INSURANCE LIMITED v WILLIAM DICINOSKI****ACE INSURANCE LIMITED v SHANE PEREZ****ACE INSURANCE LIMITED v RIENZIE PERIES** |
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| File numbers: |  |
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| Judges: |  |
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| Date of judgment: | 25 January 2013 |
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| Catchwords: | **INDUSTRIAL LAW** – entitlement to annual leave and long service leave – whether insurance agents employees or independent contractors – test to be applied – where agents regarded themselves as independent contractors – where personal service required – where contract allowed for nominal power of incorporation  |
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| Legislation: | *Workplace Relations Act 1996* (Cth) s 179*Insurance Industry Award 1998* (Cth)cll 22, 25 |
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| Cases cited: | *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407; 18 ALR 385 referred to*Colonial Mutual Life Assurance Society Limited v The Producers and Citizens Co-operative Assurance Company of Australia Limited* (1931) 46 CLR 41 followed*Commissioner of Pay-roll Tax v Mary Kay Cosmetics Pty Ltd* [1982] VR 871 referred to*The Commissioner of Taxation of the Commonwealth of Australia v Barrett* (1973) 129 CLR 395 referred to*Connelly v Wells* (1994) 55 IR 73 referred to*Denham v Midland Employers Mutual Association Ltd* [1955] 2 QB 437 referred to*Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 referred to*Hollis v Vabu Pty Limited* (2001) 207 CLR 21 followed*Humberstone v Northern Timber Mills* (1949) 79 CLR 389 followed*Marshall v Whittaker’s Building Supply Company* (1963) 109 CLR 210 followed*Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Limited* [1947] AC 1 referred to*Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597 referred to*Nokes v Doncaster Amalgamated Collieries Limited* [1940] AC 1014 referred to*Performing Right Society Limited v Mitchell and Booker (Palais de Danse) Limited* [1924] 1 KB 762 referred to*Quarman v Burnett* (1840) 6 M&W 499 [151 ER 509] referred to*R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited* (1952) 85 CLR 138 followed*Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528 referred to*Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 followed*Stevens v Brodribb Sawmilling Company Pty Limited* (1986) 160 CLR 16 followed*Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161 followed*Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 followed  |
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| Date of hearing: | 12-13 November 2012 |
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| Date of last submissions: | 15 November 2012 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 172 |
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| Counsel for the Appellant: | Mr D F Jackson QC with Mr T Saunders |
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| Solicitor for the Appellant: | Allens |
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| Counsel for the Respondents: | Mr A A Hatcher SC with Mr M J Moir |
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| Solicitor for the Respondents: | K P O'Donnell & Associates |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1295 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | BLAGOJA TRIFUNOVSKIRespondent |

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| JUDGES: | LANDER, BUCHANAN AND ROBERTSON JJ |
| DATE OF ORDER: | 25 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. There be no order as to costs.

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

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1296 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | FETIE DICINOSKI Respondent |

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| --- | --- |
| JUDGES: | LANDER, BUCHANAN AND ROBERTSON JJ |
| DATE OF ORDER: | 25 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. There be no order as to costs.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1297 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **HERACLEA PTY LTD** Respondent |

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| JUDGES: | LANDER, BUCHANAN AND ROBERTSON JJ |
| DATE OF ORDER: | 25 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1298 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **WILLIAM DICINOSKI**Respondent |

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| JUDGES: | LANDER, BUCHANAN AND ROBERTSON JJ |
| DATE OF ORDER: | 25 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. There be no order as to costs.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1299 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | shane perezRespondent |

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| JUDGES: | LANDER, BUCHANAN AND ROBERTSON JJ |
| DATE OF ORDER: | 25 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. There be no order as to costs.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 1300 of 2012 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | RIENZIE PERIESRespondent |

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| --- | --- |
| JUDGES: | LANDER, BUCHANAN AND ROBERTSON JJ |
| DATE OF ORDER: | 25 JANUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The appeal is dismissed.
2. There be no order as to costs.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | BLAGOJA TRIFUNOVSKIRespondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | FETIE DICINOSKI Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **HERACLEA PTY LTD** Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **WILLIAM DICINOSKI**Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | shane perezRespondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | RIENZIE PERIESRespondent |

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**REASONS FOR JUDGMENT**

# lander j:

1. I have had the advantage of reading in draft Buchanan J’s reasons.
2. I agree with his Honour’s reasons and conclusions. However, out of deference to the appellant’s argument and in view of the importance of the primary judge’s decision for the conduct of the appellant’s business, I desire to add a few words for myself.
3. The issue in the proceeding before the primary judge was whether the appellant (and its predecessor) employed the respondents (which would mean that the respondents had entered into contracts of service), or whether the appellant had engaged the respondents pursuant to contracts for services.
4. The respondents would only be entitled to the benefits which they claimed if they were employed by the appellant.
5. A contract of service always requires the employee to provide the employee’s labour in exchange for the employer’s payment.
6. A contract of service has a number of terms that are implied or imposed by law; minimum payments or wage; the deduction of income tax; holidays both public and annual; long service leave; and, more recently, payment by the employer of superannuation contributions for the benefit of the employee.
7. A contract for services may require a party to the contract to provide his or her labour in exchange for the other party’s payment. However, that is not necessarily so because a contract for services may allow the party who is to provide the services to do so by providing another person’s services. A contract for services does not have the terms implied or imposed by law that a contract of service has so the parties to a contract for services must address those emoluments expressly in their contract.
8. A contract for services will usually relieve the party to or for whom the services are provided from the need to comply with statutory obligations that impact upon an employment relationship; e.g. income tax, superannuation and payroll tax.
9. The authorities, as Buchanan J’s reasons show, indicate in broad terms how the issue is to be resolved. There is no one single criterion that will necessarily be determinative of the issue. The issue will be decided by weighing all the relevant factors. The application of the principles can be quite difficult: *The Commissioner of Taxation of the Commonwealth of Australia v Barrett* (1973) 129 CLR 395 per Stephen J at 400.
10. Justice Buchanan has comprehensively discussed the cases which have addressed the differences between the two types of contracts.
11. It is for the parties to agree the kind of contract by which the services will be provided. The parties may intend to enter into a contract for services and even, as in this case, declare that to be the case, but that is not determinative of their relationship.
12. The appellant contended that the primary judge erred in saying that the common law was concerned with the relationship of employment only for the purposes of determining vicarious liability. It was also contended that the primary judge had too much regard to the business in which the respondents were engaged. However, the appellant did not suggest that the primary judge had had regard to any irrelevant issue or had not had regard to any relevant issue. The appellant accepted that the primary judge had regard to all of the indicia relevant to the determination of the issue of employment or otherwise. The challenge was to the conclusion reached by the primary judge that the indicia showed that the respondents had been engaged in contracts for service.
13. The appellant’s argument was that the primary judge had, in weighing all of the factors that the cases say need to be addressed, come to the wrong conclusion. In this regard it was contended that the primary judge over-emphasised the question in whose business were the agents working.
14. The primary judge’s statement that the common law was concerned with the relationship of employment for the purposes of vicarious liability does not need to be analysed because it did not impact upon his Honour’s reasons. In any event, it is not evident that his Honour’s statement with regard to the common law’s interest in the relationship of employment is wrong.
15. The primary judge did not err, in my opinion, in inquiring into the business in which the respondents were working, because if the respondents were not conducting their own business then logically it followed that they must have been working in the appellant’s business.
16. The primary judge had regard to the most compelling argument for the appellant’s contention that the relationship was one of a contract for services, which was that the respondents thought themselves to be, and conducted themselves and organised their affairs on the basis that they were, not employees of the appellant, but independent contractors: see [91] and [98] of the primary judge’s reasons.
17. In my opinion, the primary judge was right in concluding that, absent the respondents’ own belief that they were not employees and their structuring of their financial affairs to that effect, there were no other indicia to support the appellant’s contention that they were independent employees.
18. I agree with the reasons of Buchanan J in regard to the other issues raised on the appeal.
19. The appeal must be dismissed. The parties agreed that there should be no order as to costs.

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| I certify that the preceding nineteen (19) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Lander. |

Associate:

Dated: 25 January 2013

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **HERACLEA PTY LTD** Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **WILLIAM DICINOSKI**Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | shane perezRespondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | RIENZIE PERIESRespondent |

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**REASONS FOR JUDGMENT**

# BUCHANAN J:

# Introduction

## The proceedings

1. The central issue in this appeal is whether five insurance sales agents (“the agents”) were the employees of a general insurer, Combined Insurance Company of America, trading as Combined Insurance Company of Australia (“Combined”). The agents sold or oversaw the selling of the insurance products of Combined. They were rewarded by way of commission. They were each engaged under a contract which stipulated that they were not employees of Combined. The trial judge, however, found that they were employees.
2. The proceedings were commenced in 2008. On 1 October 2010 the business of Combined was transferred to the appellant which was thereafter substituted for Combined in the proceedings. It will generally be convenient to refer to the circumstances of Combined in this judgment.
3. In the proceedings before the trial judge each of the agents claimed to be entitled to payment for periods of untaken annual leave, earned in the service of Combined. Three of the agents claimed also to be entitled to payment for periods of untaken long service leave, earned in the service of Combined. In most cases the claims were based on entitlements arising under the *Insurance Industry Award 1998* (Cth) and in one case (that of Mr Perez) under the *Workplace Relations Act 1996* (Cth).

## Contracts whereby work is performed

1. Before dealing with the facts of the present case, and the basis for the findings of the trial judge, I propose to mention some of the issues which arise when there is a contest about whether someone carries out work as an employee, or in some other capacity. It will be necessary to examine the reasoning in some of the cases which deal with the issue. That analysis will provide some material to support the conclusion which I later express that the findings of the trial judge in the present case accord with the position declared in the cases.
2. The notion that individuals are free to contract for the provision of their services in different ways is far from new. It is traditionally explained by making a distinction between a contract *of service* (employment) and a contract *for services*. The distinction was emphasised in *Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161 (“*Sweeney*”) where the High Court said (at [33]):

33 … the two central conceptions of distinguishing between independent contractors and employees and attaching determinative significance to course of employment are now too deeply rooted to be pulled out.

1. Contracts of employment (contracts of service traditionally so-called) are contracts for personal service. Benefits and obligations of contracts of individual service of this kind are not unilaterally assignable by either party (*Nokes v Doncaster Amalgamated Collieries Limited* [1940] AC 1014 at 1018-9, 1024, 1026, 1029, 1048; *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Limited* [1947] AC 1 at 14, 15 (“*Mersey Docks*”); *Denham v Midland Employers Mutual Association Ltd* [1955] 2 QB 437 at 443 (“*Denham*”)). The requirement for personal service has the effect that a contract which truly permits discharge in another fashion or by another person, is not a contract of employment. Thus, contracts with corporations, contracts with partnerships, contracts permitting unlimited delegation and contracts which do not actually compel the performance of work but pay only on results, are each prima facie not contracts of the necessary quality (although the last category is more contestable than the first three).
2. There are two main areas in which it has been important to distinguish between contracts of service (employment) and contracts for services. Into the latter class fall so-called independent contracts, although frequently there is little real independence in some contracts for services. The two areas where the distinction is important concern the duties and obligations owed by the contracting parties to each other and the duties and obligations that one of them may owe to third parties. It is in the latter field that much of the learning has been expressed, although that circumstance has introduced some difficulties into the former.
3. One consequence of the fact that a person (not necessarily an individual) is the employer of another (earlier, the servant) is that the employer is vicariously liable to third parties for injuries caused by the negligence of the employee in the service of the employer. Cases which concern that question require attention to be given to the interests of third parties, and (generally) the scope of liability of an alleged employer towards a third party for injury caused by the conduct of an alleged employee. Although, in such cases, it is necessary to come to a view about the nature of the relationship between the alleged employer and the alleged employee (i.e. whether it is employment or a different relationship), the interests of the alleged employee and the obligations of the alleged employer to the alleged employee are generally not the matter for attention.
4. By contrast, where a case involves a claim by an individual that an obligation is owed to him or her as an employee the focus is different. Although it is necessary in such a case to determine the true character of the contract underpinning the relationship, that examination occurs in order to establish the obligations owed by the parties directly to each other, rather than to confirm or deny the existence of a liability owed to a third party. Another type of case is one where a regulatory agency or government authority asserts that liabilities to pay tax or other charges arise from a relationship of employment. Such cases also require examination of the same basic question. The basic question remains the same in all types of case but when the question at stake concerns third persons outside the contractual relationship the focus of the examination may sometimes produce subtle influences on the outcome.
5. Recognition of the possible lack of conformity arising from the different focus in different types of cases is not recent. In *Denham*, a case concerning vicarious liability for injury, Lord Denning said (at 443-4)

Much of the difficulty which surrounds this subject arises out of the nineteenth century conception that a servant of a general employer may be transferred to a temporary employer so as to become for the time being the servant of the temporary employer. That conception is a very useful device to put liability on the shoulders of the one who should properly bear it, but it does not affect the contract of service itself. … The supposed transfer, when it takes place, is nothing more than a device – a very convenient and just device, mark you – to put liability on to the temporary employer; …

1. The present case does not concern questions of vicarious liability or (directly at least) questions about liability for tax. It concerns the duties and rights of Combined on the one hand, and persons appointed in writing as its agents on the other. The particular alleged obligations sought to be vindicated in the present proceedings do not owe their existence to the particular terms of any contract between the parties; they are rights arising (ultimately) under statute. But whether the claimed rights (to annual leave and long service leave) exist at all depends on whether the agents were engaged as employees of Combined or as contractors to it; whether they made contracts of service or contracts for services.
2. The usual case is one where a third party, or a direct party to a contractual relationship, alleges that a contract of employment is in existence, and that proposition is denied. Then it becomes necessary to examine the various facets and circumstances of the relationship to discern its true character.
3. In the present case, the contracts executed by the parties stated that the agents were not employees, but were independent contractors. The judgment under appeal held to the contrary. There may be many good reasons why it might suit an individual worker to be treated as an agent or a contractor rather than as an employee. Those reasons may include a freedom to incorporate or act in partnership (with one’s spouse for example); different taxation obligations; more freedom about when, and how, work is done; the ability to work for others at the same time etc. However, it is increasingly necessary that parties conduct themselves (in their relations with regulatory agencies, and not just each other) in accordance with a correct appreciation of the nature of their relationship, not just as it may suit them (or one of them). The parties may agree the terms of their contract, but any statement by them about the character of their relationship, or of their contract, has consistently been held not to be decisive of the true legal character of either.
4. In the case of an employee, an employer is bound to deduct and remit income tax, make superannuation contributions on behalf of the employee and pay payroll tax. These all involve the discharge of obligations to regulatory agencies and, in some cases, failure to do so may attract criminal sanctions. On the other side, where a contractor is carrying on business independently of employment, that contractor will need to take responsibility for insurance, income tax arrangements, and the lodging of appropriate tax returns. Those arrangements will depend on whether the “contractor” is a sole trader, is in partnership, is engaged to provide services through a corporate entity and so on. The method chosen by the contractor will generate procedures for the acquittal of any tax liability which will need to be observed. Under whichever arrangement is appropriate, tax deductions for business and operating expenses may be claimed. The company engaging the contractor will usually have no involvement in these matters and may not even know about them.
5. Often, perhaps even usually these days, a contractor will need an Australian Business Number and to be registered under the GST legislation. The contractor will be entitled to demand a 10% additional payment on account of GST, which must be remitted to the taxation authorities pursuant to regular returns. The contractor will have the right to claim, as a deduction, input tax credits (GST credits). Although the engaging company would be required to furnish some of the material necessary to make the returns, it would not be involved in all aspects. Ultimately, compliance with the taxation legislation, in this and other respects, would be a matter for the contractor.
6. Insurance and any necessary statutory permits or licences may need to be arranged. There is a miscellany of other obligations (and benefits) which are imposed upon (or which apply to) those who are in business on their own account, rather than being engaged as employees.
7. I mention all these matters to highlight the potential difficulties of attempting to retrospectively undo what parties have chosen to adopt as the basis of their relationship, whatever it may be. However, although conventionally some weight is given to how parties have represented their relationship, as I have already said, what they have stated is not conclusive. In many cases, a decision by the parties about how to characterise the relationship merely accords with what is thought to be the characterisation of greatest convenience to one party, or both.
8. It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract (from which they often proceed). They may be taken into account but are not conclusive. These matters are less important than the adoption by the parties (where this occurs) of rights and obligations which are fundamentally inconsistent with basic requirements of a contract of employment, such as the ability to delegate the discharge of obligations under a contract to another person, or where there is a lack of control over how work is done.
9. The survey of cases which follows is directed to revealing the tests which have been stated at the highest level of authority for determining whether an employment relationship exists. It will readily be seen that the emphasis on various matters has shifted in response to the changing way work, and society in general, is organised. However, the fundamental tests remain more or less constant. The examination in various cases should also be understood in the context that a basic (but often unstated) premise is that a contract of service requires discharge of duties by the personal service of the employee, whereas in a contract for services that is only one of the possibilities. The fact that the need to characterise the relationship at all only ever arises when personal service is, in fact, provided, is an important element to be borne in mind. The possibility for confusion about the character of the relationship can usually only arise in that circumstance.

# Some authorities

## Loan or hire cases

1. Apart from the (relatively) simple case of a person working directly in, or for, the business of another there is a variety of other arrangements whereby a person’s labour may be provided to a business, without any employment relationship thereby arising. For example, there have been a number of cases where an employee was loaned to a different business or provided to it with machinery under hire. Under more modern arrangements, individuals may be provided to an enterprise or business by a labour hire agency, by which agency the individuals are themselves employed, or to which they contract.
2. In earlier times, consideration of whether employment transferred during a period of loan or hire of machinery usually arose when a third party was injured. An early example is *Quarman v Burnett* (1840) 6 M&W 499 [151 ER 509], which was referred to by the High Court in *Sweeney* (at [11]) as an historically important source of aspects of the law relating to vicarious liability.
3. *Quarman v Burnett* involved a claim arising from the negligence of a carriage driver. The owners of the carriage, two elderly ladies, were accustomed to hiring a driver and a pair of horses from the same enterprise which, at the time of the accident, was under the control of a Miss Mortlock. The driver was a regular employee of Miss Mortlock. He drove from time to time for the defendants who paid him separately for each job. The defendants were sued in negligence by another carriage owner who was seriously injured when the horses ran off, having been left unattended by the driver. The defendants claimed not to be liable because the driver was not their servant. That contention was upheld. The driver was held to be the servant of Miss Mortlock and so the defendants were not vicariously liable for his acts.
4. Baron Parke said (at 513):

If the driver be the servant of a job-master, we do not think he ceases to be so by reason of the owner of the carriage preferring to be driven by that particular servant … If, indeed, the defendants had insisted upon the horses being driven, not by one of the regular servants but by a stranger to the job-master, appointed by themselves, it would have made all the difference.

and (at 513-4):

The immediate cause of the injury is the personal neglect of the coachman, in leaving the horses, which were at the time in his immediate care. The question of law is, whether any one but the coachman is liable to the party injured; for the coachman certainly is.

Upon the principle that qui facit per alium facit per se, the master is responsible for the acts of his servant; and that person is undoubtedly liable, who stood in the relation of master to the wrong-doer – he who had selected him as his servant, from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or intermediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference.

But the liability, by virtue of the principle of relation of master and servant, must cease where the relation itself ceases to exist: and no other person than the master of such servant can be liable, on the simple ground, that the servant is the servant of another, and his act the act of another; consequently, a third person entering into a contract with the master, which does not raise the relation of master and servant at all, is not thereby rendered liable; …

1. The concepts of power of appointment and removal, and of control, came to be central in later cases to resolution of the question of who was the real employer in cases of this kind, and those same notions (especially the right of control) also became very influential in deciding whether there was an employment relationship at all.
2. *Mersey Docks* was also a claim in negligence. A harbour authority provided a crane to a firm of stevedores, along with a craneman. The general hiring conditions stipulated that the craneman would be the servant of the hirers (i.e. the stevedores).
3. A third person was injured by the craneman while he was negligently driving the crane. The injured person sued both the stevedores and the harbour authority. The harbour authority, but not the stevedores, was found liable. The harbour authority sought to have judgment substituted against the stevedores. Members of the House of Lords referred to the principle that a contract of service cannot be unilaterally assigned. Equally important, however, was the finding that the stevedores had no power of control over the actual operation of the crane. Viscount Simon said (at 10):

The appellant board had engaged Newall, and it paid his wages: it alone had power to dismiss him. On the other hand, the respondent company had the immediate direction and control of the operations to be executed by the crane driver with his crane, e.g., to pick up and move a piece of cargo from shed to ship. The respondent company, however, had no power to direct how the crane driver should work the crane. The manipulation of the controls was a matter for the driver himself. In the present case the accident happened because of the negligent way in which the crane driver worked his crane, and since the respondent company had no control over how he worked it, as distinguished from telling him what he was to do with the crane, it seems to me to follow that Newall’s general employers must be liable for this negligence and not the hirers of the apparatus.

1. Lord Macmillan said (at 12):

That the crane driver was in general the servant of the appellant board is indisputable. The appellant board engaged him, paid him, prescribed the jobs he should undertake and alone could dismiss him. The letting out of cranes on hire to stevedores for the purpose of loading and unloading vessels is a regular branch of the appellant board's business.

and (at 13):

The stevedores were entitled to tell him where to go, what parcels to lift and where to take them, that is to say, they could direct him as to what they wanted him to do; but they had no authority to tell him how he was to handle the crane in doing his work. In driving the crane, which was the appellant board’s property confided to his charge, he was acting as the servant of the appellant board, not as the servant of the stevedores. It was not in consequence of any order of the stevedores that he negligently ran down the plaintiff; it was in consequence of his negligence in driving the crane, that is to say, in performing the work which he was employed by the appellant board to do.

1. Lord Porter said (at 17):

… amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorized to do this he will, as a rule, be the person liable for the employee’s negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it. It is true that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but who is entitled to give the orders as to how the work should be done.

1. In similar vein, Lord Uthwatt said (at 21):

The circumstance that it is the hirer who alone is entitled to direct the particular work from time to time to be done by the workman in the course of the hiring is clearly not sufficient for that purpose. The hirer’s powers in this regard are directed merely to control of the job and the part the workman is to play in it, not to control of the workman, and the workman in carrying out the behests of the hirer as to what is to be done is not doing more than implementing the general employer’s bargain with the hirer and his own obligations as a servant of his general employer. To establish the power of control requisite to fasten responsibility on him, the hirer must in some reasonable sense have authority to control the manner in which the workman does his work, the reason being that it is the manner in which a particular operation (assumed for this purpose to be in itself a proper operation) is carried out that determines its lawful or wrongful character.

and (at 23):

The proper test is whether or not the hirer had authority to control the manner of execution of the act in question. Given the existence of that authority its exercise or non-exercise on the occasion of the doing of the act is irrelevant. The hirer is liable for the wrongful act of the workman, whether he gave any specific order or not.

1. The notion of ultimate, or reserve, authority later came to be seen as an essential aspect of the application of the “control” test. In a case where the issue is vicarious liability for the consequences of negligent performance of work it is readily apparent why attention should be concentrated on ultimate authority over the manner of performance of work. The same approach was adopted in later cases turning on different contractual arrangements, but it has not survived as the sole determinant of the question.
2. *Denham* concerned the loan of an unskilled labourer by the labourer’s employer to a contractor engaged by the employer to do work at the employer’s premises. The labourer was killed. The contractor was found liable to pay damages to the widow and sought to recover under an insurance policy covering it for liability to any person “under a contract of service”. This aspect of the claim was rejected. Romer LJ distilled the essential features of a contract of service as follows (at 446):

Among the common features of a service contract are an obligation by the employer to employ a man, and to pay him an agreed or proper wage, and a right to control his services and the manner in which he performs them, and to dismiss him if reasonable cause is shown; and, on the workman’s side, he must obey all reasonable directions, present himself for work at an agreed hour, and continue to work for the agreed period, and will be guilty of breach of contract if he refuses to perform these obligations.

and (at 447):

There is a clearly marked distinction between the transfer of a servant on the one hand and the transfer only of his services on the other.

1. This last aspect is a critical one so far as modern labour hire arrangements are concerned.

## Direct engagement cases – vicarious liability (early cases)

1. These were cases where no loan or hire was involved. Engagement to perform work was direct. The cases involved consideration of vicarious liability. The question was: what was the nature of the engagement? It is convenient to mention first the early cases in this area and later it will be necessary to return to the most recent authorities.
2. *Performing Right Society Limited v Mitchell and Booker (Palais de Danse) Limited* [1924] 1 KB 762 (a case much cited) concerned vicarious liability for breach of copyright by the employer of a band of musicians. McCardie J attempted to distil the tests to be applied to determine whether members of the band were employees or contractors. McCardie J said (at 767):

It seems, however, reasonably clear that the final test, if there be a final test, and certainly the test to be generally applied, lies in the nature and degree of detailed control over the person alleged to be a servant. This circumstance is, of course, one only of several to be considered, but it is usually of vital importance.

1. Later, after setting out the terms of the written contract, McCardie J said (at 771):

Such is the agreement which was signed by each member of the band. In my humble opinion it is an agreement which made the band the servants of the defendants. It provides for seven hours’ daily service. It uses the word “services.” It mentions “salary.” It mentions “pay.” It uses the word “employ.” It provides for a period of employment. It provides that the band shall play at any place in London where the defendants may direct. It provides that their services shall be at the exclusive disposal of the defendants. It gives the defendants the right of immediate dismissal for the breach of any reasonable instructions or requirements. Above all it gives, I think, to the defendants the right of continuous, dominant, and detailed control on every point, including the nature of the music to be played. In my opinion this is not a case of an independent contractor agreement with some features of a service agreement; it is a case rather of a service agreement with several peculiar features appropriate to the employment of a band. I think that just as the defendants would be prima facie liable for the negligence of the band causing physical injury to third persons, so they are prima facie liable for infringement by the band of copyright.

1. It was a feature of the case that the particular, somewhat specialised, skills and talents which were used were not readily susceptible to direction in their detailed application. The emphasis, however, was again on ultimate control.
2. The next case, *Colonial Mutual Life Assurance Society Limited v The Producers and Citizens Co-operative Assurance Company of Australia Limited* (1931) 46 CLR 41, did not involve only a question of alleged employment. It principally concerned vicarious liability for the acts of an agent. The case is of interest because it concerned the conduct of an insurance salesman, who slandered a competitor of his principal.
3. Some of the judges in the majority thought the agent was an employee. Gavan Duffy CJ and Starke J said (at 46):

It was said that the defendant reserved to itself no power of controlling or directing Ridley in the execution of the work he was employed to do or of dismissing him for disobedience of orders: in short, that Ridley was an agent of the defendant in the nature of an independent contractor, and not the servant of the defendant for whose tort in the course of his employment the defendant would be responsible. The nature of Ridley’s employment, however, gave the defendant a good deal more power of controlling and directing his action than was conceded by the argument addressed to us. Nothing in the agreement or the position of the parties denied the right of the plaintiff to control and direct Ridley when, where and whom he should canvass.

1. On the other hand, Dixon J (with whom Rich J agreed) said (at 48):

Little evidence was given of the relations which in fact subsisted between him and the appellant in the actual conduct of his agency; and, I think, no sufficient reason appears for supposing that the appellant assumed *such a control over the manner in which he executed his work as to constitute him its servant*. In my opinion, the liability of a master for the torts committed by his servant in the course of his employment is not imposed upon the appellant by the agency agreement, but I do not think that it follows that the appellant incurs no responsibility for the defamation published by the “agent” in the course of his attempts to obtain proposals.

(Emphasis added.)

1. It is evident, regardless of the particular conclusion, that the control test (in one form or another) was at the forefront of the principles to be applied to the question of employment.
2. Next, it will be convenient to deal with cases involving some claimed right arising directly from alleged employment, then some taxation cases and then return to the most recent cases concerning vicarious liability.

## Direct engagement cases – statutory rights (workers’ compensation)

1. *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 involved a claim under Victorian workers’ compensation legislation. Humberstone was a carrier. He used his own truck, primarily to carry timber. Humberstone paid for petrol, insurance and maintenance of the truck. He was found not to be an employee. Latham CJ said at 396:

The distinction between a servant and an independent contractor was explained in the case of *Performing Right Society, Ltd. v. Mitchell & Booker (Palais de Danse) Ltd.* If the work done by one person for another is done subject to the control and direction of the latter person as to the manner in which it is to be done the worker is a servant and not an independent contractor. If, however, the person doing the work agrees only to produce a given result but is not subject to control in the actual execution of the work he is an independent contractor.

1. Dixon J said (at 404):

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.

1. *Zuijs v Wirth Bros Pty Ltd* (1955) 93 CLR 561 concerned a claim for workers’ compensation by a circus acrobat. Compensation under the relevant legislation was due if the acrobat was an employee. It was evident that the employer exercised little control over the particular way in which the acrobat, and his fellow acrobats, went about their trade. The High Court said (at 571-2):

The duties to be performed may depend so much on special skill or knowledge or they may be so clearly identified or the necessity of the employee acting on his own responsibility may be so evident, that little room for direction or command in detail may exist. But that is not the point. What matters is lawful authority to command so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters. Even if Mr. Phillip Wirth could not interfere in the actual technique of the acrobatics and in the character of the act, no reason appears why the appellant should not be subject to his directions in all other respects.

Assuming that the terms of the engagement fixed the character of the act and that from its very nature an acrobatic performance must be executed upon the unhampered responsibility of the performers, that does not remove the relationship from the category of master and servant. There are countless examples of highly specialized functions in modern life that must as a matter of practical necessity and sometimes even as a matter of law be performed on the responsibility of persons who possess particular knowledge and skill and who are accordingly qualified. But those engaged to perform the functions may nevertheless work under a contract of service. In the present case what has been proved in evidence all points to the conclusion that the relation between the parties was that of master and servant. If the power of selecting the person engaged must exist in the master in order that the contract may be one of service, that element was certainly present. If the fact that the remuneration takes the form of wages is a mark of the relationship, that was the case here. If a right in the master to suspend or dismiss for misconduct is something to be looked for, then again there could be little doubt that the appellant was subject to that discipline. If a right to superintend and control the manner in which the servant fulfils his obligation must exist in some degree, a little consideration will show that the daily relations of a performer playing a regular part in the work of such an organization as a travelling circus would demand a large measure of control and superintendence. With reference to the act itself there are many subsidiary matters. The place it took upon the programme, the measures of safety to be observed, the number, time and manner of the rehearsals, the costume of the performers, the place where they dressed and their conduct both before the audience and otherwise, these are all matters naturally calling for control. The grand parade doubtless involved no inherent difficulty but one may suppose that it was necessary to exercise control and direction as to the manner in which it was done. Apart from the two central duties of performing the act and taking part in the grand parade, the incidents of the relation between a regular performer and a touring circus must cover a wide field of conduct calling for superintendence and control. No doubt it might all be dealt with by a contract for services, but unless the express terms of the contract of engagement specified the obligations of the performer in great detail in order to avoid reserving an extensive power of control, it would be likely to be treated as a contract of service ...

1. *Marshall v Whittaker’s Building Supply Company* (1963) 109 CLR 210 was another workers’ compensation case from the timber industry. In that case, an experienced timber faller was killed while working. The timber faller was obliged “to supply his own falling equipment and a truck with a power winch for hauling and he had also to employ a swamper at his own expense”. The majority judgment said (at 214-5):

In Australia certain work such as timber getting and sleeper cutting is normally carried out under contracts providing for payment by results under which the contractor, within the limits of his contract, works as he thinks fit rather than in accordance with the directions of the person for whom the work is being performed; and it is common to find in workers’ compensation legislation limited provisions for bringing such contractors within the scope of the legislation. The definition with which we are here concerned is clearly enough such a provision and its effect is that in the cases specified, where there is a contract for services providing for remuneration which appears in reality to be payment for manual labour, the person providing the services is a worker for the purposes of the Act. The words “in substance” do not mean, as the Board appears to have thought, “to any substantial extent”. Their function is to enlarge the description which the words immediately following provide, so that the definition may apply not only where the remuneration is a return for manual labour bestowed by a person upon the work in which he is engaged and for nothing else, but also where, although the remuneration is a return for something else also, the something else is comparatively so insignificant that in reality, or as one might say to all intents and purposes, it is a return for manual labour so bestowed. For instance, the definition could cover a tradesman who provides his hand tools to do the manual work required of him by his contract or a man whose work in performing his contract is not wholly manual.

The meaning which we have attributed to the definition, however, renders it entirely inapplicable to the facts found by the Board. A contract, which by its terms requires not only the labour of the contracting party but his employment of other labour and his provision of power equipment to do the job and which provides for payment according to the results of the combined activity, cannot in law be regarded as a contract which provides for remuneration “of the person so working” as “in substance a return for his manual labour”.

1. Even though the conclusion in this case turned on an extended definition, bringing manual workers under workers’ compensation coverage, the references to notions of control, provision of equipment and payment by results are all instructive.

## Direct engagement cases – statutory rights (salesmen)

1. There have been a number of cases decided at the highest level concerning whether salesmen working on commission were employees. The cases (like the present case) had the feature that they involved contracts stating that the salesmen were not employees. That contention has been frequently disapproved.
2. *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited* (1952) 85 CLR 138 (“*Foster*”) was a case concerning insurance salesmen. The question was whether they were employees, and thus able to be covered by the terms of a federal award. That question was not decisively answered, but this case provides clear statements supporting an examination of the reality of a relationship, as well as its written terms.
3. Dixon, Fullagar and Kitto JJ said (at 150-1):

It appears that all the persons whom the company engages for this work enter into a contract in writing in a common form. Such a person is described by the agreement as “an agent”. The document begins by a statement that the company appoints him as its agent and he accepts the agency on terms it proceeds to enumerate. The terms are contained in twenty-eight clauses and these provide a full and detailed account of the duties of the agent. His remuneration is fixed by schedules on the basis of percentage commissions. None of the clauses subjects the agent to the will of the company as to the manner of carrying out the duties thus specified and the twenty-seventh clause goes out of its way to exclude the relationship of employer and employee, which no doubt the agreement treats as that of master and servant. The clause says that the document contains the whole of the terms of the agency and that it is intended thereby that the relationship between the company and the agent will be strictly that of principal and agent and not in any way whatever that of employer and employee. It goes on to say that the agent is to be under no obligation to perform any duties other than those contracted for in the instrument and that no communication from the company or its officers inconsistent with the agreement or varying or adding to it is to bind the agent and he may regard it as in the nature of guidance and advice which he is to be under no obligation to accept.

Provisions of this character are perhaps more likely to arouse misgivings as to what the practical situation of the agent may be in fact than to prevent a relation of master and servant being formed.

For, if in practice the company assumes the detailed direction and control of the agents in the daily performance of their work and the agents tacitly accept a position of subordination to authority and to orders and instructions as to the manner in which they carry out their duties, a clause designed to prevent the relation receiving the legal complexion which it truly wears would be ineffectual. 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.

1. Those are observations which have particular relevance to the present case also. As will be seen, while it is certainly possible for insurance salesmen to be engaged as independent contractors that is not a conclusion universally reached.
2. Interestingly, their Honours referred to ongoing controversy about the question so far as it concerned insurance canvassers or agents, saying (at 153-4):

… the allegation that the contract between insurance canvassers or agents and the company for whom they act does not represent the true relation and is nothing but an attempt, by means of a form, to escape industrial regulation is no new thing. This conflict between form and reality in reference to the status of insurance canvassers or agents appears to go back over a considerable period of time. It is the subject of the decision in *Re Life Assurance Canvassers’ Submission*; *Thiel v. Mutual Life & Citizens' Assurance Co. Ltd.*; and *Austine v. Retchless*.

In *Federated Clerks Union of Australia v. Industrial Life Assurance Agents Association* Chief Judge Piper decided almost the very question of fact in issue here. The form or forms of agreement were similar though the matter arose in another way. His Honour held that industrial life assurance agents employed by life assurance companies for the purpose of canvassing and collecting are “employees” within the meaning of the *Commonwealth Conciliation and Arbitration Act* 1904-1934. In this Court Webb J. tried the same issue between the Associated Dominions Assurance Society Pty. Ltd. and the Industrial Life Assurance Agents' Union, the form of agreement being almost identical. His Honour found that the agents were employees of the company.

(Footnotes omitted.)

1. In *The Commissioner of Taxation of the Commonwealth of Australia v Barrett* (1973) 129 CLR 395 Stephen J, sitting as a single judge of the High Court, considered whether land salesmen, paid by commission on sales, were employees or independent contractors. The case arose in the context of an alleged obligation to pay payroll tax, but it is convenient to deal with it here as it raises similar questions to *Foster*, the present case and the next authority to be examined. Stephen J said (at 400):

The relevant principles of law lie in a familiar and much-visited field; the principles are little in doubt although their application to particular facts may, as here, give rise to difficulty. The task, then, is to apply the principles which have been evolved in determining, over the years, whether the relationship between an employer and those engaged in working for him is that of master and servant or employer and independent contractor. The courts have, for a variety of purposes, distinguished between servants and independent contractors and it is by recourse to this body of law that this Court has in the past determined upon the incidence of pay-roll tax: *Queensland Stations Pty Ltd v. Federal Commissioner of Taxation*, per Latham C.J.; per Rich J.; and per Dixon J.; and per Latham C.J. in *Federal Commissioner of Taxation v. J. Walter Thompson (Australia) Pty Ltd*.

An important factor on which the courts have fastened in differentiating between servant and independent contractor has been that of control. This distinction was first developed in determining the existence of vicarious liability to third parties for the acts of those performing work for others, the discrimen being said to be that a master was vicariously liable for the acts of his servant over whom he exercised control in the manner of performance of his work, whereas for an independent contractor, whom he might only direct as to what he should do and not how it should be done, he was not vicariously liable.

(Footnotes omitted.)

1. Stephen J, however, said (at 401):

However it is clear that the fact of control is no more than one of a number of indicia…

1. The salesmen in question were found to be employees, notwithstanding that each used his preferred technique in selling, that each was remunerated solely by commission, that their employers were not concerned with hours worked or holidays taken, and that there was little evidence of detailed supervision. Against those factors there existed the facts that the salesmen were integral to the operations of their employers, were required by statute not to act on their own account while representing their employers and were required to report on their whereabouts each working day. Stephen J concluded at 407-8:

There emerges from the evidence a picture of a staff of land salesmen who enjoy a settled and permanent relationship with the respondents, although it is subject always to termination by either party, and who work exclusively for the respondents in their chosen vocation of land salesmen, receiving their commission remuneration from the respondents and conforming to the respondents’ requirements concerning ethical conduct, compliance with the law and observance of approved procedures in the negotiation of sales. They are otherwise free from supervision in their primary task of effecting land sales, a task calling for highly individual qualities and a willingness to work at odd hours when the community at large is not at work. This lack of supervision is in large measure accounted for by the nature of their work and their careful selection and resultant skill and responsibility, coupled with the fact that payment by commission itself provides adequate incentive so as to safeguard the interests of the respondents. Even without reference to their rostered duties and the other tasks to which they may from time to time be directed by the respondents I would conclude from the foregoing that, whichever of the acknowledged tests of an employer-employee relationship may be applied, the conclusion must be that such a relationship does exist in the present case.

1. A different outcome was reached by the Privy Council in *Australian Mutual Provident Society v Chaplin* (1978) 52 ALJR 407; 18 ALR 385 (“*Chaplin*”). That case involved an insurance salesman, much as the present case does. It concerned a claim for long service leave, much as the present case does. The salesman was found not to be an employee. There were a number of factors mentioned which were, in context, held not to be conclusive. There were some other factors which were held to point clearly to the conclusion that the salesman was not an employee. One was his right to enter into a partnership. Another was the lack of any restriction preventing the salesman in that case from delegating the whole performance of his work to one or more sub-agents. Another was the right of the salesman to incorporate. Another was the fact that the contract contemplated that the salesman might carry out his duties through his own employees. Each of those features is at odds with the essential nature of a contract of employment as a contract for the provision of only personal service. There were other indications that the salesman was carrying on business on his own account. Those indications were seen in the large proportion of business expenses claimed in tax returns, including “commission to sub-agents, wages to secretarial staff, depreciation of motor car and office furniture and equipment, and other typical business expenses”.
2. The picture which is left by the various cases concerning the work of salesmen, or even of insurance salesmen in particular, is inconclusive. There is no central feature of the work itself that suggests that contracts for doing that work are likely to be found, or not likely to be found, to be contracts of employment. Much depends on the particular features of the contracts and whether those features are matched by the reality. Assertions about the character of the relationship carry weight, but are far from conclusive.

## Direct engagement cases – taxation

1. *Commissioner of Pay-roll Tax v Mary Kay Cosmetics Pty Ltd* [1982] VR 871 concerned “beauty consultants” who were engaged, nominally as independent contractors, to sell the products of the respondent. The case has some parallels with the present. The consultants were found not to be employees by the Full Court of the Supreme Court of Victoria. Gray J (with whom Young CJ and Lush J agreed) said (at 878-9):

As with most cases in this area of the law, there is a good deal which can be said on each side of the argument. A court is usually faced with a large collection of relevant facts and circumstances, some pointing this way and some the other. The resolution of the problem usually comes down to a very subjective matter of individual impression. It all depends upon where the emphasis is laid.

In cases of this sort, the court is usually referred to a number of decided cases dealing with facts similar to but not identical with the subject case. This appeal was no exception, although counsel showed commendable restraint and selectivity in this regard.

Courts have over the years endeavoured to lay down principles which may be capable of general application. Because of the infinite variety of relationships in commercial situations, it is rare to find a case which can be easily resolved by the application of a principle to the established facts.

The one principle which is clearly established is that the degree of control exercised by one person over another is always a relevant consideration in determining whether a contract of service exists between them. Although the sole test of control has proved inadequate in some classes of case, e.g. *Zuijs v Wirth Bros. Pty. Ltd.* (1955), 93 C.L.R. 561, it has always been accepted as a factor, in some degree, in all cases where the present question arises.

Recent years have seen the emergence of the “integration test”, where the question whether a person is an employee is measured by reference to the extent that his activities form an integral part of his master’s business operation: see *Bailey v Victorian Soccer Federation* [1976] V.R. 13, per Gillard, J. at pp. 33-4 and the cases there referred to.

The limitations of this test were referred to by Stephen, J. in *Federal Commissioner of Taxation v Barrett* (1973), 129 C.L.R. 395, at p. 402; 2 A.L.R. 65 and in my opinion it is not a helpful test in a case such as the present. In one sense, the beauty consultants are an integral part of the respondent's organization because it is entirely reliant upon them to sell its product. In another sense, the beauty consultants, being part-time workers who can work as much or as little as they please, are anything but an integral part of the respondent's undertaking. The integration test may be useful in forming a judgment about a person said to be an employee of, say, a public hospital or like institution. But, in my opinion, it throws no light on the present problem.

and (at 879):

The arguments presented to this court implicitly recognized that the element of control was the most important of the indicia which had to be considered and each counsel strove to maximize or minimize this factor.

The learned Judge’s decision rested upon his conclusion that, in this case, the beauty consultants were subjected to very little control in the relevant sense. He also referred to other indications which, in his opinion, supported the conclusion which he reached. His Honour fully considered the factors which pointed towards a contract of service, but found them to be found wanting in the balance.

The matters which weighed with his Honour as telling against a contract of service were largely those relied upon by counsel for the respondent in argument, to which I have already referred.

In relation to the primary issue, I consider that the learned Judge was correct in his conclusion that the circumstances of this transaction do not provide any impulse to look behind the status assigned to a beauty consultant in the agency agreement. Although I have so far resisted the temptation to compare the facts of this case with the facts of other decided cases, I feel persuaded that, had the facts of this case been before the Privy Council at the time of[*Chaplin*], the result would have been in the present respondent's favour. Furthermore, [*Chaplin*] is very clear authority for the view that, in a case like the present, the agreement is the best evidence of the relationship between the parties.

1. However, the following year the Privy Council affirmed a decision of Woodward J of the Supreme Court of New South Wales that “lecturers” appointed by a “Weight Watchers” franchisee were employees (*Narich Pty Ltd v Commissioner of Pay-Roll Tax* [1983] 2 NSWLR 597). The only authority referred to was *Chaplin*. After consideration of a number of matters of detail their Lordships said (at 606):

The plain situation in law is that a lecturer is tied hand and foot by the contract with regard to the manner in which she performs her work under it. In these circumstances it is not possible to hold that she is, in relation to Narich, an independent contractor. On the contrary, the only possible conclusion is that she is an employee.

1. That is, in substance, the basis for the conclusion reached by the trial judge in the present case.
2. A similar outcome was also reached in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528, principally upon the basis that the market researchers in that case were not conducting business on their own account.
3. Different considerations carried the day in *Vabu Pty Ltd v Commissioner of Taxation* (1996) 33 ATR 537; 81 IR 150 (“*Vabu*”), a judgment of the New South Wales Court of Appeal. It concerned couriers of three types: using bicycles, motorbikes or motor vehicles. Meagher JA said (at 538):

While it is almost never an easy task to decide whether a given person is an employee or an independent contractor, there is no doubt what the legal tests are. The old test of “control” is now superseded by something more flexible. This is made clear by the judgment of Mason CJ in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and the earlier judgment of Dixon J in *Queensland Stations Pty Ltd v FCT* (1945) 70 CLR 539.

Learned senior counsel for the respondent, Mr J L Trew QC, stressed in the course of his submission, that the company always retained a considerable measure of control over the couriers, and that the couriers were employees. Thus, the documents to which I have referred provide that operatives are to be neat and tidy, are to wear uniforms provided by the company, are to replace their vehicles when the company considers them to be unsatisfactory, are to observe a starting time and to work a prescribed number of hours, and are not to use foul language on the telephones. They must accept work allocated to them by the company, deliver goods in the manner directed by the company, accept re-routing if told to by the company, and take no more leave than is permitted. The cumulative effect of these conditions certainly gives the company a deal of control over its courier. However, a person may supervise others without becoming their employer.

And there are several considerations which make me think that on balance the couriers are not employees. In the first place, they supply their own vehicles (be they bicycles, motorbikes, cars, utilities or vans). They have to bear the expense of providing for and maintaining these vehicles: they pay for running repairs, petrol, insurance and registration. The company provides telephones, uniforms and signage. The couriers’ expenses are very considerable.

1. His Honour referred to other matters as well. Sheller JA agreed and added (at 542):

For reasons that I gave in *World Book (Australia) Pty Ltd* at NSWLR 385-6 I do not regard a person who enters into a contract to produce a given result and who is paid for that result, as working under a contract wholly or principally for the labour of that person. On the one hand the person employs himself or herself to produce the result, on the other the person is working in the service of the other contracting party. In the present case, as Meagher JA has said, the couriers supplied their own vehicles and bore the expense of maintaining and running them. In short they provided the resource and bore the cost, in large measure if not entirely, of delivering parcels and other items which the appellant had contracted with its clients to deliver. The couriers were paid a flag fall payment and, where they used vehicles, a running rate per kilometre for each contract of carriage undertaken. The contracts between the appellant and the couriers were neither wholly nor principally for the labour of the couriers. Each courier agreed to deliver the parcels and items that the appellant had contracted to deliver for the particular client, that is to say, to produce the result the appellant had contracted with that client to produce. Accordingly the courier was not an employee within the extended meaning of that term under s 12(3) of the *Superannuation Guarantee (Administration) Act*.

1. The status of the bicycle couriers was later dealt with differently by the High Court, but the conclusions of the Court of Appeal concerning motorbike and motor vehicle couriers remain undisturbed.
2. Those conclusions are, however, not at large. In particular, so far as they concern the provision of motor vehicles, the use of the vehicles as a conveyance for goods in that case must be given due weight. In *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 a Full Court of this Court came to a similar view as the Full Court of the Supreme Court of Victoria in the earlier *Roy Morgan* case. It rejected, as it did so, reliance on the cost of motor vehicles as a sufficient indicator of a separate business, at least insofar as such a purchase was directed to personal transport (see at [41]).

## Recent cases on vicarious liability

1. In *Stevens v Brodribb Sawmilling Company Pty Limited* (1986) 160 CLR 16 the High Court dealt with another claim for vicarious liability for negligence. The plaintiff was engaged to perform work in the defendant’s logging operations, along with others also engaged as contractors. Some were “fellers”, some were “sniggers”. The plaintiff was a truck driver. He was injured by the negligence of a snigger and claimed that the defendant was liable as the employer of the snigger. The High Court examined the relationship of both the snigger and the plaintiff. Mason J said at 23 – 24:

The first question to determine is whether the relationship between Brodribb and Gray was one of employer and employee or one of principal and independent contractor. It will also be convenient at this point to consider whether Stevens was an employee of Brodribb or an independent contractor, for, although not directly relevant to the matter presently under consideration, both issues arise from a common factual foundation. 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.; Federal Commissioner of Taxation v. Barrett; Humberstone v. Northern Timber Mills*. 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. Federal Commissioner of Taxation*; *Zuijs’ Case; Federal Commissioner of Taxation v. Barrett; Marshall v. Whittaker’s Building Supply Co.* 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.

(Footnotes omitted.)

and (at 25-26):

I agree with the majority in the Full Court of the Supreme Court that neither Stevens nor Gray was an employee of Brodribb. The facts, as I have related them, do not support an inference that Brodribb retained lawful authority to command either Stevens or Gray in the performance of the work which they undertook to do. As I have said, they provided and maintained their own equipment, set their own hours of work and received payments, not in the form of fixed salary or wages, but in amounts determined by reference to the volume of timber which they had been involved in delivering, through the use of their equipment, to the sawmill. The authority of Brodribb's bush boss seems to have been confined to the organization of activities in the forest, determining the location of roads and ramps, selecting the logs to be snigged, monitoring the volume and quality of production and deciding whether work would take place in bad weather. There is, in my opinion, no basis for inferring an intention that the bush boss should have authority to direct Stevens and Gray in the management and control of their equipment which they were using for the purpose of delivering timber to the mill.

and (at 26):

What is more, Brodribb and the men, including Stevens and Gray, regarded their relationship as one of independent contract, not one of employment, an attitude evidenced in the case of Gray by his employment of his son as a driver. The power to delegate is an important factor in deciding whether a worker is a servant or an independent contractor: *Australian Mutual Provident Society v. Chaplin*.

1. Mason J then referred to the “so-called ‘organisation test’” saying (at 26):

The test seems to have had its genesis in a passage of Lord Wright in *Montreal v. Montreal Locomotive Works* in which his Lordship said:

“ … it is in some cases possible to decide the issue by raising as the crucial question whose business is it, or in other words by asking whether the party is carrying on the business, in the sense of carrying it on for himself or on his own behalf and not merely for a superior.”

but said (at 27):

For my part I am unable to accept that the organization test could result in an affirmative finding that the contract is one of service when the control test either on its own or with other indicia yields the conclusion that it is a contract for services. Of the two concepts, legal authority to control is the more relevant and the more cogent in determining the nature of the relationship.

(Footnotes omitted.)

1. Wilson and Dawson JJ said (at 35):

The classic test for determining whether the relationship of master and servant exists has been one of control, the answer depending upon whether the engagement subjects the person engaged to the command of the person engaging him, not only as to what he shall do in the course of his employment but as to how he shall do it: *Performing Right Society Ltd. v. Mitchell and Booker (Palais de Danse) Ltd*. The modern approach is, however, to have regard to a variety of criteria. This approach is not without its difficulties because not all of the accepted criteria provide a relevant test in all circumstances and none is conclusive. Moreover, the relationship itself remains largely undefined as a legal concept except in terms of the various criteria, the relevance of which may vary according to the circumstances. Thus when Windeyer J. in *Marshall v. Whittaker’s Building Supply Co*. said that the distinction between a servant and an independent contractor “is rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own”, he was really posing the ultimate question in a different way rather than offering a definition which could be applied for the purpose of providing an answer.

(Footnotes omitted.)

1. The importance of the concluding observation should be noted. Their Honours, like Mason J, did not regard the identification of a “business” as supplying an alternative, or a preferable, test. Their Honours said (at 36):

In many, if not most, cases it is still appropriate to apply the control test in the first instance because it remains the surest guide to whether a person is contracting independently or serving as an employee. That is not now a sufficient or even an appropriate test in its traditional form in all cases because in modern conditions a person may exercise personal skills so as to prevent control over the manner of doing his work and yet nevertheless be a servant: *Montreal v. Montreal Locomotive Works*. This has led to the observation that it is the right to control rather than its actual exercise which is the important thing (*Zuijs v. Wirth Bros. Pty. Ltd*.) but in some circumstances it may even be a mistake to treat as decisive a reservation of control over the manner in which work is performed for another. That was made clear in *Queensland Stations Pty. Ltd. v. Federal Commissioner of Taxation*, a case involving a droving contract in which Dixon J. observed that the reservation of a right to direct or superintend the performance of the task cannot transform into a contract of service what in essence is an independent contract.

(Footnotes omitted.)

but continued (at 37):

Having said that, we should point out that any attempt to list the relevant matters, however incompletely, may mislead because they can be no more than a guide to the existence of the relationship of master and servant. The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.

1. Brennan J and Deane J agreed with Mason J’s conclusion that neither the plaintiff nor the snigger were employees.
2. In *Connelly v Wells* (1994) 55 IR 73 Gleeson CJ (of the Supreme Court of New South Wales) referred to *Stevens v Brodribb* and to the way in which the “control test has given way to the application of competing criteria and indicia”. His Honour said:

When one person agrees to perform work for another, it may become necessary, for any one of a number of purposes, to determine whether the relationship between them is that of employer and employee. Such a determination might affect their respective obligations to the revenue authorities, or the extent to which one is legally responsible for the acts or omissions of the other, or their insurance arrangements. In the present case the respondent suffered an injury whilst at work, and the question arose, in the course of proceedings under the *Workers Compensation Act* 1987, whether the respondent had entered into or was working under a contract of service with the appellant as his employer.

When such an issue arises it is often the case that the competing possibility advanced for consideration is that the relationship between the two persons involved is that of principal and independent contractor. Consequently, many of the decided cases state the relevant principles in a manner which directs attention to the differences between these two kinds of legal relationship. The most recent authoritative statements on the subject in this country are to be found in the judgments of the High Court in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, (Mason J at 23-29, Wilson and Dawson JJ at 36-39 and Deane J at 49). As Deane J observed, the distinction between an employee and an independent contractor has become increasingly amorphous as what used to be called the control test has given way to the application of competing criteria and indicia. The degree of control to which the person performing the work is subject is still described as a prominent factor, but is not now regarded as determinative. Other relevant matters are said to include the way in which the work is remunerated, the provision and maintenance of equipment, the arrangements that are made about hours of work and provision for holidays, the obligation to work, the arrangements that are made about taxation, and the capacity to delegate the work.

1. Importantly his Honour said (at 74):

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

1. His Honour thought post-contract conduct to be irrelevant. That was also the view of the Privy Council in *Chaplin* and *Narich*. It has been, however, assumed in the present case that the nature of the relationship may be legitimately examined by reference to the actual way in which work was carried out. No dispute has been raised in the present case about that approach, which for reasons to be explained shortly appears to be correct, and I will not dwell upon the contrary view. At 81 – 82 Kirby P said:

Originally disputes such as the present were resolved by reference to the “control test”, ie whether the suggested “employer” had control over the work to be done by the asserted “worker”. Traditionally the test was expressed: can the person said to be the employer direct the person claimed to be a worker not only as to what the worker does but also as to how he or she does it.

In due course the unsatisfactory features of this test became obvious. This led to a line of authority in which the higher courts made it clear that the search was not for *actual* control but for the *ultimate* authority to control the work involved, employment lying in the latter. See *Humberstone v Northern Timber Mills Pty Limited* (1949) 79 CLR 389 at 404. Nevertheless, despite this clarification, in the understandable desire to have simple rules which could determine the threshold question of the alleged employment of a worker (upon the determination of which entitlements of the Act would either follow or be denied), there was a natural tendency to look for rules which could readily be applied. One by one, these “rules” came, on analysis, to be seen as unreliable.

Burke CCJ referred to the suggested principle that one indicium of employment was the control of hours. But then it was held that the absence of such control did not necessarily take the relationship outside that of employment or the worker outside the protection of the Act. Similarly, the suggested rule that only a contractor supplied his or her own tools and equipment and that a worker looked to the employer to do so except in the most minor respects, became discredited. Whilst the supply of its own equipment was often an indication of the fact that the relationship was not one of employment, it was not necessarily determinative as *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 516 illustrates.

The real incapacity of the “control” test to provide sound guidance, as to the nature of the relationship of worker and employer was demonstrated in a series of cases where the asserted “worker” performed duties in isolated places or was involved in activities so peculiar and individualistic that no effective control could either be exerted or expected in that worker’s work. See eg *Zuijs v Wirth Bros Pty Limited* (1955) 93 CLR 561 at 572.

It is in this way that Australian courts, after their hankering for clear and simple rules, came to the present test. It is stated in such decisions as *Stevens v Brodribb Sawmilling Company Pty Limited* (1986) 160 CLR 16.

(Emphasis in original.)

and (at 83):

The other indicia of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or a distinct calling on the part of the person engaged, the provision by him of his own place of work or his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.

1. It was in the context set by the various decisions to which I have referred that the High Court gave judgment in *Hollis v Vabu Pty Limited* (2001) 207 CLR 21 (“*Hollis*”), the case which the trial judge in the present case found decisive. In *Hollis*, the High Court dealt with the circumstances of bicycle couriers of the kind dealt with by the New South Wales Court of Appeal five years earlier in *Vabu* (see above), but not with motorbike or motor vehicle couriers.
2. It appears to me to have been in *Hollis* that a real emphasis was authoritatively placed on the notion of working in the business of another, rather than in the business of the individual. The joint judgment said (at [39]-[40]):

39 In *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia*, Dixon J explained the dichotomy between the relationships of employer and employee, and principal and independent contractor, in a passage which has frequently been referred to in this Court. His Honour explained that, in the case of an independent contractor:

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

40 This statement merits close attention. It indicates that employees and independent contractors perform work for the benefit of their employers and principals respectively. Thus, by itself, the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. However, Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor. These notions later were expressed positively by Windeyer J in *Marshall v Whittaker’s Building Supply Co*. His Honour said that the distinction between an employee and an independent contractor is “rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own”.

(Footnotes omitted.)

1. It seemed to be important to the reasoning that individual bicycle couriers made no great investment in, or commitment to, a “business” of their own. At [22] the joint judgment said:

22 It is significant to note that one of the considerations mentioned by Meagher JA in the taxation decision as indicating that the couriers were independent contractors was that they bore the “very considerable” expense of providing, maintaining and insuring their own vehicles. It is apparent that Meagher JA was there concerned with expense in relation to motor vehicles and motorcycles. The purchase and maintenance of a bicycle could hardly be termed a “very considerable” expense. It may be that, in the taxation decision, a case that was, as his Honour put it, “hardly without difficulty”, a different result might properly have been reached respecting Vabu’s bicycle couriers from that which obtained respecting its other couriers. However, it is unnecessary to express any conclusion on this matter. It is sufficient to say that this case concerns liability arising from the activity of a bicycle courier, not a motor vehicle or motorbike courier. For the reasons that follow, the relationship between Vabu and its bicycle couriers in the present case is properly to be characterised as one of employment.

1. The restriction of analysis and conclusions to the circumstances of bicycle couriers is, in my view, a potentially important one. It seems to suggest that questions of scale may be important, and even decisive. In similar vein, dealing with the facts of the case, the joint judgment said (at [47]-[48]):
2. In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it. The case does not deal with situations of that character. The concern here is with the bicycle couriers engaged on Vabu’s business. A consideration of the nature of their engagement, as evidenced by the documents to which reference has been made and by the work practices imposed by Vabu, indicates that they were employees.
3. First, these couriers were not providing skilled labour or labour which required special qualifications. A bicycle courier is unable to make an independent career as a free-lancer or to generate any “goodwill” as a bicycle courier. The notion that the couriers somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed in the record.
4. The last observation echoes a similar conclusion of the Full Court of the Supreme Court of Victoria in *Roy Morgan* in 1997.
5. Other important indicia of employment in *Hollis* were: bicycle couriers were required to be at work by 9 am; they were not able to refuse work, which was assigned to them by Vabu; they wore uniforms bearing Vabu’s logo, in part as a form of mobile advertising; their finances were superintended by Vabu; their outlays were relatively small; and they had “little latitude” in what they did and when. Importantly for the present case, the following things were said:

57 Finally, and as a corollary to the second point mentioned above, this is not a case where there was only the right to exercise control in incidental or collateral matters. Rather, there was considerable scope for the actual exercise of control. Vabu’s whole business consisted of the delivery of documents and parcels by means of couriers. Vabu retained control of the allocation and direction of the various deliveries. The couriers had little latitude. Their work was allocated by Vabu’s fleet controller. They were to deliver goods in the manner in which Vabu directed. In this way, Vabu’s business involved the marshalling and direction of the labour of the couriers, whose efforts comprised the very essence of the public manifestation of Vabu’s business. It was not the case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, as the two documents relating to work practices suggest, to its customers they *were* Vabu and effectively performed all of Vabu’s operations in the outside world. It would be unrealistic to describe the couriers other than as employees.

(Emphasis in original.)

1. *Hollis*, of course, was a decision based squarely on its own facts, but it is obvious that the trial judge thought that similar considerations applied to the resolution of the issues before him.
2. The joint judgment in *Hollis* also emphasised that no new principle was created, saying (at [59]):

59 … This decision applies existing principle in a way that is informed by a recognition of the fundamental purposes of vicarious liability and the operation of that principle in the context of one of the many particular relationships that has developed in contemporary Australian society.

1. In *Sweeney*, also a case about vicarious liability, the High Court dealt further with the development of the concepts of employment and independent contracting, as they interact with the principle of vicarious liability, saying (at [11]-[13]):
2. Three recent decisions of this Court have examined questions of vicarious liability: *Scott v Davis*, *Hollis v Vabu Pty Ltd* and *New South Wales v Lepore*. It is unnecessary to rehearse all that is established by those decisions. It is important, however, to begin examination of the issues in this appeal from a frank recognition of some considerations that are reflected in those decisions. First, “[a] fully satisfactory rationale for the imposition of vicarious liability in the employment relationship has been slow to appear in the case law”. Secondly, “the modern doctrine respecting the liability of an employer for the torts of an employee was adopted not by way of an exercise in analytical jurisprudence but as a matter of policy”. That may suggest that the policy to which effect was given by “the modern doctrine” is clearly identified, but, as is implicit in the first proposition, the policy which is said to lie behind the development of the modern doctrine is not and has not been fully articulated. Thirdly, although important aspects of the law relating to vicarious liability are often traced to the judgment of Parke B in *Quarman v Burnett*, neither in that decision, nor in other early decisions to which the development of the doctrine of vicarious liability may be traced, does there emerge any clear or stable principle which may be understood as underpinning the development of this area of the law. Indeed, as is demonstrated in *Scott*, the development of the law in this area has not always proceeded on a correct understanding of the basis of earlier decisions.
3. Nonetheless, as the decisions in *Scott, Hollis and Lepore* show, there are some basic propositions that can be identified as central to this body of law. For present purposes, there are two to which it will be necessary to give principal attention. First, there is the distinction between employees (for whose conduct the employer will generally be vicariously liable) and independent contractors (for whose conduct the person engaging the contractor will generally not be vicariously liable). Secondly, there is the importance which is attached to the course of employment. Whether, as has recently been suggested, these, or other, considerations would yield a compelling and unifying justification for the doctrine of vicarious liability need not be decided in this matter. In particular, whether, as suggested, the justification for the doctrine of vicarious liability is found in an employer's promise in the contract of employment to indemnify the employee for legal liability suffered by the employee in the conduct of the employer's business is a large question which is better examined in the light of full argument.
4. Whatever may be the justification for the doctrine, it is necessary always to recall that much more often than not, questions of vicarious liability fall to be considered in a context where one person has engaged another (for whose conduct the first is said to be vicariously liable) to do something that is of advantage to, and for the purposes of, that first person. Yet it is clear that the bare fact that the second person’s actions were intended to benefit the first or were undertaken to advance some purpose of the first person does not suffice to demonstrate that the first is vicariously liable for the conduct of the second. The whole of the law that has developed on the distinction between employees and independent contractors denies that benefit or advantage to the one will suffice to establish vicarious liability for the conduct of the second. But there is an important, albeit distracting, consequence that follows from the observation that the first person seeks to gain benefit or advantage from engaging the second to perform a task. It is that the relationship is one which invites the application of terms like “representative”, “delegate” or “agent”. The use of those or other similar expressions must not be permitted to obscure the need to examine what exactly are the relationships between the various actors.

(Footnotes omitted.)

1. Referring to *Hollis*, the High Court said (at [30]):

30 It is as well to add something further about *Hollis*. *Hollis* hinged about whether the person whose conduct was negligent was to be identified as an employee of the principal. Seven considerations were identified in the facts of that case as bearing upon the question. They included that the courier wore the principal’s livery, that he was subject to close direction by the principal about not only the manner of performing the work (work which required only limited skills), but also both the financial dealings generated by the work and the times at which the work was done.

## Some conclusions

1. It is trite to say that the foregoing survey yields no single or unifying test to determine whether an employment relationship exists. Some features of a particular relationship may tend strongly against such a conclusion. Principal amongst such features, in my view, are contractual terms which deny any requirement for personal service or represent clear indications of the pursuit of an independent business. Even where such features are absent the proper conclusion may be that a particular relationship is not one of employment, but the analysis is less straightforward.
2. Of the indicia of employment it is clear that a right of control remains an important consideration in many cases. It may be found in a right of organisation and allocation of work, as much as in some theoretical right to say how actual work should be done.
3. So far as these various tests apply to the present case, the factual findings of the trial judge, which I shall discuss shortly, indicate that there were no features decisively, or strongly, against a characterisation of employment and that work was done, organised and allocated in a way substantially consistent with that characterisation.

## Labour hire or supply

1. Finally, before turning to the facts of the present case, it is worth mentioning that, increasingly, alternative forms of provision of labour are being used in Australia which do not involve direct employment by the enterprise in whose business the labour is provided. I discussed some of those arrangements in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174 at [61]-[92]. Such arrangements may legitimately (i.e. as already approved by various courts) include provision of workers by a company at arm’s length from the business being supplied, or provision of labour by a related company. The individuals whose personal service is thereby provided may be engaged as the employee of the labour provider, or as contractors to it.
2. Provided the arrangements are not a sham (see *Ramsey* at [102]-[117]) there is no objection in principle to the use of any particular form of legal relationship. However, as the cases referred to earlier show, there may be a lively contest, for any one of a number of reasons, about the accuracy of the characterisation given to the relationship, even from one of the parties, well after it begins. So it was in the present case.

# Findings of the trial judge

1. As I have said, the case, at trial, proceeded upon the basis that it was relevant to examine the detail of the actual working arrangements, as well as the terms of the contracts in question. As I pointed out earlier, Gleeson CJ in *Connelly v Wells*, and the Privy Council in *Chaplin* and *Narich,* expressed the view that the terms of the contract establishing the legal parameters of the relationship were the appropriate point of reference, and that post-contractual conduct was not relevant. The principle is, of course, well-established in contract law. However, in cases of the present kind, where it is necessary to examine whether a particular relationship is one of employment, or of a different character, it now seems established in Australian law that all the circumstances should be taken into account. In *Hollis* the majority noted (at [24]):

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

1. In the present case many of the contracts were renewed. Amongst agents in general there was a high turnover. It was legitimate, in my view, in the present case to give consideration to actual work practices and no suggestion was made that such matters were irrelevant.
2. The factual findings made by the trial judge may be seen in the following paragraphs of the judgment under appeal:

2 This case concerns the question of whether five agents (‘the agents’), none of whom are any longer engaged by Combined, were in fact employees. Each was paid commission on the premiums which they collected; used his or her own vehicle; did not have income tax deducted from earnings; and issued tax invoices to Combined for the services each provided. On [the] other hand, those tax invoices were generated by Combined and issued to itself; the agents accrued no goodwill in their own businesses; were in practical terms quite unable to work for any other insurer; sold only Combined’s policies to Combined’s customers; and were trained by Combined in a system of business devised and maintained by Combined. Having no goodwill, they had no business which could be sold. In real terms, as will be seen, they were also under Combined’s practical control.

…

6 There are five agents. The oldest claim is brought by Mr Peries who was first engaged by Combined on 26 October 1981 and whose engagement ended on 15 December 2005. There is a claim brought by Mr Perez who commenced on 29 October 1990 and who was dismissed on 12 October 2006. Mr Trifunovski’s claim commences on 1 June 1992, when he was engaged by Combined as a trainer; however he ceased to act in that role in late 1993 and commenced work as an agent on 1 January 1994. Mr Trifunovski claims he remained contracted to Combined until he resigned on 18 September 2005; Combined, however, pleads a limitation defence on the basis that Mr Trifunovski resigned in July 1994 (but recommenced four weeks later). It appeared Mr Trifunovski had also been engaged by Combined at earlier times but these were not the subject of his claim. The last two claims are brought by Mr and Mrs Dicinoski both of whom commenced in late 2001 and both whom finished up in 2005.

…

32 The agents are all nominally independent contractors operating under detailed written contracts. They are arranged hierarchically in three tiers: sales representatives; territory representatives; and sub-regional representatives. The sub-regional representatives in turn are themselves responsible to a position known as a ‘regional manager’ and that position is filled by a person who, it is not in dispute, is an employee of Combined. The structure of the business therefore appears to be one in which Combined administers geographical ‘regions’ through the direct actions of its own staff; that each of the regions is further divided into sub-regions under the aegis of a sub-regional representative; that each sub-region is itself further constituted by territories headed up by a territory representative; and that, within that territory structure, sales representatives under the territory representative are engaged in the business of selling insurance policies to the public. There being no debate that the pyramidion of this structure – the regional manager – was employed by Combined, the parties join issue about the status of its lower levels: that is, the sub-regional, territory and sales representatives.

1. His Honour referred with more particularity then to the work of sales representatives:

38 It was the task of sales representatives to travel door-to-door collecting policies from customers whose policies were up for renewal and seeking to sell new policies to new customers. A sales representative earned commission on the new policies which were written (including renewals) and on any premiums which were collected (either in person or when premiums were paid by direct debit or credit card). They were not entitled to any trailing commission in respect of renewals of policies originally written by them. This is an important fact because it means that the right to receive commission rested in the hands of those who in fact renewed the policies, so that upon ceasing to be a sales representative an agent was entitled to no further commission. The sale by assignment of a sales representative’s ‘business’ was quite impossible in practice – there was nothing to sell. In addition to these commissions, sales representatives were also paid bonus commissions to reward superior selling activity.

39 Sales representatives were organised into teams which worked principally in a physical area known as territory (which was overseen by a territory representative). Most of Combined’s 140,000 customers were located in rural areas and most of the territories which existed were similarly located. Each territory was broken into six sub-zones known, within Combined, as ‘route months’ and each team of sales representatives worked in each route month for one month every six months before moving on to the next route month. Put another way, the team moved systematically through the whole territory once every six months spending one month in each route month. Every route month was, therefore, visited by the team twice per year.

1. Then his Honour said:

44 Over time there have been some alterations to the manner in which the sales task has been performed. Since 11 March 2002 sales representatives have been banned from ‘cold calling’ which is the practise of arriving unannounced at premises and seeking to sell insurance. From about the same time the agents have also been ‘authorised representatives’ of Combined and have carried cards to that effect. At no time, however, has there ever been a uniform for the sales representatives to wear.

1. The trial judge referred to daily meetings and weekly meetings organised by territory representatives which the sales representatives were expected to attend. The activities of territory representatives were described as follows:

47 Each territory had assigned to it (by Combined) a single territory representative who was responsible for its administration. The tasks of the territory representatives were several. One part was to train the sales representatives for a period, previously of one week and presently of two weeks, after they completed a two week training course conducted by Combined. This training was known as field training. Another task – important in a day to day sense – was to distribute the leads which the territory representative had received from Combined. In practice, Combined provided each territory representative with a ‘route plan’ of the area to be canvassed and a card containing leads for that area. The territory representative would then plan the areas (down to particular streets) into which each sales representative would go. Mr Owen-Schwind gave evidence – typical I assume – that this task of allocation required some assessment of how many business locations could be canvassed in a day and the plans had to be drawn accordingly.

48 It was the territory representative, too, who organised the various meetings which took place during the week and who was also responsible for packaging up the policies and premiums on Friday nights for forwarding to the territory representative’s own sub-regional representative (and thence on to Combined). Reference has already been made to Mr Owen-Schwind’s evidence as to territory representatives inspecting sales representative’s paper work to make sure it was correct and up-to-date. In addition to all of these duties, territory representatives also engaged in the actual selling of policies to customers and collecting of premiums.

49 Territory representatives were not remunerated by anyone for the administrative tasks which they carried out as opposed to their sales activities upon which they received commission. They were, however, entitled to additional commission on the commissions earned by the sales representatives on ‘their’ team (of course, none of ‘their’ team was engaged by them – the team was engaged by Combined). This commission was known as ‘override commission’. In addition, when field training new sales representatives it is the present practice of Combined to split any commission earned between the sales representative being trained and the territory representative. At earlier times the territory representative conducting the field training received only the override commission with the sales representatives receiving the commission; at other times the sales representative has received a bonus during field training and all of the commission has been paid to the territory representative. I do not regard the difference in those two practises as being material to any issue for determination although the existence of a single unified practice on this topic undercuts somewhat the notion that anything but a single business was being conducted.

…

54 Flowing in the opposite direction – but just as instrumental in Combined’s operations – was Combined’s practise of providing leads to the territory representatives for distribution amongst the sales representatives. Viewed together one sees a process in which Combined engaged in a corporate form of respiration: exhalation of leads for each route month to the territory representatives and down to the sales representatives; conversion by the sales representatives of the leads into written policies and premiums through the process of working the route month; inhalation of written policies and premiums from the territory representatives (gathered in from the sales representatives at check-in meetings). Thus depicted is a business operated by Combined.

1. Sub-regional representatives were referred to as follows:

57 The next organisational structure above a territory is the sub-region. Each sub-region consists of a number of territories. To each sub-region a single sub-regional representative is assigned by Combined. A sub-regional representative does not generally engage in the sale of any policies to customers and in that regard is different to the position of the sales or territory representatives.

58 The very high level of turnover of sales representatives has already been noted. As a result there existed a consistent demand for new sales representatives. A significant part of the role of a sub-regional representative was to find persons willing to become sales representatives. Mr Owen-Schwind’s evidence was that when he became a sub-regional representative he was taught ‘how to hire [sales representatives]’. This involved placing advertisements for the position in the local press, taking telephone calls from interested applicants and arranging an interview. The sub-regional representative was also responsible for providing premises in which such interviews might take place. Another role of the sub-regional representative was conducting field training of new sales representatives if one of the territory representatives was unable to perform that function (either by being on holidays or sick). Finally, it was the sub-regional representative who checked the policies and premiums handed in at Friday night meetings before forwarding them to Combined.

59 A sub-regional representative was paid an override commission on all of the commissions earned by the sales and territory representatives within his or her sub-region. In addition, they also received a field recruiting bonus for each sales representative who was recruited, together with half of the commission earned during field training of new recruits. The role of the sub-regional representative was therefore truly representative; it was a role of procurement by which members of the public were introduced to Combined so that Combined might engage them as its sales or territory representatives. Combined’s case that the sub-regional representatives were conducting their own business is difficult to reconcile with the fact that they could not, and did not, hire any of the insurance staff ostensibly working for them who were solely contracted to Combined and, in respect of whom, from the sub-regional representative’s perspective contractual rights of termination and therefore discipline did not exist. The only way a sub-regional representative could sack a member of his team would be to persuade Combined to do so.

1. Then the following was said:

60 The regional manager was an employee of Combined. It appeared to be a State based position, that is, each State had at least one regional manager. Mr Owen-Schwind was the regional manager for New South Wales in 1987 and Mr Bosnic, now the Executive Vice President of Combined for Australia and New Zealand, was regional manager for QLD for the latter part of the 1990s. While it varied over the relevant period, at one point each of NSW, QLD, WA and Victoria had its own regional manager, and SA and TAS were rolled together into one of those state regions.

61 The structure just described is a pyramid with the regional manager at its apex. The numbers of persons involved varied. As at 20 March 2009 there were 301 sales representatives, 83 territory representatives and 26 sub-regional representatives. Those figures suggest that for each sub-regional representative there were about three or so territory representatives and for each territory representative around three to four sales representatives. On average each sub-regional representative is likely to have had a team of about 15 people beneath him or her made up of three or so territory representatives and 11 or 12 sales representatives. This lowest tier was constantly changing in its composition (three to four times per year) and the duties of the top two tiers included the constant renewal of this primary sales tier.

1. There was no serious challenge to these various findings of fact.
2. Then the trial judge considered the extent of control exercised by Combined. In part, that was illustrated by many items of correspondence set out in a schedule to the judgment. It would be unduly tedious to refer to them in detail, and it is not necessary. It has not been suggested that the summary given by the trial judge does not reflect the effect of the correspondence.
3. The trial judge said:

65 Combined submitted that its training manuals were not compulsory but I conclude that this is an untenable proposition. Since it was Combined which controlled who got promoted within the sales force pyramid the idea that its training manuals could simply be ignored by an agent is unrealistic. No doubt it is true that amongst Combined’s more successful sales representatives (the overwhelming minority since the turnover rate was 300%-400% per annum) the self-interest generated by the commission structure might be expected to provide motivation so that formal instruction might not be necessary. It is highly likely that a number of witnesses called in Combined’s case fell into that category. But I do not think that such a view is more generally realistic and, more importantly, it is demonstrably not consistent with the documentary record to which it is now useful to turn.

66 I have no doubt that Combined exercised direct control over the sub-regional representatives. In Schedule One I have set out a series of excerpts from letters written by Combined to its sub-regional representatives over a number of years. There is no substitute for reading that correspondence. It shows a relationship of direction. Indeed, it shows that Combined was directly across more or less every aspect of the structure and how it was performing, and in command of it. In light of this correspondence I simply cannot accept the evidence of Combined’s witnesses that Combined never told sub-regional representatives how to conduct ‘their’ businesses.

67 The correspondence set out in Schedule One is useful for another purpose. It suggests the existence of a command relationship between the sub-regional representatives and the territory representatives and it hints at a similar relationship between the territory representatives and the sales representatives. In a sense that relationship is an obvious artefact of the pyramidal architecture erected by Combined. The sales representatives were organised into teams under a territory representative. The territory representatives fell under the leadership of a sub-regional representative. These were relationships of control, without which the pyramid made no sense. The instrument of control was dismissal but this industrial tool lay not in the hands of the territory or sub-regional representatives. Its ultimate legal expression rested with Combined in whom it was vested by every contract with every representative.

…

76 One of Combined’s contentions in this case was that it did not instruct any of its representatives as to the manner in which they went about their work and, more particularly, that they were neither instructed that they had to use the methods disclosed in the manuals nor that they had to attend particular meetings. The manuals lacked the ‘imperative character’ just as similar manuals had in *Commissioner of Pay-roll Tax (Vic) v Mary Kay Cosmetics Pty Ltd* [1982] VR 871 at 880. There was some evidence to support this proposition. Combined’s Director of Training, Mr Owen-Schwind, gave evidence that he had done the business course himself in 1972 (that is, to become a sales representative) and that during the course he had been told that he did not have to follow the scripts if he did not want to; somewhat confusingly, he also gave evidence that on the same course he was asked ‘by the person running the course to learn some of the sales scripts and some of the rebuttals because I had no sales experience’.

77 There is little doubt that Combined was well aware of the need to ensure, so far as possible, that its sales force were not employees. There is similarly little doubt that it was aware that the existence of any ability on its part to control its representatives carried with it the risk that an employment relationship might be found to exist. Some of its witnesses gave evidence that they were unaware of Combined ever having issued instructions to representatives about how they did their job; that they did not regard the sales manuals as compulsory; or that they were unaware of any representative ever having been told to attend a meeting. In the end I have come to the view that much of this evidence was wishful thinking. The witnesses called by Combined all had, in the main, lifelong associations with the company starting with their initial engagement as sales representatives. I do not doubt their sincerity but I have found it impossible to reconcile their evidence that Combined did not exercise control in this structure with either the documentary record or the structural implications to which I have referred.

…

79 I have spent some time explaining the training arrangements to emphasise what should already be clear – that the structure of all of these arrangements was Combined’s structure. The training courses were conducted by Combined and the manuals were provided by it too. Territory representatives did not perform the tasks associated with that office because it struck them as a useful business structure – they performed it because it was the only way it could be done.

1. It is apparent from the judgment that the trial judge carefully examined the features of the relationship between the agents and Combined, conscious of the way such features had been treated in cases of the kind to which I have referred. The trial judge referred to the fact that nobody in the sales force at any level obtained any goodwill. Attention was given to business expenses. One set of business expenses concerned rental costs of premises and office expenses, particularly at the level of sub-regional representative. Sales representatives also freely claimed as deductions against their assessable income both the finance costs and depreciation associated with motor vehicles which were purchased GST-free as a business asset. The evidence showed, and the trial judge concluded, that in a number of cases sales representatives chose to provide themselves with expensive motor cars to transport them to the places where they attempted to sell Combined’s insurance policies. However, the trial judge was inclined to give this less significance than the appellant claimed, pointing out that the vehicles were available for personal use. Reliance on motor vehicles which are used for personal transportation is problematic for the reasons pointed out in the *Roy Morgan* case in this Court, referred to earlier.
2. Reference was made by the trial judge to the fact that the contracts permitted agents to operate (although in some respects only) through a corporation, but it did not appear, at a factual level, to be an option actually taken up by agents at the level of sales representative and territory representative, either in the present case or generally. It was open to the agents to engage secretarial or administrative staff but they could not engage anyone to sell insurance on their behalf, whether as an employee, subcontractor or delegate.
3. Critically, in my view, the selling of insurance was an activity which was required to be carried out through the personal efforts of individual agents and only by them. They were the personal authorised representatives of Combined under relevant legislation regulating activities in the financial services sector. The requirement for personal service to discharge the obligations under the contract which each agent had made is a strong indicator in favour of a contract of employment, although not decisive for the various reasons already discussed. The fact that sub-regional representatives did not directly sell insurance is insufficient to make a difference in their individual cases bearing in mind also that their own supervisors were employees of Combined.
4. The trial judge was, in part at least, influenced by his assessment of whose business was being conducted through the activities of the agents. In particular, he concluded that they were at all times working in the business of Combined. A conclusion of that character goes only part of the way in the necessary analysis and his Honour’s concentration on this aspect of the case was criticised on appeal. However, it is clear from his Honour’s findings that he also concluded that the agents were not truly conducting a business on their own account, despite their representation to that effect in tax returns etc. Particular emphasis was given in *Hollis* to the idea of identifying the business in which work is conducted, or whether alleged contractors are in business on their own account. Provided it is not overlooked that a contractor may work in the business of another and still on his or her own account (*Hollis* does not suggest to the contrary) there can be no criticism of an examination of, and conclusion about, these issues. In my view the trial judge did not fall into error about this matter.
5. One of the strongest arguments in favour of the appellant’s position was that the agents themselves had organised their affairs on the basis that they were not employees, an arrangement which met Combined’s requirements. The arrangements to which the trial judge referred, whereby for taxation purposes the agents were treated as non-employees, are clearly not decisive in their own right. They follow the prior assumption about employment (or more correctly non-employment). That assumption led to what was done about income tax deductions, GST, payroll tax, superannuation contributions and the like.
6. The trial judge accepted that the agents had each understood themselves to be independent contractors:

91 In this case, I accept that each of the sales representatives understood that he or she was an independent contractor at all material times. Their status as independent contractors was one of the attractions of the position. Indeed, none of them denied that understanding. It is hardly surprising in that circumstance that income tax was not deducted from their commissions or that they each obtained an ABN. Beyond throwing light on the parties’ understanding, however, I do not think this advances matters very far.

…

98 As I have said above, I accept that each of the agents at all times understood himself or herself to be an independent contractor.

1. The trial judge’s final conclusions about the issue of employment are captured in the following paragraphs:

121 It will follow from what I have said above that there was only one business being conducted and that was Combined’s business of renewing the policies of its existing customers and chasing up those which had lapsed or cancelled. The business of a sub-regional representative was the business of Combined. He administered Combined’s team of agents for it; he hired staff for its business; he trained its staff; he passed on its policies and premiums; he distributed its leads to its agents to sell to its customers. Further, he conducted this ‘business’ in accordance with Combined’s very active instructions and pursuant to training which had been given to him by Combined at its expense. He generated no goodwill in the conduct of the ‘business’ and his ‘business’ could not be sold.

122 There are features which do tell with some strength against an employment relationship nevertheless. The contracting by Mr Trifunovski and Mr Peries through companies; the payment of commission earned on the labour of others; the ability to engage secretarial support taken up in some cases; the substantive advantage obtained being registered for GST; most importantly, the fact that the parties to the contract understood that there was no employment relationship. At the end of the day, however, I am unable to accord these decisive weight. In my opinion, the sub-regional representatives were employees. The same reasoning inevitably supports the conclusion that the territory representatives were employees.

123 The situation with the sales representatives is not quite the same. They were the endpoint to which Combined’s leads were distributed; they represented Combined to the public in selling Combined’s policies. They were trained by Combined, at its expense, in its procedures. They were assigned to teams organised by Combined under the leadership of two layers of management – the territory and sub-regional representatives – who I have found to be employees of Combined. I do not accept that they were running their own businesses. I conclude, therefore, that the sales representatives were also employees.

1. The appeal cannot succeed on the principal matter argued unless these findings are set aside or disapproved. In my view they should not be.

# The appeal

## Conclusions about employment

1. There were two specific challenges made to the approach taken by the trial judge about the principal issue of whether the agents were employees. They were each to the effect that he misunderstood the nature of the enquiry to be made to resolve the issues before him. The first challenge was to an observation by his Honour that the common law is concerned with the identification of an employment relationship only for the purpose of attributing vicarious liability. The second was his Honour’s statement that the basal question to be answered was “in whose business was the putative employee toiling”. Each of these propositions occurred relatively early in the judgment.
2. The first proposition may be contestable, although it is no doubt historically accurate, as the earlier survey of cases might indicate. In my view, however, this historical aside did not distract the trial judge’s attention from the need to apply the tests laid down in the cases surveyed earlier.
3. The second proposition was distilled from *Hollis* at [40]*.* Working in the business of another is not inconsistent with working in a business of one’s own. The High Court in *Hollis* did not suggest to the contrary. Indeed, the High Court said (at [40]):

40 … the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee.

1. The importance of the subsequent analysis by the trial judge was, however, that it showed that the agents had no business of their own; they were working only in the business of Combined.
2. The appellant’s argument contested the findings on which this conclusion was based but many of the matters relied upon were only manifestations of a prior view that no employment relationship was involved. Thus, the appellant relied on claims for business expenses, provision of motor cars by the agents to themselves, preparation of financial statements and other matters which follow, rather than dictate, a conclusion about whether a relationship involves employment or not.
3. The following list of matters arising under the relevant contracts with the agents was said to be evidence of non-employment:

 (a) each agent was “engaged in the business of selling insurance on his own account as an independent contractor”;

(b) each agent was to operate as an independent contractor and nothing in the contract was to create any relationship of employer and employee;

(c) there was power to advertise at his or her sole expense;

(d) there was power to conduct a business through a corporation (provided that he or she was a director) and to assign to any such corporation his or her rights and benefits under the contract after giving 45 days’ notice;

(e) there was power to engage in other activities or business, provided that they did not conflict or compete with the obligations under the contract;

(f) there was power to engage persons to provide secretarial, administrative or other services to the agents at their sole expense;

(g) there was a requirement on each agent to maintain an “Agency Account”, against which Combined may set off any amounts owing to it against commissions owing by Combined;

(h) there was a requirement that agents bear all expenses and indemnify Combined against any losses;

(i) there was a provision that the agents had sole responsibility for all credit arrangements made between them and any other person and for any contracts made between them and any “employee, delegate, partnership or corporation”;

(j) there was a promise by the agents that they shall not cause, permit or suffer any of their servants or agents to do anything which would cause them to be in breach of the contract;

(k) payment was only by a commission in the event of a sale or renewal; there was no fixed wage or salary;

(l) each agent was empowered to allocate and distribute to other sales agents in his or her territory or sub-region sales leads referred to him or her by Combined;

(m) the contracts provided for termination on 7 or 10 days’ notice.

1. Of this list, (d), (f) and (h) are in my view the strongest indications against an employment relationship, but they must be seen in context. The permission in (f) did not extend to a power of delegation of the work in question, which was to be carried out personally by the agent concerned. Reference to another agent under (l) does not detract from this conclusion, because it refers to sub-regional and territory representatives. It reinforces the methods of control and organisation of work employed by Combined.
2. The expenses referred to in (h) were, in the case of sales representatives, principally the provision of a motor vehicle of choice. Employment of secretarial assistance or rent of office space by sub-regional representatives was insufficient to make a critical difference, even in their cases.
3. The strongest indicator of a truly separate business was the nominal power of incorporation in (d). However, the precise nature of this provision requires attention. As part of the submissions on the appeal, the appellant identified typical contractual arrangements applying from the late 1980s until October 2006, being the end of the period the subject of the claims. The standard contract authorised sales representatives:

 (d) To conduct business pursuant to this Agreement through any corporation of which the Representative is a director, and to assign to any such corporation, the Representative’s rights and benefits under this Agreement provided that the Representative shall first give to the Company not less than forty-five (45) days’ advance written notice and that the Company may levy such charges as it considers reasonable to compensate it for the costs of the proper administration of the agency relationship created under this Agreement and may also impose such other conditions as it considers reasonable.

(e) To engage in other activity or business which does not conflict or compete with the undertakings and obligations of the Representative under this Agreement.

(f) At the Representative’s sole expense, to engage persons to provide secretarial, administrative or other services to the Representative.

1. These contracts were made with individual agents. The agent was the authorised seller, no-one else. What was assignable to a corporation were “rights and benefits” under the contract. The trial judge inclined to the view that this merely permitted channelling of income to a corporate vehicle. The right to engage in other business was subordinated to the personal obligations owed by the agents to Combined. Permission to engage staff did not amount to a power of delegation.
2. The standard contract for territory representatives contained identical provisions. So did the standard contract for sub-regional representatives.
3. Like the trial judge, I do not regard these as sufficient indications of incompatibility with a relationship of employment, so far as representatives at any level were concerned. Nor do I regard them, or the contracts as a whole, as indicative of that level of independence which would be necessary to displace the indications that the true relationship was one of employment.
4. There were few examples of a contract purportedly with a corporation. Those few examples were also in the standard form and in those cases also personal service by an individual agent was necessarily required.
5. A contract in evidence naming Heraclea Pty Ltd (“Heraclea”) “in trust for Heraclea Trust” was in the same form as the contract executed by individual sub-regional representatives. It contained exactly the same clauses, including the power to conduct operations through a corporation of which the sub-regional representative was a director. Although it bore the name of Heraclea on the first page, the contract was, in fact, signed personally by Mr Bill Trifunovski (one of the respondents), who was named as the sub-regional representative in the execution clause.
6. In my respectful view, the existence of this contract (and another in the name of Renham Pty Ltd, a corporate reflection of Mr Peries, another of the respondents) was an insufficient obstacle to a finding that each of Mr Trifunovski and Mr Peries were employed by Combined. It was only they who were entitled legally to sell Combined’s policies, regardless of where payment of the resulting commissions was directed.
7. Of the authorities I canvassed earlier, the case which gives greatest support, by way of general analogy, to the position of the appellant in the present case is *Chaplin*. It appears to have been reliance on *Chaplin*, or at least the development of principle to that point, which explains the legal advice given to Combined, referred to in the evidence, which supported the view that insurance agents like the respondents were not employees. In the present appeal limited reliance was placed on *Chaplin*. That is not surprising because it is easy to distinguish *Chaplin* on the facts in a way which draws attention to the weakness in the appellant’s position.
8. In *Chaplin* the Privy Council identified a small number of conclusive factors in support of the conclusion that the agents in that case were not employees. None apply in the present case. Their Lordships said (at 391-394):

The matters so far mentioned are inconclusive on the question of whether the contract is one of service or for services. But there are a number of clauses which, in the opinion of their Lordships, point clearly to the latter conclusion. The first of these is cl 12 which recognizes that the respondent has a right to enter into a partnership in connection with the Society’s business. It may not be absolutely inconsistent with a relationship of master and servant that the alleged servant should be a partnership, but it would certainly be unusual.

…

In the present case there appears to be nothing in the written agreement to prevent the respondent from delegating the whole performance of his work to one or more sub-agents. In the opinion of their Lordships this power of unlimited delegation is almost conclusive against the contract being a contract of service … The unlimited extent of the power of delegation is one consequence of the striking absence of any express obligation upon the respondent to perform any particular duties, or to work any particular hours, or indeed to do any work at all on behalf of the Society. The assumption is that the payment of commission will be sufficient inducement to him to do some work.

…

A further important indication against this being a contract of service is the right of the respondent to incorporate himself — see the latter part of cl 14 of Section I (as amended March 1970). It may not be impossible for a body corporate to be a servant but the concept is certainly unfamiliar.

…

The conclusion that their Lordships draw from a detailed examination of the written agreement is that it was providing for a contract of agency and not of service.

…

They have in mind particularly that the respondent was not required to report his whereabouts or his activities in agency work, or to ask for leave of absence when he took a holiday, that he used a room in his own house as an office, paid his own clerical staff, and appointed three sub-agents during his period in office. His freedom in these respects involved no departure from the terms of the written agreement.

…

The last matter to which it is necessary to refer is in connection with the respondent’s income tax returns. Their Lordships attach no importance to the fact that he described himself in the return as a consultant. But what does appear to be important is the relatively large amount that he claimed in respect of business expenses as a deduction from his gross income. The items in the claim included commission to sub-agents, wages to secretarial staff, depreciation of motor car and office furniture and equipment, and other typical business expenses.

1. It is convenient, when considering these points of distinction, to concentrate on the sales representatives first.
2. In the present case, there was close control over the organisation of work and the deployment of agents in sales teams. The agents had no right to contract in partnership, nor to appoint sub-agents. When recruiting was done, the relationship created was directly with Combined. There was no effective right of incorporation; simply a right to assign the rights and benefits of the contract (not the burden, as the trial judge noted). There was no demonstrated history, at the level of sales representatives at least, that business expenses of the kind thought important in *Chaplin* were incurred, with the exception of motor vehicle expenses.
3. No sufficiently different position arose in relation to territory representatives, or sub-regional representatives. Although sub-regional representatives, in particular, were liable to incur some administrative expenses to be met out of their different commission arrangements, the service which was rendered remained personal service. Although two of the sub-regional representatives (Mr Trifunovski and Mr Peries) interposed a corporate entity in some of the financial arrangements, as I earlier indicated, in my view the trial judge was correct not to see these arrangements as decisive or determinative.
4. Any comfort from *Chaplin* is therefore meagre and it is not surprising that not much weight was placed on it.
5. Whether the facts as found by the trial judge are tested against the analysis by the Privy Council in *Chaplin*, or the High Court in *Hollis*, or whether they are tested more generally against the jurisprudence which developed over a long period, in my respectful view the trial judge was correct to conclude that the agents in the present case lacked the independence to be regarded as not the employees of Combined. None of the indicia which would stand positively against a relationship of employment was truly established.
6. The overwhelming impression from the evidence is that the agents at each of the three levels were specifically trained by Combined in particular techniques of selling which Combined had adopted as its own, and the training was constantly reinforced. They then worked under close direction, supervision and organisation with a view to selling insurance products in a way determined by Combined. They had no real independence of action or true independence of organisation. Once the mutual representation, that the agents were not employees, was set to one side there was no adequate foundation for a conclusion that the relationship was anything other than one of employment. The representation did not suffice to make it one.
7. For those reasons I would reject the principal challenge advanced by the appeal.

## Remaining issues

### Incorporation

1. It was argued that the trial judge should have found that Mr Trifunovski or Mr Peries were, at particular times, not employees of Combined whatever conclusions were reached about other agents. Both Mr Trifunovski and Mr Peries were sub-regional representatives. Each of them, it was contended, had at those particular times provided his services through a company of which he was a director – Heraclea in the case of Mr Trifunovski and Renham Pty Ltd in the case of Mr Peries.
2. I have already referred to the contract which names Heraclea as a party as trustee. That contract was made in March 2004. In this agreement, in the execution clause, Mr Trifunovski personally was named as the sub-regional representative and signed in that apparent capacity. It is not clear, owing to the fact that this contract was signed by Mr Trifunovski personally as sub-regional representative, and that it was not executed under the seal of Heraclea, that Heraclea was in fact a party to any contract notwithstanding that it was named in the opening parts of the contract. Whatever view may be taken about that issue I do not think there can be any doubt that, notwithstanding the apparent existence of this contract, it was necessary for Mr Trifunovski to provide his services personally to Combined. The appellant accepted in written submissions that agents were not permitted to engage their own employees or contractors to sell Combined’s products.
3. In any event, in my view, the trial judge was correct to conclude that the arrangements, whilst perhaps made to enable money to be channelled through Heraclea, did not represent an independent contract whereby Heraclea provided Mr Trifunovski’s services as its employee to Combined as the other party to the contract. The existence of this contract does not denote, therefore, that Mr Trifunovski was not an employee of Combined. In my view the trial judge correctly found that he was.
4. In Mr Peries’ case a similar conclusion should be reached. There were four contracts purportedly made with Renham Pty Ltd between November 1990 and December 2001. The trial judge noted, and the appellant appeared to accept, that the contracts between the agents and Combined did not materially differ throughout the periods in question. Hence, I shall treat the contract purportedly made with Renham Pty Ltd dated 27 January 1992 as representative. The contract was stamped with the seal of Renham Pty Ltd. This document appears to me to have been merely a formality, or more correctly, formalism as Mr and Mrs Peries provided a personal indemnity to Combined to guarantee performance and as the contract was otherwise in the standard form for individuals. Although the execution clause for this contract was also stamped with the seal of Renham Pty Ltd it represented that the sub-regional representative was Mr Peries. He signed the contract personally. I would not conclude that this contract was in fact made with Renham Pty Ltd even though it was named in the recitals. In any event, it is undoubtedly the case that Mr Peries’ personal service was required. I think the findings of the trial judge that he was an employee of Combined, notwithstanding the existence of this and other similar contracts, are correct. Renham Pty Ltd could not discharge the duties imposed by these contracts. That could only be done by Mr Peries personally. The contracts with Renham Pty Ltd were, in my view, an apparent device to divert funds to a corporate vehicle.

### Indemnity

1. The appellant argued that, in the event that the appeal did not succeed on the principal issue of whether the agents were employees, Combined was entitled to an indemnity from Heraclea pursuant to the terms of the contract made between Heraclea and Combined. There are two answers to this proposition. The first is that it has not been established that such a contract was in fact a contract with Heraclea rather than Mr Trifunovski. In any event, whatever the proper conclusion about that matter, Mr Trifunovski was found correctly to be an employee of Combined. Accordingly Combined owed a liability to him directly. His services, on the findings of the trial judge, were not provided by Heraclea. No question of an indemnity could arise.
2. The clause said to indicate that Heraclea had provided an indemnity to Combined was in the following terms:

 (f) The Sub-Regional Representative shall pay for all rent, transportation, hiring, postage, telegrams, telephone, advertising and all premiums, if any, in respect of workers compensation, income protection, health, accident and other insurances, superannuation contributions and all other expenses whatsoever incurred in connection with the Sub-Regional Representative’s business hereunder. The Sub-Regional Representative also shall pay all taxes payable to any Governmental Authority in connection with income earned by the Sub-Regional Representative under this Agreement. The Sub-Regional Representative shall hold the Company harmless against any and all claims, demands, proceedings, actions, suits, losses, damages or awards whatsoever brought against or suffered by the Company in relation to any such costs, expenses and taxes.

1. In my view this provision, whatever view may be taken of it, did not extend to liabilities incurred directly by Combined. It clearly relates to liabilities incurred by Heraclea. Heraclea did not incur a relevant liability, on the findings of the trial judge, in relation to any work carried out by Mr Trifunovski.

### Annual leave

1. On the findings made by the trial judge the employment of four of the five respondents was governed by a former *Insurance Industry Award 1998* (Cth) (“the award”). It was common ground between the parties that the award, if it applied, was enforceable under s 179 of the former *Workplace Relations Act 1996* (Cth). On the findings made by the trial judge calculations were required under the award with respect to annual leave and long service leave. Payment for annual leave on termination of employment was provided for in the award under clause 22.9 in the following terms:

**22.9.1** On the termination of employment of an employee an employer must pay the employee for any annual leave to which the employee became entitled during the period of employment with the employer to the extent that the annual leave was not taken.

**22.9.2** The rate of pay at which the payment must be made is that actual salary rate the employee was receiving immediately prior to termination. Annual leave loading at the rate prescribed in 22.8.2(a) of this clause subject to the maximum prescribed in that subparagraph shall be paid on leave which has fallen due. Proportionate leave shall be treated as prescribed in 22.10.

1. The trial judge concluded that the “actual salary rate” of each employee should be calculated by reference to commissions received over the period prior to termination, which would then be applied to calculate annual salary. One incongruity which is thrown up by the present proceedings is that the agents in question received only commission for insurance actually sold or, in the case of sub-regional representatives, commission derived from such sales. They did not have a rate of salary which was paid to them during ordinary periods of work, or during any non-working periods. In one sense, therefore, the employees were not receiving any actual salary rate immediately prior to termination.
2. The term “rate” of salary usually denotes the rate at which an entitlement to salary will be calculated in conjunction with an obligation to work specified periods. In the award, clause 18 required that ordinary hours of duty not exceed 38 hours per week. It provided that “week’s pay means the ordinary time rate of pay for the employee concerned”. It excluded from that calculation overtime, penalty rates, disability allowances, shift allowances, special rates, fares and travelling time allowances, bonuses and any other ancillary payments of a like nature.
3. However, the annual leave entitlement which was given to employees who actually took their annual leave was not restricted to the ordinary time rate of pay. By clause 22.1.1 an employee was entitled to four weeks leave of absence on full pay. Full pay was defined in clause 22.7 (for the purpose of payment of annual leave) to mean “the amount of salary that the employee would have received for performing the employee’s normal duties during ordinary hours had the employee not been on leave for the relevant period”. Reference in clause 22.9.2 to an “actual salary rate”, therefore, was a reference to a rate of salary calculated by reference to receipts immediately before termination.
4. In my view, there was no apparent error in the trial judge reaching a conclusion about receipts of remuneration over an appropriate period and applying that information to the calculation of a rate for the period of annual leave which became due under the award pursuant to his findings about the employment relationship.
5. The appellant, however, argued that the long service leave provisions of the award suggested that a different approach should be taken.
6. A calculation in relation to long service leave arose only for three agents: Mr Perez, Mr Peries and Mr Trifunovski. Calculation of long service leave under the award (under clause 25) is different to the calculation of payment for untaken annual leave. Clause 25.5 of the award provided:

**25.5.1** “Actual rates of pay” for the purpose of this clause, means the actual salary of the employee for a normal weekly number of hours of work immediately prior to the time of taking each period of long service leave.

**25.5.2** Such salary will not include shift premiums, overtime, penalty rates, commissions, bonuses or allowances payable to the employee when working.

1. Clause 25.5.1 directs attention to “actual salary” for a normal weekly number of hours of work which under the award does not exceed 38. The salary is not to include commissions. In those circumstances employees would be entitled to payment during long service leave at the rate of pay calculated in accordance with the minimum rates in the award for a normal working week. That appears to have been the calculation made by the trial judge although he arrived at that point for different reasons. It appears to have been the submission made at first instance by Combined. I agree that the submission was soundly based.
2. I do not agree that these matters provide a reason to construe the annual leave provisions in the same way. There are clear differences between the two and they are directed to different objectives. It is quite usual for employees on annual leave to be afforded the preservation of rates of pay actually being received, including bonuses, over award payments etc. It is also quite usual for employees on long service leave to be guaranteed their standard entitlements under an award but without the additional benefit of payments which arise in excess of those standard entitlements.

### Mr Perez

1. Two issues were raised in relation to Mr Perez’ entitlement to payments for annual leave and long service leave. The first issue concerned Mr Perez’ claim for annual leave prior to 3 June 1998. The second issue concerned the reference points used by the trial judge to calculate Mr Perez’ long service leave and annual leave entitlements. As to the first issue, the trial judge found that Mr Perez was entitled to annual leave prior to 3 June 1998 because Combined did not plead against Mr Perez the non-existence of the award (although it was pleaded against the other agents). Combined submitted that in doing so his Honour incorrectly reversed the onus of proof, and that the correct conclusion was that, as Mr Perez had failed to show the existence of any entitlement prior to 3 June 1998, his claim for annual leave prior to that date should be rejected.
2. I do not accept this submission. The trial judge was entitled to rely on the pleadings as an accurate reflection of the issues that were contested between the parties. As the respondent pointed out, had the non-existence of the award been pleaded, he may have been able to locate an alternative foundation for his claim for annual leave in reply.
3. As to the second issue, Combined’s position was that Mr Perez was demoted to the equivalent of a sales representative, from a territory representative, before his services with Combined finished on 12 October 2006. Combined therefore argued that Mr Perez should have his entitlements to leave calculated in a way different to that used by the trial judge. There are two aspects to the argument. One is that Mr Perez’ long service leave should have been calculated at the Grade 4 rate in the award rather than Grade 5 and the other is that his annual leave should have been calculated by reference to Mr Perez’ earnings as at 12 October 2006 rather than his earnings in the financial year ending 30 June 2006.
4. The finding of the trial judge was that Mr Perez was demoted from Grade 6 to Grade 5, from a sub-regional representative to a territory representative. The trial judge found at [64] of the principal judgment that this occurred on 12 June 2005. However, Combined’s point was that Mr Perez was demoted again from Grade 5 to Grade 4 before his employment came to an end. As the trial judge accepted in principle that Mr Perez’ long service leave should be calculated at the rates applicable when his employment came to an end, it seems to me that the submission for Combined should be accepted if the evidence supports it. However the respondent pointed out that the submission which referred to this alleged factual circumstance did not refer to any evidence to support it. That is correct. In the circumstances I would not find that error in the findings of the trial judge has been demonstrated on the appeal and I would make no adjustment to the calculation of Mr Perez’ long service leave.
5. As to the calculation of annual leave for Mr Perez, the trial judge found at [55] in his second judgment that Mr Perez had ceased performing effective work for Combined about three months before the formal date of termination of his employment. Mr Perez had commenced working for another enterprise in April or May 2006. No challenge was made to those findings on the appeal. In those circumstances, the approach taken by the trial judge of calculating Mr Perez’ actual pay by reference to the period of the twelve months to 30 June 2006 for the purpose of the further calculation of annual leave appears to me to be correct. I would not be prepared to disturb it on appeal as, in my view, error was not clearly shown.

# Orders

1. In my view the appeal should be dismissed. It was agreed that no order should be made about costs.

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| I certify that the preceding one hundred and fifty-two (152) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan. |

Associate:

Dated: 25 January 2013

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | BLAGOJA TRIFUNOVSKIRespondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | FETIE DICINOSKI Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **HERACLEA PTY LTD** Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | **WILLIAM DICINOSKI**Respondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | shane perezRespondent |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | ACE INSURANCE LIMITEDAppellant |
| AND: | RIENZIE PERIESRespondent |

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| PLACE: |  |

**REASONS FOR JUDGMENT**

# ROBERTSON j:

1. I agree with the judgment and orders of Buchanan J.

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

Associate:

Dated: 25 January 2013