HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 04 Jun 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	P5/2021
File Title:	Construction, Forestry, Maritime, Mining and Energy Union &
Registry:	Perth
Document filed:	Form 27E - Reply
Filing party:	Appellants
Date filed:	04 Jun 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN:

Construction, Forestry, Maritime, Mining and Energy Union

First Appellant

Daniel McCourt

Second Appellant

Personnel Contracting Pty Ltd

Respondent

APPELLANTS' SUBMISSIONS IN REPLY

1 The Respondent's approach to the issues of control and characterisation terms would permit those engaging labour to unmeritoriously avoid vicarious liability and the need to provide the benefits conferred on employees in the FW Act and other laws designed to protect employees. These ends could be achieved by two simple steps: first, by engaging the worker through a mode that supposedly denies the engager the right to control the worker, and supposedly vesting control over the worker in a third party who then pays the engager to provide labour that the third party can control. Such modes include engaging a worker through a labour hire company, or within a corporate group, or by lending a worker's labour by an engagement *pro hac vice*. On the Respondent's approach[1], as authority to control must reside in the employer and as control is an essential element in any employment contract, taking this first step will ensure the worker is not an employee. The second step is to insert a carefully crafted characterisation term, out of an abundance of caution. Such terms, the Respondent contends, would clinch the resolution of any ambiguity in the status of the worker: RS [36].

2 The Respondent's approach prefers form over substance, encourages artifice, and eschews an examination of reality.[2] It allows for the 'manipulation' of the indicia to produce results that are 'less than intuitively sound'.[3] The practical effect is that engagers of labour can opt out of the award system covering workers of any description, whether or not the worker is conducting his or her own business. Indeed, if an engager of labour took those two steps, whether the worker was conducting his or her own business is ultimately irrelevant.

---

[1] Respondent's submissions (**RS**) at [22], [23], [26].

[2] CAB 149, FC [188]; *Autoclenz* at [29], [35], [38]; *Uber* at [60], [68], [78]. The abbreviations used in this Reply are the same as those made in the Appellants' submissions (**AS**).

[3] CAB 113, 147, 148, FC at [76], [181], [185].

3 **The unprincipled exception to the common law**: It is not clear whether the proposed exception to the ordinary principles sought by the Respondent at RS 40-1 is limited to workers for this particular agency due to the *Personnel Contracting* decision, or all workers engaged under the '*Odco* model'.[4] Whatever the scope, the exception is not based on principle. It does not cohere with the rationales of the doctrine of vicarious liability, or the protective purpose of the FW Act. There is no *Odco* or *Personnel Contracting* principle. The characterisation process is a fact heavy adjudication involving a mixed question of fact and law. The results of previous cases in themselves have no precedential value to cases with findings on different facts.

4 **Evolutionary change:** The exception for which the Respondent contends is based on a poorly reasoned judgment in *Personnel Contracting*: see AS 42. The '30 year line of authority' relied on by the Respondent consists of three cases based on the *Odco* model: *Odco*, *Young* and *Personnel Contracting*. When that model has been used, it has just as often resulted in courts and tribunals finding that the workers engaged under it were employees.[5] Leading academics have been predicting its demise for many years.[6] It would require the perpetuation of error without sound justification and has never been endorsed by this Court. If the exception were established by this Court, it would have significant implications for labour regulation (as well as the tax and superannuation systems) as 'armies of lawyers' would be deployed to allow engagers of labour to opt out of the award system.[7]

5 **The significance of Mr McCourt not conducting his own business**: RS [21], Notice of Contention (**NOC**) [6]: The trial judge afforded insufficient weight to the finding that Mr McCourt was not conducting his own business, even if the ultimate question and organising conception approaches are not accepted. It was not just 'one indicator' or a single fact, equivalent to the provision of tools or non-exclusive service. It was a conclusion that went to the heart of the inquiry based on a multitude of facts.[8]

---

[4] What is meant by the 'Odco model' is never made clear by the Respondent. Is it the basic seven-point contract that was used in *Odco* and *Young*, but not here? Does it include facts about business systems, or the method of performance, and which facts? The 'Odco model' referred to in 'Making it Work' at [3.14] (referred to in RS 41) was for contractors 'with their own Australian Business Numbers (ABNs)'. Mr McCourt never had an ABN**:** Appellant's Book of Materials (**ABM**) at 5, 24, McCourt first affidavit at para 13, McCourt second affidavit paras 3-4.

[5] The engagers of labour all used the basic seven-point contract from *Odco* in *Country Metropolitan Agency Contracting Services v Slater* (2003) 124 IR 293 at [30], *Damevski* at [30], [31], [60], *Quest* at [8]-[15], *Fair Work Ombudsman v Contracting Solutions Australia* [2013] FCA 7, and *Johnson v MNG Investments* [2011] ACTSC 124 at [16]-[24]. All the workers in those cases were all found to be employees: see also *Fox v Kangan Batman TAFE* referred to in *Damevski* at [72]-[75].

[6] See eg A Stewart *et al*, *Creighton & Stewart's Labour Law* 6th ed, at 259 referred to in **CAB 149,** FC [188].

[7] *Autoclenz* at [25]; CAB 121-2, FC [100]-[101].

[8] CAB 50, TJ [156]; CAB 147, FC [181]; ABM at 5,6, 9-22, McCourt affidavit at paras 13, 25, 34-53, 58-78.

6 **Control is not essential:** RS [16], [22], [23] and [26]: As the Full Court held, the Respondent is incorrect when it contends that the right of control is a 'necessary element' in the employment relationship.[9] In *Stevens*, Mason J described the right of control as 'prominent', 'not the sole criterion', and 'merely as one of a number of indicia which must be considered'.[10] Wilson and Dawson JJ rejected control as a determinative factor and, after finding there was no control, proceeded to weigh the other factors.[11] If the Respondent's contention were correct, then there must be two limbs of the categorisation test: the first issue would be whether there is control, and the second would be a consideration of the balance of the factors. This is not the approach taken in subsequent cases in this Court and has nothing to commend it.

10 7 **In whose business?** RS [17]: The question is not – in whose business does the worker perform work? An independent contractor performs work in both his or her own business and that of the engager of the labour. An employee engaged by a labour hire agency performs work in both the business of the employer and the business of the client.[12] The question is whether in the performance of the work the worker is conducting his or her own independent business: AS [11], [12], [17]. The Respondent also contends (at RS [17]) that the Appellants' approach would not allow for the wide variety of different work arrangements. It does not identify any work arrangement, other than this particular case, where using the Appellants' approach would be inapposite.

8 **The authority need not reside in the employer:** RS [22], [26]: The Respondent's
20 flawed proposition that, for the purposes of establishing control in the characterisation process, it is necessary that control reside in the employer is based on decisions that did not concern trilateral relationships. If correct, it would mean employees *pro hac vice* would not be employed by the general employer as the divested right of control is only exercised by a third party. If correct, a labour hire agreement which required the worker to perform work as directed by a master's spouse would divest the master of control.[13]

9 **Control manifest through the Induction document:** AS [24], RS [32], NOC [2]: First, the Induction document contained express terms for the reasons stated by Lee J.[14] The acknowledgement was broader than merely acknowledging Mr McCourt had read it and

---

[9] CAB 117, FC at [87].
[10] *Stevens* at 24, 29.
[11] *Stevens* at 35, 37.
[12] *Drake Personnel v Commissioner of State Revenue* (2000) 2 VR 635 at [53]-[54] (***Drake***).
[13] See also AS at [29] on employment within corporate groups.
[14] CAB 137-140, FC [151]-[160]; Respondent's Book of Further Material (**RBFM**) at 36-46.

included promises to ensure compliance with rules and procedures given by the host client.[15] Second, the Induction document imposed obligations on Mr McCourt different to his statutory obligations under s 20 of the *OSH Act* 1984 (WA).[16] It imposed contractual duties, which were broader than those imposed under statute.[17] Third, the Respondent only had obligations under s 19 of the *OSH Act* if it was providing or maintaining a work environment, which it was not. Further, in the details of its instructions, the Respondent went beyond what was required in order to meet its obligations under s 19 of the *OSH Act*.[18] Fourth, even if (contrary to the above) the employer only had a statutory and not contractual right to give the instructions that it gave, then it would still manifest control.

10 10 **The necessity of control and its devolution**: AS [26], [31], RS [30-1]: For the LHA to be effective, and for the McCourt-Respondent contract to be effective, it was necessary that Mr McCourt be the subject of an obligation to obey directions. The principal consideration moving from the Respondent under the LHA was that it was providing Mr McCourt's labour for the builder's 'direction and supervision'. Unless the Respondent had the power to control Mr McCourt, then it could not provide the promised consideration: the subordinated labour of Mr McCourt. The fulfilment of the LHA was the very reason Mr McCourt was engaged by the Respondent. His engagement followed an order from the builder for labour under his contract with the Respondent. The Respondent earned remuneration under the LHA because Mr McCourt could be directed by the builder. Mr McCourt earned remuneration under his contract
20 because he obeyed the builder's directions. Obedience by Mr McCourt to the builder's directions was necessary for the object of both contracts to be fulfilled. Yet the Respondent denies Mr McCourt had an obligation to obey anyone. There is a simple explanation for the legal foundation of the trilateral enterprise: Mr McCourt was an employee.

11 **Characterisation terms:** AS [36]-[37], NOC [7]: The Respondent contends that, if there is still ambiguity after all the other indicia are considered, then the characterization term becomes decisive as it becomes the 'best material' to ascertain the character of the relationship: RS [36]. In practice, there are almost always indicators and contraindicators of employment,

---

[15] RBFM at p 43.5.

[16] The Respondent refers to the Respondent's and Mr McCourt's statutory duties, but does not identify the Act relied on. It is assumed it is the *Occupational Health and Safety Act* 1984 (WA) (***OSH Act***).

[17] For example, compare the duty in the Induction document to take reasonable care for the safety of others in the workplace to the more limited duty in s 20(1)(b) of the *OSH Act*: see RBFM 36, 43.

[18] For example, see the detailed instructions about manual handling, plant and equipment, UV Radiation etc: RBFM 36, 37.

even in the most straightforward of bipartite categorisation cases. The Respondent's approach prefers form over substance and favors the party with the power to set the terms: see AS 34-5.

12 **Genuine expectations:** RS [37]: The parties' genuine intentions and expectations are not only assessed by reference to the terms at the time of the formation of the contract: they are informed by the performance. Allsop CJ was correct in his assessment of those matters.[19] Contrary to the warranty in the terms, and as the Respondent knew, McCourt was not 'self-employed' and had never been never self-employed – he was a backpacker. Contrary to the terms, Mr McCourt did not issue invoices; he never negotiated a pay rise, and did not know how his pay rate came to be increased. 'Self-employed' workers control their own work, which Mr McCourt did not.[20] The Induction Manual, the Site Rules, and the way work was performed involved minute submission to direction - a notion not consistent with being 'self-employed'. The LHA contemplated control of McCourt: see AS 25 and [34].

13 **Freedom to not work:** RS [38]: Once McCourt had accepted the offer of work, he was not then free to reject work as he wished.[21] In practice, McCourt's engagement involved a reasonably high degree of stability and was continuous in the two tranches.[22] His freedom was that of any employee: to terminate on notice.

14 **The *Independent Contractors Act*:** RS [8], [43]: The scope of the *Independent Contractors Act 2006 (Cth)*, like the FW Act, is based on the employee-independent contractor dichotomy. The Acts enlist the common law approach in the adjudication of the issue and do not alter it. The statutory use of a common law concept contemplates changes in that concept as it develops from time to time This Court has adjusted the meaning of 'employee' and 'control' through the development of principle and should continue to do so.[23]

Dated 4 June 2021

Bret Walker
Fifth Floor St James Hall
02 8257 2527
maggie.dalton@stjames.net.au

Mark Irving
Owen Dixon Chambers
03 9225 7288
mirving@vicbar.com.au

Thomas Dixon
State Chambers
02 9223 1522
t.dixon@statechambers.net

---

[19] CAB 94-96, FC at [27], [31].

[20] CAB 16-8, TJ [32]-[35], [41], ABM 4-5, 7-16, 19-22, 25 McCourt affidavit paras 10-14, 29-35, 40-53 and 61-79 (where further differences between the ASA and reality are identified), McCourt second affidavit paras 6-7.

[21] Clause 5(c) of the ASA; CAB 11 TJ [12].

[22] ABM 14-5, 19, McCourt affidavit paras 47-51, 59-60: when sick he notified the builder; when he went on 4 days holiday he did so after applying for leave from the builder.

[23] *Aid/Watch* at [18]- [24], *Hollis* at [59]-[60]: on the evolution of the concepts, see AS 46; *Zuijs* at 571.

Annexure

List of constitutional provisions, statutes and statutory instrument referred to in submissions

Title	Provisions	Date
Occupational Health and Safety Act 1984 (WA)	Sections 19 and 20	27 July 2016 to 30 June 2017: reprint 7