HIGH COURT OF AUSTRALIA

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Details of Filing

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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

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RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

These submissions are in a form suitable for publication on the internet.

Part II: Argument

[1] **(Introduction)** The trial judge was right to find Mr McCourt was not an employee of the Respondent (**Construct**) having regard to the absence of control, representation and integration and the written terms. The Full Court, while it erred in other respects, was right to hold the earlier authorities should not be departed from.

[2] **(Meaning of employee)** The question is whether Mr McCourt was 'employed' by Construct, within the meaning of s 13 of the *Fair Work Act 2009* (Cth). The terms 'employed' and 'employee' in the Act have their common law meaning which is not informed by the scope or purpose of the Act. Where Parliament has intended the Act to apply to persons other than employees at common law, it has said so expressly: **R[5]-[11], [19]**.

[3] **(Test for employment)** The common law test for employment is multifactorial informed by a recognition of the fundamental purposes of vicarious liability: **R[14]-[15]**.

[4] (**Own business test)** Whether a worker is conducting their own business (or is working in the putative employer's business) is a relevant factor to be weighed but is not an alternative test nor an organising principle, having been rejected as such in *Stevens*. Of the two concepts, legal authority to control is the more relevant and cogent in determining the nature of the relationship: **R**[**12]-[13].** In Australia and England, in cases such as the present, the courts have consistently held the contract between the agency and the worker was not an employment contract, principally because the agency exercised no or insufficient control over the worker in the performance of the work: **R[16], [27]**. The business test is not apt in a triangular arrangement as the worker is neither working in their own business nor the putative employer's. Rather, they are working in the business of the host (which is the business that creates the risk, provides the tools and controls the work): **R[17].**

[5] To pose the ultimate question as whether the worker has their own business directs attention away from the totality of the relationship and narrows the focus of inquiry. It also wrongly assumes an archetype of independent contractor. Further, the term independent contractor has no settled meaning. The question is not whether the worker is an entrepreneur or an independent contractor. It is whether they are an employee: **R[18]**.

[6] **(Control)** In Australia, as in England, lawful authority to command must exist in a 'sufficient degree' for a contract of service to exist. A person cannot be a servant without any obligation to serve and obey directions. Even where there is a sufficient right of control,

that is not determinative and the nature and extent of control will be an important factor in determining whether the contract is one of service or not: **R[22]-[27]**.

[7] Construct had neither a legal nor practical right of control over Mr McCourt, or, alternatively, had very little control over him in the performance of the work. Hanssen alone supervised and directed every aspect of Mr McCourt's work. No express term in the ASA gave Construct a right to control Mr McCourt or to terminate his engagement for poor performance and there is no basis for implying such a term. Hanssen alone had the right to terminate Mr McCourt's engagement if not satisfied with his work (and exercised that right without Construct's input or involvement): **R[28]-[29]**.

[8] It is not correct to say cl 4 of the LHA 'devolved' control to Hanssen. Mr McCourt was unaware of the LHA and the LHA could not devolve a right of control which Construct did not have. Nor is it correct to say that because in practice Mr McCourt accepted direction from Hanssen, a right of control in Construct is to be implied. Viewed objectively, neither Construct nor Mr McCourt contemplated that he would be subject to Construct's directions in the performance of the work on the building sites or even in incidental or collateral matters. In the circumstances, there was no necessity for Construct to have any lawful authority over Mr McCourt: **R[31]**.

[9] The only obligation which Mr McCourt had to comply with Construct's instructions was a statutory duty to comply with instructions in relation to safety. A limited statutory duty to comply with instructions (imposed on employees and contractors) cannot bear on whether a worker is an employee (employment being a contractual relationship). The Safety Guide was not contractual. In any event, the steps taken by Construct to comply with its statutory safety obligations, including the provision of the Safety Guide, were either neutral or did not constitute a sufficient degree of relevant control to sustain a finding of employment: **R[32]**.

[10] The Full Court was wrong to hold the control indicium was not an essential factor nor particularly helpful in the characterisation of multilateral arrangements, that an absence of control by the labour hire agency may be neutral and that the lack of interaction between Mr McCourt and Construct was minutia and of minimal significance: **R[34]**. It ought to have held that the absence of any, or any sufficient, degree of control by Construct meant Mr McCourt was not its employee or else, strongly contraindicated employment.

[11] **(Vicarious liability)** None of the policy concerns and purposes underlying vicarious liability – control, deterrence, enterprise risk, representation, identification and integration -

favoured a finding that the relationship was one of employment. Hanssen created the enterprise risk and controlled the activity. Mr McCourt was not required to wear Construct's uniform or branding nor was he integrated into Construct's business. He was integrated into Hanssen's business, attending Hanssen's pre-start meetings and performing Hanssen's work to Hanssen's schedule as part of a team that was organized and directed by Hanssen's supervisors: **R[35]**.

[12] (Written terms) The trial judge did not err in his treatment of the characterisation terms. In circumstances where there was 'no unconscionability or predation' FC [36] CAB [97] and 'any suggestion of a sham or pretence had been disavowed' TJ [4] CAB[8]; TJ [177] CAB [55], the trial judge, having found the question to be reasonably evenly balanced, was entitled to have regard to the characterisation terms as an expression of the parties' bargain and genuine intentions: **R[36]-[37]**.

[13] (Freedom to reject/accept work and work for others) That Mr McCourt was free to reject or accept offers of work and to work for others pointed to a degree of autonomy. They are factors which standing alone would not be determinative but when viewed in context and as part of the totality of the relationship are capable of informing an assessment of whether Mr McCourt was an employee: **R[38]**.

[14] (Long standing authority) *Odco*, *Personnel Contracting* and *Young* represent a 30 year line of authority in which three appeal courts have held that labourers engaged by a labour hire company to perform work for a builder under the supervision and direction of the builder were not employees. The decisions are authoritative in cases in which the circumstances are not materially distinguishable. The model applied in those decisions has been widely replicated. They should not be lightly disturbed where to do so would expose persons who have relied on them to retrospective claims and substantial civil penalties under the Act. Any changes to these longstanding principles ought to be made by Parliament. In this respect, following an inquiry (which examined Odco-style arrangements), Parliament enacted the *Independent Contractors Act 2006* (Cth), which provides a remedy for contractors who consider their terms to be harsh or unfair: **R[39]-[43]**.

Dated 30 August 2021

John Blackburn **Marc Felman**