WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION	**:**	2020 WAIRC 00061
CORAM	**:**	INDUSTRIAL MAGISTRATE M. FLYNN
HEARD	**:**	WEDNESDAY, 22 MAY 2019
DELIVERED	**:**	THURSDAY, 30 JANUARY 2020
FILE NO.	**:**	M 33 OF 2018
BETWEEN	**:**	CRAIG IVAN BOTICA **CLAIMANT** AND TOP CUT TMS HOLDINGS PTY LTD (ACN 134 606 661) **RESPONDENT**

CatchWords	**:**	INDUSTRIAL LAW – Whether the claimant was an 'employee' of the respondent for the purposes of the *Fair Work Act 2009* (Cth) or was an independent contractor – Whether the claimant was an 'employee' of the respondent for the purposes of the *Long Service Leave Act 1958* (WA) or was an independent contractor – Interpretation of the definition of 'employee' in the *Long Service Leave Act 1958* (WA) as 'any person who is the owner of any vehicle used in the transport of goods if the person is in all other respects an employee'
Legislation	**:**	*Fair Work Act 2009* (Cth) *Long Service Leave Act 1958* (WA) *Superannuation Guarantee (Administration) Act 1992* (Cth) *Industrial Arbitration Act 1979* (WA) *Industrial Relations Act 1979* (WA) *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA)
Instruments	**:**	*Road Transport and Distribution Award 2010* (Cth)
Case(s) referred to in reasons:	**:**	***Hollis v Vabu Pty Ltd*** [2001] HCA 44 ***Abdalla v Viewdaze Pty Ltd t/as Malta Travel*** (2003) 53 ATR 30 ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37 ***Tattsbet Ltd v Morrow*** [2015] FCAFC 62 ***Hall (Inspector of Taxes) v Lorimer*** [1992] 1 WLR 939

Howard v Merdaval Pty Ltd t/as North Essendon Auto Spares [2019] FCCA 1127
Miles v Brendon Penn Nominees Pty Ltd (2006) WAIRC 5752
Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others (1981) 61 WAIG 1705
Paul Ernest Dallaston v Canon Foods [2005] WAIRComm1978
Sharrock v Downer EDI Mining Pty Ltd [2018] WAIRC 00377
Wright v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 00887
Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878
Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350
Cuzzin Pty Ltd v Grnja [2014] SAIRC 36
Qube Ports Pty Ltd v Maritime Union of Australia [2018] FCAFC 72
Stagnitta v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886
Al-Hakim v Toyoor Al Jannah Pty Ltd & Ors [2018] FCCA 3184
Marshall v Whittaker's Building Supply Co [1963] HCA 26
Moffet v Dental Corporation Pty Ltd [2019] FCA 344
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16
ACE Insurance Ltd v Trifunovski [2011] FCA 1204
Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539
Australian Education Union v Victoria (Dept of Education and Early Childhood Development) [2015] FCA 1196
Whitby v ZG Operations Australia Pty Ltd [2018] FCA 1934
Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537
Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation [2010] FCAFC 52; (2010) 184 FCR 448
Australian Air Express Pty Limited v Langford [2005] NSWCA 96
United Construction Pty Ltd v Birighitti [2002] 82 WAIG 2409
United Construction Pty Ltd v Birighitti [2003] WASCA 24
David Kershaw v Sunvalley Australia Pty Ltd [2007] WAIRComm 520
Paul Ernest Dallaston v Canon Foods [2004] WAIRComm13246

Result : Judgment for the claimant on the long service leave claim

Representation:

Claimant : Mr J Leslie (of counsel) from Zafra Legal
Respondent : Mr J Raftos (of counsel) as instructed by Sparke Helmore

REASONS FOR DECISION

1 The claimant, Mr Craig Ivan Botica (Mr Botica) worked for a meat supply business (the Meat Business) between January 2007 and 4 September 2017. The Meat Business was acquired by the respondent, Top Cut TMS Holdings Pty Ltd (ACN 134 606 661) (the Company) in July 2009 and operated under the name *Top Cut* from that date. Mr Botica's work involved driving a refrigerated vehicle to collect and deliver packaged meat to customers of the Meat Business. Mr Botica supplied the vehicle that he used when working for the Meat Business. He worked between six and nine hours each week day. The Company paid for Mr Botica's work upon a weekly invoice to the Company. The payment reflected the number of hours worked by Mr Botica and an hourly rate of pay. The invoice was from a partnership named 'The Bull Run' (the Partnership). The partners were Mr Botica and, his wife, Ms Tracy Botica (Ms Botica).

2 The *Fair Work Act 2009* (Cth) (FW Act) confers upon employees of the Company an entitlement to annual leave and superannuation in accordance with the terms of the statute and any relevant modern award, including the *Road Transport and Distribution Award 2010* (Cth) (the Award).

3 The *Long Service Leave Act 1958* (WA) (LSL Act) confers an entitlement to long service leave upon employees of the Company who have completed, in accordance with the statute, 10 years of 'continuous employment'.

4 Mr Botica alleges that his work in the Meat Business was undertaken as an employee of the entity that operated the Meat Business. He alleges that, as an employee of the Company when his employment ended, the Company failed to account for his entitlements to annual leave, superannuation and long service leave. The Company denies that Mr Botica's work in the Meat Business was undertaken as an employee. It argues that Mr Botica worked as an independent contractor and that any work done by him for the Company was done as a contractor.

5 The issue in this case is whether, for the purposes of Mr Botica's claim to annual leave and superannuation entitlements, Mr Botica was an '***employee***' of the Company as defined by the FW Act and, for the purposes of long service leave entitlements, Mr Botica was an '***employee***' of the Company as defined by the LSL Act.

Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court of Western Australia (IMC)

6 The annual leave and superannuation claims will be determined according to the law governing the jurisdiction, practice and procedure of the IMC when dealing with claims made under the FW Act. The relevant provisions of the FW Act are identified in an endnote.[1] *If* Mr Botica proves that, for the purposes of the FW Act, he was an employee of the Company:

a. The Company is a national system employer and Mr Botica is a national system employee as those terms are defined in the FW Act.

b. Mr Botica was entitled to four weeks of paid annual leave for each year of service as a result of the National Employment Standard (NES) pursuant to s 87 of the FW Act (unless he was a casual employee). Section 87 of the FW Act is a civil remedy provision. The IMC may order the Company to pay to Mr Botica any (unpaid) amounts that the Company was required to pay under s 87: s 545(3) of the FW Act.

c. The Award applied to and covered the Company and Mr Botica. The summary of non-contentious facts in paragraph [1] of the judgment and cl 4.1 of the Award is sufficient to reveal that:

i. the Award covered the Company as a result of it being in the '**road transport and distribution industry**' as defined in cl 3 of the Award;

ii. the Award covered Mr Botica as a result of him being a 'transport worker' identified by reference to cl 15 of the Award; and

iii. the Award applied to the Company and to Mr Botica as a result of the operation of s 47(1) of the FW Act.

d. The Company was required to make superannuation contributions for the benefit of employees in accordance with cl 21.2 of the Award. Section 50 of the FW Act has the result that the terms of the Award, including cl 21.2, are enforceable as a civil remedy provision of the FW Act. The IMC may order the Company to make superannuation contributions, on behalf of Mr Botica, of any (unpaid) amounts that the Company was required to contribute under cl 21.2 of the Award: s 545(3) of the FW Act.

7 The long service leave claim will be determined according to the law governing the jurisdiction, practice and procedure of the IMC when dealing with claims made under the LSL Act. The relevant statutory provisions are identified in an endnote.[2] The IMC has the jurisdiction to determine all questions arising from Mr Botica's long service leave claim, including whether he is an '***employee***' for the purposes of the LSL Act.

The Facts

8 Many facts are either not in dispute or are the subject of uncontroverted evidence that I consider to be reliable. The witness' called by the Company were only able to attest to their knowledge of the operations of the Meat Business from the time of their involvement with the Company, for example, from March 2013 in the case of Mr Jay Ovens (Mr Ovens) and February 2017 in the case of Mr Grant Taylor (Mr Taylor). In those circumstances, it is convenient to set out the facts in a narrative form, identifying and resolving any relevant factual disputes.

9 In January 2007, Mr Botica accepted an offer of work at the Meat Business made during a telephone conversation with Mr Steve Litton (Mr Litton). At this time the Meat Business was known as *Total Meat Solutions* and Mr Litton was the manager. Mr Botica had been a delivery driver for a business known as *Perth Meat Export* since 1999. It was agreed that Mr Botica would use his own purpose-built vehicle to deliver frozen packaged meat throughout Perth and would be paid $35 per hour for this work. Mr Botica would also receive 'free meat'. Mr Litton requested that Mr Botica invoice *Total Meat Solutions* for the hours that he worked. The Partnership was the entity, since 1999, that had been receiving income for Mr Botica's work for *Perth Meat Export.* In the result, each invoice to the Meat Business for the hours worked by Mr Botica was from the Partnership.

10 Mr Botica was the only driver working for *Total Meat Solutions* as at January 2007. Later in 2007, a second driver, Mr Paul Bedford (Mr Bedford), commenced delivering meat for the Meat Business. Mr Bedford also used his own vehicle. Mr Botica observed approximately 25 other workers involved in the Meat Business. Their work included receiving orders from customers and butchering the meat as necessary before packaging the meat for delivery.

11 Mr Botica attended the premises of *Total Meat Solutions* early each morning from Monday to Friday. He would be given a 'run sheet' listing details of each customer delivery he was to make that day. He was also given an original and a copy invoice for each customer. Mr Botica would personally load his vehicle with the meat needed to fill the deliveries listed in the run sheet. The Meat Business supplied him with cool room gloves. Mr Botica would spend the rest of the day

delivering meat to each customer listed in the run sheet. He would drive approximately 200 km each day making deliveries to customers. On average, the time taken by Mr Botica to complete deliveries was 7.6 hours.[3] Mr Botica's work for the Meat Business usually finished sometime between 12.00 pm and 3.00 pm, upon completion of his last delivery. He was not required to return to the premises of the Meat Business and was free to go home. The copy invoice and (completed) run sheet were returned by Mr Botica to the Meat Business on the following day. Mr Botica never received an express request to attend for work on a particular day. Nor was he ever asked not to attend for work on a particular day.

12 Subject to meeting any specific delivery time as advised by the transport supervisor of the Meat Business,[4] Mr Botica determined the route he would follow each day and, consequently, the order of deliveries. The most efficient route was usually self-evident. On completion of each delivery, the customer signed a copy invoice (retained by Mr Botica). The original invoice was left with the customer. The arrival and departure times to and from the customer were recorded on the run sheet. Mr Botica was required to complete, by the end of the day, all of the deliveries listed in the run sheet. If instruction to Mr Botica was required, it came from a supervisor working in the Meat Business. For example, if there was any issue with a customer delivery while Mr Botica was on the road, Mr Botica would contact a supervisor. Occasionally, a supervisor would initiate a call to Mr Botica. There was evidence of Mr Lincoln McDermott (Mr McDermott), a supervisor at *Total Meat Solutions*, requesting Mr Botica to attend upon a customer to re-collect meat that a customer had subsequently rejected. Mr Botica was instructed to return the meat to the premises of the Meat Business and, on occasion, this necessarily resulted in Mr Botica storing the collected meat overnight at his own house.

13 The Company, associated with entities involved in the meat industry on the east coast of Australia, acquired the business of *Total Meat Solutions* from Mr Litton in July 2009. Mr Litton continued to manage the Meat Business, now known as *Top Cut*, for the Company. Mr Botica continued to deal with Mr McDermott. Mr Botica's daily routine and remuneration arrangements did not change. Mr Botica noticed that the volume of the Meat Business increased. The operations moved to new and larger premises in Bibra Lake. Deliveries commenced to be made to large retail customers including Coles Supermarkets. Mr Botica observed about 50 other workers involved in the Meat Business from about this time, growing further to have approximately 100 workers until, in 2016, the volume of activity commenced to decline.

14 At the time that he commenced working for the Meat Business in 2007, the Partnership owned a vehicle that Mr Botica had previously acquired, second hand, for a price of $10,000. Over the period that Mr Botica worked for the Meat Business, he replaced this first vehicle with a second vehicle and replaced this second vehicle with a third vehicle. The cost of second and third vehicles (with the additional cost of specialist refrigeration) was, respectively, in excess of $30,000 and $50,000. The second and third vehicles were each owned by the Partnership.[5] Mr Botica, on behalf of the Partnership, paid all the expenses of maintaining and operating the vehicle, including insurance.

15 On occasions, before March 2013, when Mr Botica's vehicle was being repaired or serviced, Mr Botica attended the premises of the Company and the Company supplied him with a replacement vehicle. Mr Botica performed his usual duties. No adjustment was made to Mr Botica's usual hourly rate; he was paid (on his invoice) at the usual hourly rate notwithstanding that he was using a vehicle supplied by the Company.

16 During or after 2009, the Company engaged four additional drivers who each drove a vehicle that had been hired or purchased by the Company (the Company Vehicles). The Company

considered the four additional drivers to be employees of the Company (the Employee Drivers). They were paid a wage equating to an hourly rate of $24 - $26 and were subject to a contract of employment providing for, inter alia, annual leave and superannuation. Compared to the Company Vehicles, the vehicles of Mr Botica and Mr Bedford were better suited for inner city deliveries. The Employee Drivers returned the Company Vehicles to the premises of the Meat Business upon completion of the last customer delivery of the day. The vehicles used by the Employee Drivers contained tracking technology, enabling Company management to monitor the vehicle's movement. Mr Botica's vehicle did not contain tracking technology. Some (but not all) of the Company Vehicles displayed insignia of the Meat Business. The vehicles used by Mr Botica and Mr Bedford did not display insignia. For example, all drivers determined their own delivery route. Mr Botica gave evidence of: receiving a 'Driver Rest Hours' policy document on an occasion between 2012 and 2014; receiving a Christmas hamper of meat each year he worked for the Meat Business; and being offered salmon at a discounted price on occasion when the Meat Business had an excess supply. Managers of the Company referred to Mr Botica (and Mr Bedford) as 'couriers' or 'subbies' when distinguishing them from the Employee Drivers. Except as noted in this paragraph, the role of Mr Botica (and Mr Bedford) and the Employee Drivers was largely indistinguishable.

17 In July 2009, Mr Botica was supplied and commenced to wear a cap with a *Top Cut* logo. On an occasion in 2016 or 2017, Mr Botica and Mr Bedford accepted an invitation to attend a marketing presentation arranged by the Company for all Western Australian employees. Mr Botica was supplied with and commenced to wear (while working) clothing that featured *Top Cut* insignia.

18 I have noted that Mr Botica was paid upon an invoice in the name of the Partnership that he arranged to be prepared and delivered to the Meat Business, initially to *Total Meat Solutions* and subsequently to the Company. The invoice was occasionally reconciled against relevant run sheets by the Company's manager. The invoice amount reflected the hours Mr Botica had worked and an hourly rate of pay set by the Company.

19 The evidence of the weekly invoices in each financial year between July 2009 and July 2017 reveal the total hours worked each year ranged between 1,608.25 hours in the financial year 2009 - 2010, and 2,184.50 hours in the financial year 2015 - 2016; i.e. a weekly average of between 31 and 42 hours (over 52 weeks).[6] For each working day of the week, the invoice identified: the unit price; quantity of hours (typically between 5 - 10); and GST and a total daily amount. The average hours worked per week over this eight-year period was 37.5 hours.[7] Mr Botica gave evidence that he did not take any breaks 'because I was getting paid'. The Meat Business did not expressly or impliedly restrain Mr Botica from working for anyone else. There were periods when Mr Botica worked on four days each week, particularly as business activity commenced to decline from 2016. Although Mr Botica may have had a limited opportunity to engage in work for other business', I am satisfied that he did not, in fact, work for anyone other than the Meat Business.

20 Over time the agreed hourly rate increased from $35 in January 2007 to $45 in July 2009. However, the hourly rate remained at $45 from July 2009 until Mr Botica ceased working at the Company in September 2017. Mr Botica was required to meet all of the expenses of operating his vehicle, including fuel (estimated by Mr Botica to be between $8,000 and $10,000 per annum) and the costs of servicing his vehicle. On occasion, Mr Botica unsuccessfully attempted to negotiate a higher hourly rate. This occurred in 2011 (with Mr Litton) and in 2015 (with Mr Litton's successor, Mr Neil Peebles).

21 The Partnership received income for Mr Botica's work for *Perth Meat Export* from 1999 - 2007 and then received income for Mr Botica's work for the Meat Business from 2007 - 2017.

22 Ms Botica performed some administrative duties for the Partnership. For example, she arranged for invoices to be sent by email to the Meat Business. Her email address appeared on the invoice of 'The Bull Run' to the Company. She followed up on any unpaid invoices. The Partnership was registered for GST purposes and submitted necessary returns.[8] The Partnership submitted an annual income tax return. Two are in evidence, for the years 2013 and 2015. The returns are similar. The 'main business activity' of the Partnership is described as a meat delivery service. The gross income was approximately $78,000. The net taxable income was between $48,000 and $49,000 which was distributed to Mr Botica and Ms Botica in equal shares. The most significant expense of the Partnership was the costs of operating the motor vehicle used by Mr Botica ($10,770 - $13,311) and depreciation, including depreciation of that motor vehicle ($7,943 - $4,467).

23 Mr Botica's practice between 2007 and 2013 was to have approximately two weeks holiday each year. Mr Botica made arrangements for a replacement driver of his vehicle. On occasion, Mr Botica arranged for his friend, Mr Peter Johnson (Mr Johnson), to be the replacement driver and paid Mr Johnson $20 per hour. Sometime before 2014 (and after Mr Johnson had replaced Mr Botica for a short period), Mr McDermott informed Mr Botica that Mr Johnson would not be permitted by the Company to replace Mr Botica in the future.

24 Mr Botica planned a four-week holiday in 2014 and informed Mr McDermott of this fact. After Mr Botica unsuccessfully attempted to find a replacement driver, Mr McDermott informed Mr Botica that the Employee Drivers would cover his duties while he was away.

25 There is no evidence on arrangements (if any) regarding Mr Botica's holidays *after* 2014 save for:

a. Mr Oven's stating that Mr Botica 'always sorted a substitute driver' himself;

b. 'any substitute worker was decided by Mr Botica'; and

c. Mr Bedford stating that Mr Shaun Murphy 'covered' for Mr Botica as well as other drivers working for the Company.

26 Mr Botica did not request and was not offered any leave on account of illness.

27 There is no evidence that the Company arranged insurance of any risks associated with work done by Mr Botica. There is evidence of the Partnership paying workers compensation insurance.[9] There is no evidence of the Company satisfying itself as to Mr Botica (or the Partnership) putting in place any insurance until a single communication in mid 2016.

28 Commencing in the middle of 2017, the decline in the activity of the Meat Business resulted in Mr Botica being allocated a reduced number of customer deliveries on each working day. He started working later than his usual time. A review of the operations of the Meat Business, initiated by the Company, resulted in a decision, in September 2017, to cease offering work to Mr Botica and Mr Bedford. On the morning of Saturday, 2 September 2017, Mr Botica received a telephone call at his home from Mr Taylor, a manager of the Company. Mr Taylor told Mr Botica that he was required to attend for work on Monday, 4 September 2017 but the Meat Business may not require Mr Botica to attend for work after that day. On 4 September 2017, Mr Botica was informed by Mr Taylor that he was not required for work on 5 September 2017. On 7 September 2017, Mr Botica received an invitation from Mr Ovens, by text message, to express interest in occasional future work for the Company. Mr Botica and

Mr Ovens were unable to agree upon Mr Botica's request for an increased hourly rate of pay (from $45 to $60) for any future work.

Who Is An "Employee" Under The FW Act?

29 The FW Act confers entitlements found in the NES, including the entitlement to annual leave, upon 'an employee'.[10] An '***employee***' is defined to mean a 'national system employee'.[11] The phrase '***national system employee***' is defined to be 'an individual so far as he or she is employed, or usually employed' by a ***national system employer*** (for instance 'a constitutional corporation, so far as it employs, or usually employs, an individual').[12] Similarly, the FW Act confers entitlements found in modern awards, including the entitlement to superannuation found in cl 21.2 of the Award, upon 'an employee' to whom an award applies[13] and '***employee***' is defined to mean a 'national system employee'.[14]

30 The absence of a statutory definition of 'employee' in the FW Act has resulted in courts drawing upon the distinction, well known at common law and having origins in the law on vicarious liability,[15] between an employee and an independent contractor when determining whether a 'worker' is an employee for the purposes of the FW Act.[16] Subject to discussion of one preliminary issue in the following paragraph, the distinction is discussed in the remainder of this section of my reasons.

31 Counsel for Mr Botica submitted that, for the purposes of Mr Botica's claim to superannuation entitlements, it may also be necessary to consider the extended definition of 'employee' found in s 12(3) of the *Superannuation Guarantee (Administration) Act 1992* (Cth).[17] The submission is misconceived. Clause 21.1(b) of the Award speaks of the Award *supplementing* the rights and obligations set out in the *Superannuation Guarantee (Administration) Act 1992* (Cth). The entitlement of an '**employee**' to superannuation as provided in cl 21.2 of the Award must be taken to be a reference to an '**employee**' as defined in cl 3.1 of the Award, being 'a national system employee within the meaning of' the FW Act. The same conclusion may be reached by an alternative route. The jurisdiction of the IMC to make any order against the Company in favour of Mr Botica is proscribed by s 545(3) of the FW Act. One result is that the IMC does *not* have jurisdiction other than to make orders in relation to parties who fall within the 'ordinary meaning' of '***employer***' and '***employee***'.[18] It is impermissible to draw upon an extended definition of '***employee***' in the *Superannuation Guarantee (Administration) Act 1992* (Cth) to determine the 'ordinary meaning' of employee.

32 The employee and the independent contractor have in common that, pursuant to a contract, each supplies their labour to another. An employee is a party to a contract of service supplying labour to an employer. An independent contractor is a party to a contract of services supplying labour to a client. The distinction between the two 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'.[19] An employee represents the business of his or her employer. An employee identifies with the business of his or her employer. The absence of representation and identification is indicative of a relationship of principal and independent contractor.[20] There is no one defining factor which places a person into the category of employee or independent contractor. The totality of the relationship between the parties must be evaluated.[21]

33 Historically, a prominent factor in determining the nature of the relationship between a person who engages another to do work (a Business) and the person who is engaged (a Worker) is the degree of control which a Business *may* exercise over a Worker.[22] At issue is the extent to which a Business may give directions with respect to, or exercise control over, the manner in which work is performed by a Worker. Over time, it has become apparent that the degree of skill and

expertise required of a Worker to perform many tasks is not amenable to control by a Business. Accordingly, the emphasis of the control test has shifted from: the *actual* exercise of control by a Business to the *right* to exercise control; and a distinction has been made between control over matters that are *central* to the core activities of a Business and matters that are *ancillary* to the core activities of a Business.[23] Where a Business exercises significant control over the activities of a Worker whose tasks are central to the function of the business, the worker is more likely to be an employee.[24] Where a Worker is engaged in tasks that are *ancillary* to the core activities of a Business, 'control' may be less significant.

34 Control is one factor to be assessed when evaluating the totality of the relationship between a Business and a Worker. It is a mistake to treat the reservation of control over the manner in which work is performed as decisive in favour of an employment contract if the essence of the totality of the relationship is an independent contract.[25]

35 The focus of the inquiry is upon 'the real substance, practical reality or true nature of the relationship in question'.[26] A gross disparity between what is presented on the face of a document purporting to be a contract and the reality of what has truly been agreed may result in the document being ignored as a sham or a pretence.[27] The parties to a contract 'cannot alter the truth of that relationship by putting a different label on it'.[28] The party's own characterisation may contradict the nature of the relationship that the parties have actually created.[29] However, if the nature of an agreement is ambiguous, the parties' own characterisation may assist to remove that ambiguity.[30]

36 The *presence* of the deduction of PAYG instalments by a Business and the remittance of funds by a Business to the superannuation fund of a Worker has been treated as indicative of an employment relationship. More recently, the *presence* of GST collections by a Worker, and the Worker's compliance with regulatory requirements that apply to small business has been relied upon to indicate that a Worker is an independent contractor.[31] However, caution is required when attributing significance to participation by a Business or a Worker in particular regulatory regimes. There is a risk of circular reasoning where the criteria for participation in a particular regulatory regime requires characterisation of a party as a Business or a Worker. A Business may deduct PAYG instalments because the Business and the Worker both (wrongly) believe that the Worker is an employee.[32] A Worker may collect GST from a Business and participate in the GST scheme because the Worker (wrongly) believes that he or she is not an employee of the Business.

37 Where a Worker's investment in capital equipment is substantial and a degree of skill or training is required to use or operate the equipment, the Worker is more likely to be an independent contractor. In ***Hollis v Vabu Pty Ltd*** [2001] HCA 44, the High Court of Australia drew attention to the distinction between a Worker's substantial investment in a motor vehicle and a Worker's modest investment in a bicycle. The plurality observed that, all things being equal, a relatively modest investment in capital by a Worker *may* be a reason for concluding that a Worker is an employee.[33] The fact that a Worker contributes substantial assets to a workplace is significant because the contribution may indicate that the Worker has an opportunity to make a profit. The opportunity may arise from a Worker making decisions on matters such as the timing of the acquisition of the asset, the amount spent on the asset and how to finance the acquisition of the asset.[34] However, caution is required before drawing conclusions on the significance of a Worker using her or her own vehicle when working in a Business. A Worker who is 'required' to use his or her own vehicle for transport from job to job where the worker deploys his or her skills on

behalf of the Business does not become an independent contractor by reason of the requirement to use his or her vehicle.[35]

38 In ***Abdalla v Viewdaze Pty Ltd*** (2003) 53 ATR 30, the Full Bench of the Western Australian Industrial Relations Commission identified a number of factors of potential significance when assessing the totality of the relationship between a Business and a Worker. I have adapted the list and added to it from other cases. The list is not exhaustive. Features of a relationship in a particular case which do not appear below may be relevant.

a. Does a Worker perform work for anyone other than a Business (or have a genuine and practical entitlement to do so)? Does the Worker operate from premises other than that of a Business? Does a Worker advertise his or her services to the world at large? The right of a Business to the exclusive services of a Worker is characteristic of an employment relationship. On the other hand, if a Worker also works for others (or has the genuine and practical entitlement to do so) then this suggests an independent contract.

b. Does a Worker have the right to delegate or subcontract work? Does a Worker have an obligation to regularly attend the workplace? If a Worker is entitled to delegate work to others (without reference to a Business) then this is an indicator that a Worker is an independent contractor. An employment contract is personal in nature; it is a contract for the supply of the services of the worker *personally*.

c. To what extent do the arrangements for remuneration and leave of a Worker resemble an employment relationship?[36] Employees tend to be paid a periodic wage or salary and the rate is often set in advance by the Employer. Employees tend to be afforded paid leave for holidays and when unable to work because of illness. Independent contractors tend to be paid by reference to completion of tasks and there may be genuine negotiations about remuneration. Independent contractors tend not to be paid when on holidays or when unable to work because of illness. Employers tend to meet certain expenses associated with each employee including insurance and the cost of a uniform. Independent contractors often pay these expenses themselves. Compared to independent contractors, employers are rarely entitled to make deductions from payments to Workers on account of poor work performance.

d. Does a Business present a Worker to the world at large as an emanation of the business?[37] Typically, this will arise because a Worker is required to wear the uniform of the Business. Alternatively, if a Worker generates personal goodwill with customers of the Business and is able to leverage this goodwill into an asset that is saleable, a Worker may be an independent contractor.

e. Does a Worker have a special skill that is typically required by a Business for a discrete task or for a discrete time period? Such persons tend to be engaged as independent contractors rather than as employees.

f. Does a Worker spend a significant portion of his or her remuneration on business expenses, suggesting an independent contractor?

g. Does a Business have the right to suspend or dismiss a Worker in a manner consistent with typical dealings between an employer and an employee, suggesting an employment relationship?

39 Finally, something should be said about the preferable methodology to be deployed when determining whether examination of the totality of the relationship leads to a conclusion in favour of a Worker being an employee or an independent contractor. In ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37 (North and Bromberg JJ, Barker J concurring) it was suggested that it was helpful to determine, firstly, whether or not a Worker was engaged in the conduct of business in his or her own right. If a Worker is *not* engaged in his or her own business, it follows (it was said) that the worker is serving the interests of a Business and is an employee of the business. A different view was expressed by Jessup J in ***Tattsbet Ltd v Morrow*** [2015] FCAFC 62 who preferred to determine whether the Worker was an employee without sole emphasis on the activities of the Worker; 'working in the business of another is not inconsistent with working in a business on one's own'.[38] On both views, the extent to which the activities of a Worker exhibit the characteristics of a business is a matter of significance in determining the question of whether a Worker is an employee or an independent contractor.[39] A proper evaluation of those factors can only be assessed in the context of a Worker's specific involvement with the Business in question. Adopting the approach of Mummery J in ***Hall (Inspector of Taxes) v Lorimer*** [1992] 1 WLR 939 at 944:

> *This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.*

Submissions Of The Parties: The FW Act

40 In closing submissions, counsel for Mr Botica:

a. Summarised the relevant legal principles in a manner that emphasised the methodology suggested by North and Bromberg JJ in ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37 (and explained above).

b. Identifies three factors that might be thought to suggest that Mr Botica was an independent contractor and rebuts the suggestion. First, Mr Botica arranged his affairs and participated in regulatory regimes characteristic of business. Mr Botica's labour was supplied by a partnership. The Partnership delivered an invoice to the Company. The invoice was paid without any deduction on account of income tax. Mr Botica responds by noting that this arrangement was done on the initiative of Mr Litton. There was no negotiation. Further Mr Botica notes that he was informed (and accepted) that the Company was content to continue the prevailing practice. Secondly, Mr Botica was not allocated leave of any form by the Company. He had limited powers of delegation, confined to periods when he was on 'leave'. Mr Botica draws attention to authority for the proposition that 'a limited or occasional power of delegation' does not alter the status of a Worker.[40] Thirdly, Mr Botica invested in and used his own vehicle when working for the Company. However, viewed as a 'tool of the trade' of the driver, Mr Botica argued that the vehicle may be said to be characteristic of an employment relationship.

c. Places emphasis on factors tending to suggest that Mr Botica was not in business on his own account. It was said that there was no evidence of Mr Botica pursuing profits or generating goodwill in connection with any business, including the business name of his

partnership, 'The Bull Run'. It was noted that Mr Botica was expected to regularly attend the work place and did in fact do so. The Company 'controlled' the tasks performed by Mr Botica on each and every day of his work.

d. Places emphasis on factors tending to suggest that Mr Botica's work was *in* the business of the Company. Mr Botica followed a run sheet drafted by the Company. If a Worker's vehicle was off-road, the vehicle was replaced by the Company. Mr Botica wore a uniform.

41 In written submissions, counsel for the Company stated:

a. Mr Botica assumed the risk of business.

b. Mr Botica 'had substantial control over the manner in which the work was carried out'. He took leave when it suited. He had 'no set start and finish times'.

c. It is significant that Mr Botica:

i. was not constrained to working for the Company; he was free to work for other parties;

ii. 'could delegate and he did delegate' his work to third parties; and

iii. Mr Botica supplied his own substantial asset, i.e. a refrigerated vehicle.

d. There is a similarity between the facts of this case and the facts of ***Howard v Merdaval Pty Ltd*** [2019] FCCA 1127 in which the Court held that the Worker was an independent contractor.

e. ***Miles v Brendon Penn Nominees Pty Ltd*** (2006) WAIRC 5752 (***Miles***) is authority for the proposition that the IMC must be circumspect before making a finding that results in a detriment to a Business where such a finding is inconsistent with an agreed arrangement made between the Business and the Worker.

42 I confess to being puzzled by the Company's reliance upon ***Miles***. The cited case contains the reasons of the Full Bench of the Western Australian Industrial Relations Commission for reversing a decision of the IMC. The Full Bench held that the IMC fell into error when departing from conventional criteria for characterisation of the relationship between the Business and the Worker (totality of the relationship, control et cetera) and considered detriment to the Business.[41] In the result, the Full Bench, after consideration of the relevant factors, substituted a finding of an employer/employee relationship. The case does not assist the Company.

Analysis: The FW Act

43 The submissions of each party bear out the obvious observation that this is a case where many of the factors relevant to characterisation of the relationship between the parties suggest an 'employer/employee' relationship and many of the factors suggest that Mr Botica is an 'independent contractor'.

44 In this paragraph I identify the factors that suggest an 'employer/employee' relationship between the parties.

a. Mr Botica attended the premises of the Meat Business early each morning from Monday to Friday. He was never expressly directed to attend for work. He was never directed not to attend for work (until the last day of his work).

b. Mr Botica was paid at an hourly rate, set by the Company, on a 'take it or leave it' basis. Mr Botica's attempts at negotiation were rebuffed. The hourly rate was modest once account is taken of Mr Botica's vehicle expenses. Although Mr Botica's remuneration for his work was by payment upon an invoice from a partnership of which Mr Botica was a member, the *sole* source of income of the Partnership were payments from the Meat Business. The *sole* source of income of Mr Botica were payments from the Meat Business to the Partnership.

c. Commencing in July 2009, Mr Botica usually wore a hat containing *Top Cut* insignia and, commencing on an unknown date in 2016 or 2017, he usually wore shorts and a shirt with similar insignia.

d. There was minimal scope for Mr Botica to vary a daily routine that was determined by the nature of his task (making deliveries) and the requirements of the Meat Business (filling orders placed by customers of the Meat Business).

e. The time that elapsed between Mr Botica commencing work and ceasing work was similar to that of a full time employee performing the same task, ie betweenseven and eight hours.

f. After the Employee Drivers commenced work in 2009, almost identical tasks were performed by Mr Botica and the Employee Drivers.

g. Although Mr Botica was expected to arrange another person to drive his vehicle when he contemplated having a holiday, the Company retained the right to veto Mr Botica's selection. On one occasion, the Company waived the expectation when Mr Botica found it difficult to find a replacement.

h. Although Mr Botica usually supplied his own (Partnership) vehicle when working, there was an occasion when his vehicle was 'off road' and he used a vehicle supplied by the Company.

45 In this paragraph I identify the factors that suggest an 'independent contractor' relationship between the parties.

a. Mr Botica was remunerated for his work for the Meat Business by a payment upon presentation of an invoice by the Partnership. The invoiced amount was based upon an hourly rate set by the Meat Business. The Partnership exhibited many of the features that are characteristic of an actively trading partnership. There were two partners, Mr Botica and Ms Botica. It supplied services to a customer via one of the partners (Mr Botica). Another partner (Ms Botica) was involved in the administration of the Partnership. The Partnership:

i. delivered invoices;

ii. received an income;

iii. owned assets;

iv. had expenses;

v. had (modest) liabilities;

vi. participated in the regulatory regimes relevant to income taxation of a business and the GST; and

vii. the profits were distributed to the partners involved in the business.

b. Payments to the Partnership varied according to Mr Botica's 'volume' of work, measured by the hours that he worked. Mr Botica was not paid for any periods of leave for any reason such as sickness or holidays.

c. The hours that Mr Botica worked were a function of the volume of work assigned to Mr Botica by the Company and was reflected in the run sheet that he collected each morning. Mr Botica was (largely) free to determine himself the manner in which he completed his tasks. He did not stop working for a lunch break. Mr Botica did not return to the premises of the Meat Business upon completion of his last delivery of the day. On infrequent occasions, the routine of Mr Botica was varied insofar as a manager of the Meat Business would contact Mr Botica and give a direction relevant to the business needs of the Company.

d. The delivery of meat was not the sole or major activity of the Company. The Company processed orders from customers before the meat was delivered. A significant number of Workers were engaged by the Company in the task of meat processing. Mr Botica was involved in a discrete and specialised area of activity of the Meat Business.

e. The Partnership purchased a vehicle for the purpose of Mr Botica using the vehicle in his work for the Meat Business. Each vehicle was purpose built. It was a significant investment. One vehicle cost in excess of $30,000. It was replaced by a vehicle that cost in excess of $50,000. The Partnership met all of the expenses of operation of the vehicle. Those expenses were significant, between $10,000 and $13,000 per annum in the period 2013 - 2015. Mr Botica was *not* required to personally drive his vehicle insofar as Mr Botica was expected to arrange another person to drive his vehicle on those occasions when he contemplated having a holiday.

46 The previous two paragraphs reveal that factors that have been identified as relevant in other cases do not clearly point in one direction in this case. In any event it is necessary to view the totality of the relationship between the parties and not any single factor.

47 From the perspective of a customer of the Meat Business, the role performed by Mr Botica was indistinguishable from that of the Employee Drivers. The daily routine of each driver did not vary. Each responded to direction (control), largely manifested in the form of a 'run sheet' that was issued by the Company. Each wore a uniform. These facts speak to Mr Botica being a representative of the Meat Business and favours Mr Botica, like the Employee Drivers, being characterised as an employee.

48 However, an evaluation of the *totality* of the relationship between the parties is not undertaken from a single perspective, for instance of a customer of the Meat Business. The totality of the relationship includes the *legal* relationship between the Company and Mr Botica.

49 Although the *tasks* performed by Mr Botica and the Employee Drivers when engaging in customer deliveries were indistinguishable, the *legal* relationship between the Company and Mr Botica was distinguishable insofar as the services of Mr Botica were supplied to the Company by the Partnership. If the (implied) agreement for meat delivery services to be supplied by the Partnership withstands scrutiny as being bona fide, it speaks to Mr Botica identifying with the interests of the Partnership and suggests that Mr Botica is not an employee of the Company. Accepting that Mr Litton requested that Mr Botica adopt the Partnership (or a similar) structure in dealings with the Meat Business, the fact remains that Mr Botica (and the Partnership) apparently embraced the suggestion. No sham or pretence was involved in the legal arrangement

and the fact that the sole source of income of the Partnership was the Company does not alter the conclusion that the Partnership was not a sham.

50 A further distinction between Mr Botica and the Employee Drivers, not necessarily apparent to a customer of the Meat Business, was the fact that Mr Botica drove a vehicle that he supplied (via the Partnership). Mr Botica's vehicle was not tracked. It did not display a logo of the Meat Business. The vehicle had some special features. It was valuable. Mr Botica or the Partnership made decisions about the vehicle that had an impact on the level of profitability of the Partnership including the timing of the purchase of a vehicle and the amount spent on the vehicle. It was not a case of Mr Botica using his own 'normal' vehicle to drive himself from job to job to perform tasks. It should also be observed that Mr Botica was paid a premium, albeit modest, compared to the Employee Drivers and that, compared to the Employee Drivers, Mr Botica was *not* required to personally supply his labour.

51 In my view, the role of the Partnership and the fact that Mr Botica supplied (via the Partnership) his own purpose-built vehicle are factors of significance in this case. When assessing the totality of the relationship of Mr Botica and the Company, the relatively minor function performed by Mr Botica when representing the Company to customers is less significant to me than the combined effect of the fact that his services were supplied to the Company via the Partnership and that he used a vehicle that was also supplied by the Partnership. Mr Botica was not serving the Company in the Meat Business carried on by the Company. Mr Botica was serving his own business.

52 I am not satisfied that Mr Botica was an '***employee***' of the Company as defined by the FW Act. His claims to annual leave and superannuation entitlements cannot succeed.

The LSL Act

53 The LSL Act provides for an employee's entitlement to long service leave of 8 2/3 weeks on '***ordinary pay***' upon completion of 10 years 'continuous employment' with one and the same '***employer***'.[42] The Act also provides for a proportionate entitlement where employment is terminated (other than for serious misconduct) and an employee has completed at least 7 years of continuous employment.[43]

54 The terms '***employee***' and '***employer***' are each defined in the LSL Act. The definitions of '***employee***' and '***employer***' appear in s 4(1) of the LSL Act:

> *'**employee**' means, subject to subsection (3) —*
>
> *(a) any person employed by an employer to do work for hire or reward including an apprentice;*
>
> *(b) any person whose usual status is that of an employee;*
>
> *(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or*
>
> *(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee;*
>
> '***employer**' includes —*
>
> *(a) persons, firms, companies and corporations; and*
>
> *(b) the Crown and any Minister of the Crown, or any public authority, employing one or more employees;*

55 The alternative definitions of '***employee***' in s 4(1)(a) ('a person employed by an employer to do work') and s 4(1)(b) ('person whose usual status is that if an employee') in the LSL Act have been construed by appellate authority in this jurisdiction in a manner that is consistent with the authorities discussed above on the meaning of '***employee***' in the FW Act. The totality of the relationship between the parties must be examined to determine whether a Worker is an employee or an independent contractor.[44] Accordingly, for the same reasons as given above with respect to the definition of '***employee***' in the FW Act, Mr Botica is not an employee as defined in s 4(1)(a) and s 4(1)(b) of the LSL Act.

56 The alternative definition of '***employee***' in s 4(1)(c) ('a person employed as a canvasser') has no application to the facts of this case.

57 The alternative definition of '***employee***' in s 4(1)(d) of the LSL Act contains a specific reference to vehicle ownership (the Vehicle Ownership Clause or VOC). The parties each made written submissions on the significance of the VOC.

58 Mr Botica submits that the VOC 'empowers a court, when determining whether somebody is an employee … to disregard the factor … that the person owned the vehicle he was using in transporting goods'. If Mr Botica's vehicle ownership was the 'factor that "tipped the scales"' in favour of characterisation of Mr Botica as an independent contractor, the VOC 'allows that factor to be removed entirely'. The result, in this case, is that, compared to the result of the application of the common law criteria, Mr Botica is more likely to be characterised as an '***employee***' as a result of the VOC. The effect of the VOC is that a Worker's vehicle ownership is deemed to be a 'neutral' factor.

59 The Company's submission places weight upon the reasoning in two cases: ***Transport Workers' Union of Australia, Industrial Union of Workers, Western Australian Branch v Readymix Group (WA) and Others*** (1981) 61 WAIG 1705 (***Readymix***); ***Paul Ernest Dallaston v Canon Foods*** [2005] WAIRComm1978 (***Dallaston***). The Company relies upon the reasons of Brinsden J in ***Readymix*** and Sharkey P in ***Dallaston*** and submits that that the VOC is to be construed by attributing a literal meaning to the word 'all' in the phrase '*all* other respects an employee' (emphasis added). If *all* factors except for vehicle ownership point toward an employee/employer relationship, the fact of vehicle ownership by a Worker is to be ignored and the Worker is to be characterised as an employee. However, if *one or more* factors point toward an independent contractor relationship, the VOC has no role to play. The result, in this case, is that Mr Botica is not an employee because at least one factor in addition to vehicle ownership (for example, the Partnership) point toward an independent contractor relationship. The effect of the VOC is that vehicle ownership is deemed not to be *the* determinative factor.

60 The relevant text of the LSL Act and the effect of the different views may be summarised as follows:

LSL Act, s 4(1)	**Mr Botica says (vehicle ownership 'neutral'):**	**The Company says (vehicle ownership not determinative):**
'***employee***' *means, subject to subsection (3) —* *…(d) any person who is the … owner … of any vehicle used in the transport of goods … if the person is in all other respects an employee*;	'***employee***' *means, subject to subsection (3) —* *…(d) any person who is the … owner … of any vehicle used in the transport of goods ... if the person is* [otherwise] *an employee;* (emphasis added)	'***employee***' *means, subject to subsection (3) —* *…(d) any person who is the … owner … of any vehicle used in the transport of goods … if the person is in* [every] *other* [respect] *an employee;* (emphasis added)

61 At issue in ***Readymix***, a decision of the Western Australian Industrial Appeal Court, was whether each person who was paid to drive a vehicle by a company was an '***employee***' as defined by the *Industrial Arbitration Act 1979* (WA) (IA Act). Each vehicle was owned by the driver or by a family company of which the driver was a shareholder.[45] In separate judgments, Wallace J, Brinsden J and Kennedy J published reasons for upholding a finding of the Commission that the driver was *not* an employee. The IA Act definition of '***employee***' is not the same as the definition of '***employee***' found in the LSL Act. It is helpful to have a 'side by side' comparison, revealing that the differences may be considered immaterial.

IA Act, s 7(1)(d) at 25 November 1981	**LSL Act, s 4(1)**
'***employee***' *means any person employed by an employer to do work for hire or reward and includes —* *(a) any person whose usual status is that of an employee;* *(b) an apprentice;* *(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward;* (d) *any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee,*	'***employee***' *means, subject to subsection (3) —* *(a) any person employed by an employer to do work for hire or reward including an apprentice;* *(b) any person whose usual status is that of an employee;* *(c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or* (d) *any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee;*

62 The reasons of Brinsden J are accurately reflected in the submission of the Company summarised above. The VOC has no application where 'one or more of the *indicia*' of work arrangements point to the Worker being an independent contractor (original emphasis). For Brinsden J, 'in [such a] case it is not possible to say that the person concerned is *in all other respects an employee*' (emphasis added).[46] If *all* factors (other than vehicle ownership) point towards an employer/employee relationship, vehicle ownership is deemed not to be *the* determinative factor favouring characterisation in favour of an independent contractor.

63 Kennedy J was concerned that if vehicle ownership was deemed not to be *the* determinative factor, a single inconsequential *indicium* favouring a contract of service would stultify the VOC. Kennedy J held that the mere fact of Worker vehicle ownership is not to be considered at all in answering the question whether the Worker is an employee.[47] The reasons of Kennedy J support the submission made by Mr Botica; vehicle ownership is to be treated as a 'neutral' factor when determining whether a Worker is an employee.

64 Wallace J records agreement with the reasoning of O'Dea P in the primary decision under appeal and does not expressly address the competing approaches of the Brinsden J and Kennedy J.[48] The reasoning of O'Dea P favours a construction of the VOC resulting in vehicle ownership being a 'neutral' factor.[49] However, when summarising the reasons of O'Dea P, Wallace J placed some emphasis upon it being 'first necessary to determine whether a driver is an employee within the ordinary notion of that term'.[50]

65 At issue in ***Dallaston***, a decision of the Full Bench of the Western Australian Industrial Relation Commission was whether a person who used their own refrigerated vehicle when working as a salesperson was an '***employee***' as defined by the *Industrial Relations Act 1979* (WA) (IR Act). In the decision, Sharkey P (with whom Wood C agreed) and Gregor SC published reasons for upholding the determination of the primary decision maker (Kenner C) that the driver was *not* an employee. The IR Act definition of '***employee***' under consideration in ***Dallaston*** is the same as the definition of '***employee***' found in the LSL Act, including the VOC.

66 In the ***Dallaston*** case, the reasoning of Sharkey P (with whom Wood C agreed) takes the following steps:

a. The IA Act definition of '***employee***' considered in the ***Readymix*** case is not materially different from the IR Act definition of '***employee***'.[51]

b. The views of Brinsden J and Wallace J were 'sufficiently similar' so as to be able formulate a ratio of ***Readymix****;*

c. The following statements constitute the ratio of ***Readymix****:*

    i. The correct approach to the VOC is to determine, first, whether the Worker was an employee within the 'general part of the definition … in accordance with accepted common law tests'.[52]

    ii. The effect of the VOC is that a Worker is not taken out of the category of an '***employee***' simply because the Worker owns a vehicle.[53]

    iii. The VOC has no application where the circumstances are that 'one or more of the *indicia* point to' the Worker being an independent contractor (emphasis added).[54]

d. The VOC prevents a Worker who is an '***employee***' at common law being declared not to be an employee because the Worker owns a vehicle; ownership of a vehicle does not decide the issue.[55]

e. If the principles expressed in ***Readymix*** were applied to the facts of the ***Dallaston*** case, the Worker 'could not be … an employee' at common law and the VOC has no application.[56]

f. Considering the effect of the VOC to the facts of the ***Dallaston*** case, vehicle ownership by the Worker is noted. However, the Worker 'must be an employee "*in all other respects*" before … [vehicle] ownership … ceases to be a bar to a finding that he was an

employee' (emphasis added).[57] Noted is the presence of multiple factors, apart from vehicle ownership, pointing to a conclusion that the Worker is *not* an employee.[58] The presence of those other factors 'preponderantly lead to the conclusion' that the Worker is an independent contractor. In the terms of the VOC, the presence of those other factors is inconsistent with a conclusion that the Worker is *in all other respects an employee*. Two factors are highlighted.[59] First, the salesperson purchased a list of clients from a fellow worker. Secondly, the salesperson offered to sell his business.

67 In brief reasons, Gregor SC expresses agreement with the reasoning of the primary decision maker (Kenner C)[60] *and* the reasoning of Sharkey P.[61] However, Gregor SC does not avert to the fact that in the primary decision Kenner C favours the view of Kennedy J in ***Readymix*** (vehicle ownership is a 'neutral' factor)[62] whereas Sharkey P expresses agreement with the view of Brinsden J in ***Readymix*** (vehicle ownership is not determinative).

68 It seems to me that the reasoning of Sharkey P summarised in (b) and (c) of paragraph [66] is ripe for debate, particularly insofar as the views of Wallace J are equated with the views of Brinsden J.[63] However, it is not appropriate (or necessary) for me to embark on that debate in circumstances where the reasoning summarised in (f) evidences the ratio of the ***Dallaston*** case. The reasoning is consistent with the reasoning of Kennedy J and Wallace J in ***Readymix***. That summary reveals a process of reasoning by which the VOC is construed to mean that a Worker's vehicle ownership is deemed to be a 'neutral' factor when determining whether the Worker is an '***employee***' for the purposes of the LSL Act. Adapting the conclusion of the primary decision maker in ***Dallaston*** (Kenner C), the reference to 'in all other respects an employee' means one applies the common law test (disregarding ownership of the vehicle) and if, looking at the relationship in its totality, the indicia are against the Worker, then he or she would not be an '***employee***' as defined in the VOC.[64]

Analysis: LSL Act

69 The result in this case is that I must re-apply the 'totality of the relationship' test applied when considering Mr Botica claims under the FW Act, *excluding consideration of the fact that Mr Botica owns or partly owns (through the Partnership) the vehicle he used to transport goods (for example meat)*, to determine whether he is an '***employee***' as defined in s 4(1)(d).

70 Specifically:

a. I must re-examine the factors suggesting an employment relationship that I set out in paragraph 44, *excluding* those factors identified in sub-paragraphs (g) and (h) because they concern Mr Botica's vehicle ownership.

b. I must re-examine the factors suggesting an 'independent contractor' relationship that I set out in paragraph 45, *excluding* the factor concerning vehicle ownership identified in subparagraph (e).

c. I must re-examine the applicability of the reasoning in paragraphs 46 - 51.

d. The reasoning in paragraphs 46 - 49 does not involve any express or implicit reference to Mr Botica's vehicle ownership. In broad terms, the point made in those paragraphs is that, save for Mr Botica supplying his services to the Company via the Partnership, his role and function within the Company was indistinguishable from the role and function performed by the Employee Drivers.

e. I must exclude from my consideration the reasoning in paragraph 50 which concerns the significance of Mr Botica's vehicle ownership.

f. The reasoning and conclusions expressed in paragraph 51, drawing upon the fact of Mr Botica's vehicle ownership, must be set aside and the issue considered afresh. This is undertaken in the following paragraph.

71 In my view, the role of the Partnership is the only significant factor in favour of a conclusion that Mr Botica was not an employee of the Company. The point has been made that Mr Botica's role and function within the Company was indistinguishable from the role and function performed by the Employee Drivers. There is no doubt that the Employee Drivers were employees of the Company. When assessing the totality of the relationship between Mr Botica and the Company, the fact that his services were supplied to the Company via the Partnership does not, in my view, displace the combined effect of the factors favouring an employment relationship. Mr Botica operated from the premises of the Meat Business each morning. Mr Botica did not work for anyone other than the Company. The fact that the Company did not withhold PAYG tax installments or superannuation and that Mr Botica was not paid for holidays or was afforded 'sick leave' are all factors that derived from the parties self-characterisation of their relationship as 'independent contractor' and are not to be afforded weight. Mr Botica embraced the taxation advantages to him afforded by operating via a Partnership. However, this fact does not obscure the true nature of relationship between the parties. Mr Botica's control over his work was limited to the extent that it was dictated by the contents of the run sheet formulated by the Company. I do not agree with the submission of the Company that the following factors suggest a relationship of 'independent contractor':

a. Mr Botica was paid an agreed hourly rate;

b. there was some variation in the hours that he worked each day; and

c. he ceased working for the Company at the conclusion of his last delivery.

72 Those factors are unremarkable to me. The extent of delegation of his work by Mr Botica was limited to very brief periods and was subject to approval by the Company. Mr Botica represented the Meat Business in his dealings with customers of the business. Like the Employee Drivers, he identified with the Meat Business and *not* with his own business.

73 I am satisfied that Mr Botica was an '***employee***' of the Company as defined by s 4(1)(d) of the LSL Act.

74 I have noted that the LSL Act provides for an employee entitlement to long service leave of 8 2/3 weeks on ordinary pay upon completion of 10 years *continuous employment* with one and the same employer and for a proportionate entitlement where employment is terminated and an employee has completed at least seven years of continuous employment.

75 The Originating Claim of Mr Botica contained particulars of his long service leave claim of $12,497.15 on the basis of eight years, two months and nine days employment (from 1 July 2009 to 10 September 2017) resulting in 6.9428606 weeks of long service leave to be paid on the basis of an average of 40 hours per week at a rate of $45 per hour. On publication of the reasons I allowed an amendment to the particulars of the claim reflecting employment ending on 4 September 2017.

76 These amended particulars were not challenged by the Company. In those circumstances:

a. The claim to long service leave entitlements on the basis of continuous employment from 1 July 2009 to 4 September 2017 will be allowed (7.08794840 weeks). Although the LSL Act does not define 'continuous employment', s 6 of the LSL Act provides for the effect of: particular absences from employment,[65] particular events (that are deemed

not to break continuous employment,[66] and for effect of the sale of a business upon the 'continuous employment' of employees of the vendor who continue to be employed by the purchaser). Mr Botica was continuously employed for at least the period particularised in his claim.[67]

b. The claim to long service leave entitlements on the basis of an average of 40 hours per week is *not* allowed; the claim is allowed on the basis of an average of 37.5 hours per week. Section 4(1) of the LSL Act defines '***ordinary pay***' to mean 'remuneration for an employee's normal weekly number of hours of work' and s 4(2) provides that 'where the normal weekly number of hours have varied over the period of employment … [the] hours of work shall be deemed to be the average weekly number of hours worked'. Mr Botica's evidence was that during the eight years of his employment, he 'averaged a working week of 37.5 hours'.[68] Mr Botica is entitled to long service leave entitlements on the basis of an average of 37.5 hours per week.

c. The claim to long service leave entitlements on the basis of $45 per hour will be allowed. Section 4(1) of the LSL Act defines '***ordinary pay***' to mean remuneration 'calculated on the ordinary time rate of pay applicable … as at the time when any period of long service leave … commences, or is deemed to commence'. Section 9(2) of the LSL Act provides, in effect, that the leave of Mr Botica is deemed to have commenced immediately prior to his termination in September 2017 with the result that $45 per hour was the 'ordinary time rate of pay applicable'.

d. There will be an order that the Company pay to Mr Botica the sum of $11,960.91 (which is sum of 7.08794840 weeks x 37.5 hours x $45 per hour) on account of his entitlements under the LSL Act.

Conclusion

77 I have concluded that Mr Botica is not an '***employee***' as defined by the FW Act with the result that he has not succeeded in his annual leave and superannuation claims.

78 I have concluded that Mr Botica is an '***employee***' as defined by s 4(1)(d) of the LSL Act with the result that he has succeeded in his long service leave claim.

M FLYNN
INDUSTRIAL MAGISTRATE

[1] **Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court of Western Australia Under The *Fair Work Act 2009* (Cth)**

1. The IMC, 'a court constituted by an industrial magistrate' is 'an eligible state or territory court' for the purposes of the FW Act: see definitions of '***magistrates court***' and '***eligible State or Territory court***' in s 12 of the FW Act.
2. The jurisdiction of the IMC under the FW Act is primarily defined by three provisions:
   (1) Section 539 of the FW Act identifies the civil remedy provisions of the FW Act which may be the subject of an application to an eligible state or territory court;
   (2) Section 545(3) of the FW Act describe the criteria for an eligible state or territory court to make an order for an employer to pay an amount to an employee upon the contravention of a civil remedy provision; and
   (3) Section 546(1) of the FW Act provides for the making of a pecuniary penalty order upon the court being satisfied of a contravention of a civil remedy provision.
3. Civil remedy provisions cast obligations upon *national system employers* to *national system employees* in:
   - The National Employment Standards (NES) (Part 2-2);
   - A modern award that applies to and covers the parties (Part 2-3);
   - An enterprise agreement that applies to and covers the parties (Part 2-4);
   - A national minimum wage order (where neither a modern award nor an enterprise agreement applies to the employee i.e. an award/agreement free employee) (Part 2-6);
   - Section 323(1) providing that 'an employer must pay an employee amounts payable to the employee in relation to the performance of work …in full'; and
   - Part 3-6, Div 3 providing for 'employer obligations in relation to employee records and pay slips'.
4. A 'national system employer' is defined in s 14(1) of the FW Act to include 'a constitutional corporation, so far as it employs … an individual' and a 'national system employee' is defined in s 13 of the FW Act to be 'an individual so far as he or she is employed by a national system employee'.
5. Section 539 of the FW Act identifies, from among the several civil remedy provisions of the FW Act, the particular civil remedy provisions for which application may be made to an eligible state or territory court 'for orders in relation to a contravention of the provision'. The provision also identifies, for each civil remedy provision, the person with standing to make application to the relevant court and, expressed in penalty units, the maximum penalty for a contravention.
6. Section 545(3) of the FW Act provides that an eligible state or territory court 'may order an employer to pay an amount to … an employee … if the court is satisfied' of two criteria. First, the failure to pay the relevant amount must be a contravention of a civil remedy provision. Secondly, the employer must have an obligation, 'under this Act [for example, a NES] or a fair work instrument' (for example, a modern award or an enterprise agreement) to pay the relevant amount.
7. The meaning of 'under this Act' as it appears in s 545(3) was the subject of examination in Sharrock v Downer EDI Mining Pty Ltd [2018] WAIRC 377 and Wright v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 00887 [38]with the result that where the claim concerns an allegation of the civil remedy provision created by s 323(1) of the FW Act ('an employer must pay an employee amounts payable to the employee in relation to the performance of work …in full'), the claimant must identify another provision under the act that creates an obligation to pay the amount. For example, s 542(1) of the FW Act provides that 'a safety net contractual entitlement' has effect as an entitlement of an employee under the FW Act. A 'safety net contractual entitlement' is defined in s 12 of the FW Act to mean an entitlement under a contract between an employee and an employer that relates to any of the subject matters described in s 61(2) (which deals with the NES); or s 139(1) (which deals with modern awards). It should be noted that 'neither the particular terms of a minimum standard, nor the necessity to engage the terms of a particular modern award , are necessary to the existence of the statutory obligation which now exists to observe the terms of a safety net contractual obligation': see Association of Professional Engineers, Scientists and Managers, Australia v Wollongong Coal Limited [2014] FCA 878 [19] per Buchanan J, especially at [22].

Rules of Evidence

8. Section 551 of the FW Act provides that 'a court must apply the rules of evidence and procedure for civil matters when hearing proceedings relating to a contravention'. It has been held that the effect of the provision is that an 'eligible State or Territory court' is required to apply the rules of evidence found in the common law and relevant state legislation when a claim concerns the contravention of a civil remedy provision of the FW Act: Gayle Balding, Workplace Ombudsman v Liquid Engineering 2003 Pty Ltd [2008] WAIRComm 350;

Cuzzin Pty Ltd v Grnja [2014] SAIRC 36 [14]. In Qube Ports Pty Ltd v Maritime Union of Australia [2018] FCAFC 72 [94] - [108] White J (with whom Mortimer and Bromwich JJ agreed) undertook a comprehensive analysis of the issue in the context of contravention proceedings before a state court of South Australia, the former Industrial Relations Court of South Australia (IRCSA). In a schedule to the judgment in Stagnitta v Bechtel Construction (Australia) Pty Ltd [2018] WAIRC 886, the IMC gave reasons for concluding that the law of evidence applied by a state court of general jurisdiction when exercising jurisdiction in non-criminal matters including the Evidence Act 1906 (WA), was to be applied by the IMC when determining a claim alleging the contravention of a civil remedy provision of the FW Act and seeking the imposition of a penalty.

9. The onus of proving a claim is on the claimant and the standard of proof required to discharge this onus is proof 'on the balance of probabilities'. When, in these reasons, I state that 'I am satisfied of fact or matter', I am saying that I am satisfied on the balance of probabilities of that fact or matter.

[2] **Jurisdiction, Practice And Procedure Of The Industrial Magistrates Court Of Western Australia Under The Long Service Leave Act 1958 (WA)**

1. An employee is entitled in accordance with the LSL Act to long service leave on ordinary pay in respect of continuous employment with one and the same employer: s 8(1) of the LSL Act.
2. The IMC has jurisdiction to hear and determine all questions and disputes in relation to rights and liabilities under the LSL Act including questions as to whether a person is an employee or an employer: s 11(1) of the LSL Act. A party to proceedings under the LSL Act may be represented by a lawyer or an agent: s 37 of the LSL Act.
3. The jurisdiction of the IMC under the LSL Act is an instance of the general jurisdiction of the court (s 81CA(1) of the IR Act), with the result that the powers, practice and procedure of the IMC when exercising that jurisdiction are to be found in the IR Act (s 81CB, s 81D and s 81F) and the *Industrial Magistrates Courts (General Jurisdiction) Regulations 2005* (WA).

Employee

4. An '***employee***' (subject to certain exceptions) is defined to mean a person who falls into any one of four categories: '(a) any person employed by an employer to do work for hire or reward'; '(b) any person whose usual status is that of an employee'; (c) any person employed as a canvasser and remunerated by commission; '(d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner of any vehicle used in the transport of goods or passengers if the person is in all other respects an employee': s 4(1) of the LSL Act.

Entitlement to Long Service Leave

5. Upon completion of at least 10 years continuous service, an employee is entitled to 8 2/3 weeks leave and for each five years completed after 10 years, to 4 1/3 weeks leave: s 8(2) of the LSL Act. Where an employee has completed at least seven years continuous service, provision is made for payment of a proportionate amount on termination (otherwise than by the employer for serious misconduct) calculated on the basis of 8 2/3 weeks for 10 years of continuous employment: s 8(2)(c) and s 8(3) of the LSL Act. Different provisions apply to an employee who had completed 9 - 15 years continuous employment as at 4 July 2006: s 8(4) of the LSL Act.

Continuous employment

6. The period of employment is deemed to include certain periods of absence from duty (annual leave, long service leave, public holidays, sick leave to a maximin of 15 days per year, periods of military service): s 6(1)(a), s 6(1)(b) and s 6(1)(d) of the LSL Act). The period of employment also includes any period following termination by an employer with the intention of avoiding long service leave obligations: s 6(1)(c) of the LSL Act. Certain events that may otherwise interrupt a period of employment are deemed not to do so: transmission of a business; authorised absences from employment; stand down periods; absence due to an industrial dispute; termination on grounds of slackness of trade if re-employed within six months and termination on any ground if re-employed within two months; reasonable absence on legitimate union business; absence by reason of any other cause unless the employer, within 14 days of the termination of the absence gives written notice to the employee that continuity of employment has been broken: s 6(2) of the LSL Act.

[3] An inference from Mr Botica's evidence of working 38 hours per week: Witness Statement of Mr Botica filed 8 May 2019, [106](e).

[4] Transcript of proceedings dated 22 May 2019, page 80. Mr Ovens gave evidence of a colour coding on the run sheet being used to indicate to drivers that a first run of deliveries close to the Company premises should be undertaken before returning and collecting stock for a final run of deliveries.

[5] Exhibit 4.

[6] Witness Statement of Mr Botica filed 8 May 2019, [74].

[7] Witness Statement of Mr Botica filed 8 May 2019, [76].

[8] Transcript of proceedings dated 22 May 2019, page 34.

[9] Exhibit 4.

[10] *Fair Work Act 2009* (Cth), s 87.

[11] *Fair Work Act 2009* (Cth), s 60.

[12] *Fair Work Act 2009* (Cth), s 13 and s 14.

[13] *Fair Work Act 2009* (Cth), s 47.

[14] *Fair Work Act 2009* (Cth), s 42.

[15] ***Al-Hakim v Toyoor Al Jannah Pty Ltd & Ors*** [2018] FCCA 3184 at [62], referring to ***Marshall v Whittaker's Building Supply Co Ltd*** [1963] HCA 26 at [5].

[16] The structure and much of the content of the summary of the law in the following paragraphs draws upon the summary in ***Moffet v Dental Corporation Pty Ltd*** [2019] FCA 344 at [12].

[17] Transcript of proceedings dated 22 May 2019, pages 106 - 109.

[18] *Fair Work Act 2009* (Cth), s 538.

[19] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44; (2001) 207 CLR 21 at 39 [40] per Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ citing ***Marshall v Whittaker's Building Supply Co*** [1963] HCA 26; (1963) 109 CLR 210 at 217 per Windeyer J).

[20] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44 at [39] - [40].

[21] ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 28 - 29; ***ACE Insurance Ltd v Trifunovski*** [2011] FCA 1204; (2011) 200 FCR 532 at [29], Perram J: 'a number of indicia have accreted over time in the authorities which are thought to throw light to varying degrees on the outcome without being determinative ... the terms of the contract; the intention of the parties; whether tax is deducted; whether sub-contracting is permitted; whether uniforms are worn; whether tools are supplied; whether holidays permitted; the extent of control of, or the right to control, the putative employee whether actual or de jure; whether wages are paid or instead whether there exists a commission structure; what is disclosed in the tax returns; whether one party "represents" the other; for the benefit of whom does the goodwill in the business inure; how "business-like" is the alleged business of the putative employee - are there systems, manuals and invoices; and so on - the list is neither exhaustive nor short'.

[22] ***Stevens v Brodribb Sawmilling Co Pty Ltd*** (1986) 160 CLR 16 at 28 - 29.

[23] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44, [49], [57].

[24] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44, [57].

[25] ***Queensland Stations Pty Ltd v FCT*** (1945) 70 CLR 539 at 552.

[26] ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37, (2015) 228 FCR 346 at 377 to 378 [142] per North and Bromberg JJ.

[27] ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37; (2015) 228 FCR 346, 377 - 378.

[28] ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37; (2015) 228 FCR 346, 377 - 378.

[29] ***Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd*** [2015] FCAFC 37; (2015) 228 FCR 346 at [148].

[30] ***Australian Education Union v Victoria (Dept of Education and Early Childhood Development)*** [2015] FCA 1196; (2015) 239 FCR 461 at 490.

[31] ***Tattsbet Ltd v Morrow*** [2015] FCAFC 62; (2015) 233 FCR 46 at 63 - 64.

[32] ***Whitby v ZG Operations Australia Pty Ltd*** [2018] FCA 1934 at [136].

[33] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44. At issue in the High Court of Australia was whether the Business (Vabu) of a Worker was a bicycle courier was vicariously liable for an injury caused by the bicycle courier to a pedestrian. The courier supplied his own *bicycle*. In an earlier (and different case), the New South West Court of Appeal had held that,

for taxation purposes, different couriers engaged by Vabu and who supplied their own *motor vehicles,* were independent contractors: ***Vabu Pty Ltd v Federal Commissioner of Taxation*** (1996) 33 ATR 537. In the plurality judgment, Gleeson CJ, Gaudron, Gummow, Kirby, and Hayne JJ, gave reasons for concluding that the bicycle courier was an employee, stating at [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.*

McHugh J resolved the case by deciding that, although the bicycle courier was *not* an employee, Vabu was vicariously liable for the injury: see [72]. In deciding that the bicycle courier was *not* an employee, McHugh J observed at [71].

> *If the couriers were confined to bicycle riders, there would be much force in the contention that, on the classical tests, they were employees. That is because the couriers were subject to extensive control and direction - always a strong indication that the worker is an employee. But the couriers included those who provided their own motor vehicles. Given the course of authority … concerning workers who provide their own equipment, it seems impossible to say that those couriers who provided their own motor vehicles were employees. The right to supervise or direct the performance of a task cannot transform into a contract of service what is in substance an independent contract and, when a person has to provide equipment such as a motor vehicle, the conventional view is that the person is not an employee. In principle, there can be no distinction between those couriers working for Vabu who provide their own bicycles and those couriers who provide their own motor vehicles.*

[34] ***Whitby v ZG Operations Australia Pty Ltd*** [2018] FCA 1934, [153].

[35] ***Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation*** [2010] FCAFC 52; (2010) 184 FCR 448, [41].

[36] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44, [54].

[37] ***Hollis v Vabu Pty Ltd*** [2001] HCA 44, [50].

[38] ***Tattsbet Ltd v Morrow*** [2015] FCAFC 62, [61]:

> *As Buchanan J put it in ACE Insurance (209 FCR 146 at [128]), "[w]orking in the business of another is not inconsistent with working in a business of one's own " On the other hand, if the putative employee's circumstances exhibit the characteristics of a business, that will undoubtedly be a matter proper to be taken into account in determining the question at hand, so long as sight is not lost of the question itself. The question is not whether the person is an entrepreneur: it is whether he or she is an employee.*

See also ***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409 (Full Bench of the Western Australian Industrial Relations Commission) at [70](o).

[39] ***Tattsbet Ltd v Morrow*** [2015] FCAFC 62, [3].

[40] ***Australian Air Express Pty Limited v Langford*** [2005] NSWCA 96 at [59], 'a limited or occasional power of delegation may not be inconsistent' with employment.

[41] ***Miles v Brendon Penn Nominees Pty Ltd*** (2006) WAIRC 5752, [28]:

> *… With respect, we are of the opinion that the Industrial Magistrate misdirected himself as to the appropriate way in which to approach the issue of whether the appellant was an employee. Although the Industrial Magistrate said he was aware of and cited some of the authorities which have set out and applied a test of the consideration of various indicia to determine the true nature of a relationship between a putative employer and employee, the Industrial Magistrate did not adopt and follow such an approach. Indeed after reference to these decisions the Industrial Magistrate said* 'notwithstanding' *them was it* 'fair to an employer who agrees to conditions, initiated by an employee, that he be employed as a subcontractor and accepts the agreed conditions for approximately three years until being made redundant to then claim to be an employee and claim entitlements under an award?'. *The issue of fairness, expressed in this way, is not, as established by the cases (to which reference is made below), the method by which one determines whether somebody is an employee or independent contractor.*

[42] *Long Service Leave Act 1958* (WA), s 8(1) and s 8(2). See the summary of the *Long Service Leave Act 1958* (WA) in endnote, [2].

[43] *Long Service Leave Act 1958* (WA), s 8(3).

[44] ***United Construction Pty Ltd v Birighitti*** [2002] 82 WAIG 2409 (Full Bench of the Western Australian Industrial Relations Commission); ***United Construction Pty Ltd v Birighitti*** [2003] WASCA 24 (Western Australian Industrial Appeal Court); ***David Kershaw v Sunvalley Australia Pty Ltd*** [2007] WAIRComm 520.

[45] ***Readymix*** at 1707.

[46] ***Readymix***, Brinsden J at 1708: 'I think the subsection has no application where the circumstances are that one or more of the *indicia* point to a contract for services for in that case it is not possible to say that the person concerning is in all other respects an employee'.

[47] ***Readymix***, Kennedy J at 1709: 'The definition has the effect, in my view, that the mere fact that the vehicle which is used by the person concerned is not owned by the employer is not to be considered in answering the question whether he (sic) is an employee." And at 1710: "I am unable to accept that the words 'in all other respects an employee' are to be read absolutely literally. In reaching a determination … a multitude of factors have to be considered. … The purported expanded definition would be stultified if the presence of one minor factor would prevent it's application…'.

[48] ***Readymix***, Wallace J at 1706.

[49] ***Readymix*** at 857: 'It seems to me that what was intended [by the VOC] was that you find a person to be an employee in all respects other than that characteristic which involves ownership of the vehicle which is then set aside'.

[50] ***Readymix***, Wallace J at 1706.

[51] ***Dallaston*** at [73].

[52] ***Dallaston*** at [73].

[53] ***Dallaston*** at [73].

[54] ***Dallaston*** at [74].

[55] ***Dallaston*** at [74].

[56] ***Dallaston*** at [75].

[57] ***Dallaston*** at [78].

[58] ***Dallaston*** at [76]. Those factors included: paying his own income tax, purchasing clients from another Worker and attempting to sell his "business" including goodwill.

[59] ***Dallaston*** at [77].

[60] ***Paul Ernest Dallaston v Canon Foods*** [2004] WAIRComm13246; 84 WAIG 3850.

[61] ***Dallaston*** at [82].

[62] ***Paul Ernest Dallaston v Canon Foods*** [2004] WAIRComm13246; 84 WAIG 3850 at [29] (Kenner C).

[63] Compare the analysis of ***Readymix*** undertaken by Kenner C in ***Paul Ernest Dallaston v Canon Foods*** [2004] WAIRComm13246; 84 WAIG 3850 at [28]-[29].

[64] ***Paul Ernest Dallaston v Canon Foods*** [2004] WAIRC 13246; 84 WAIG 3850 at [29] - [30] and see the application of this interpretation at [31] - [33].

[65] *Long Service Leave Act 1958* (WA), s 6(1).

[66] *Long Service Leave Act 1958* (WA), s 6(2).

[67] Relevant to the sale of the Meat Business by Mr Litton to the Company in July 2009 is s 6(4) of the *Long Service Leave Act 1958* (WA): "Where a business has, whether before or after the coming into operation hereof, been transmitted from an employer (herein called the transmittor) to another employer (herein called the transmittee) and an employee who at the time of such transmission was an employee of the transmittor in that business becomes an employee of the transmittee — the period of the continuous employment which the employee has had with the transmittor (including any such employment with any prior transmittor) shall be deemed to be employment of the employee with the transmittee." When the business operating under the name *Total Meat Solutions* was transmitted to the Company in July 2009 (and assuming Mr Botica to be an employee of the entity operating *Total Meat Solutions* and an employee of the Company) the two year and six month period of Mr Botica's work in *Total Meat Solutions* (January 2007 - July 2009), is deemed by s 6(4) of the *Long Service Leave Act 1958* (WA)to be employment with the Company.

[68] Witness Statement of Mr Botica filed 8 May 2019, [76].