DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Doessel Group Pty Ltd
v
Joanna Pascua
(C2024/7389)

VICE PRESIDENT GIBIAN
DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT ROBERTS

SYDNEY, 21 FEBRUARY 2025

Appeal against decision [2024] FWC 2669 of Deputy President Slevin at Sydney on 26 September 2024 in matter number U2024/3881– Application under s 394 of the Fair Work Act 2009 (Cth) for an unfair dismissal remedy – Jurisdictional objection – Applicant lives and performed work in the Philippines as a legal assistant – Whether the applicant was an employee or independent contractor – Whether national system employee and entitled to apply for an unfair dismissal remedy –Application of ss 35(2)(b) and 35(3) of the Act – Location of formation of contract of employment – No error in finding that applicant was an employee – Not appropriate to consider application of ss 35(2)(b) and 35(3) of the Act – Permission to appeal refused.

Introduction

[1] Doessel Group Pty Ltd (**Doessel Group** or the **appellant**) seeks permission to appeal and to appeal from a decision of Deputy President Slevin made on 26 September 2024.[1] The decision from which Doessel Group seeks to appeal concerns Doessel Group's jurisdictional objection to an application for an unfair dismissal remedy made by Ms Pascua. Doessel Group's objection was based on an assertion that Ms Pascua was not dismissed as she was not an employee but rather an independent contractor.

[2] Having noted that Ms Pascua performed work in the Philippines, the Deputy President indicated that he was satisfied that Ms Pascua was a national system employee for the purposes of the Act.[2] The Deputy President then found that Ms Pascua was an employee and was able to make an application for an unfair dismissal remedy under s 394 of the *Fair Work Act 2009* (Cth) (the **Act**). Accordingly, the Deputy President dismissed the jurisdictional objection.[3] The substantive application made by Ms Pasua for an unfair dismissal remedy remains to be determined by the Commission.

[3] For the reasons that follow, permission to appeal should be refused.

Factual background

[4] The background to the proceedings can be summarised as follows. Ms Pascua performed work as a legal assistant for a business known as MyCRA Lawyers. MyCRA Lawyers operates a business providing specialist credit repair services and operates out of premises located in Queensland. Ms Pascua lives and, at all relevant times, performed work from her home in the Philippines.

[5] There was in evidence before the Deputy President a document entitled "Independent Contractor's Agreement". There was separately in evidence a document entitled "Employee Non-disclosure Agreement" which was signed by Ms Pascua on 21 July 2022. The Employee Non-disclosure Agreement was an annexure to the Independent Contractor's Agreement and it appears to be accepted by the parties that the Independent Contractor's Agreement contained the terms of the contract under which Ms Pascua performed work.

[6] MyCRA Lawyers represents clients in disputes over credit arrangements with financial institutions. Ms Pascua performed paralegal work. She described the work as involving working from her computer, at home, at times that matched business hours in Australia. She was allocated files by email each day and was required to liaise with clients of MyCRA Lawyers and with banks and other credit agencies on behalf of those clients. She did so by telephone and email. She described the work as involving investigating credit claims on behalf of clients of MyCRA Lawyers.

[7] The Deputy President recorded that Ms Pascua was paid $18 per hour for the work she performed. She provided weekly invoices using a pro forma electronic invoicing system provided by Doessel Group. The invoices set out the hourly rate, stated that time was capped at 8 hours per day across 5 days and recorded a default amount of $720. Any 'downtime' was to be recorded and subtracted from $720 to give a total amount payable for the week.

[8] On 20 March 2024, Mr Doessel sent Ms Pascua an email asserting that she had breached her contract and that the contract had been terminated. The breaches were said to be unlawfully copying company information and client information to her personal drive. Ms Pascua denies copying the material to her personal drive or having engaged in any misconduct. It is unnecessary, for the purposes of dealing with this appeal, for the Full Bench to consider whether there was a valid reason for Ms Pascua's termination.

[9] Following her termination, Ms Pascua filed an application for an unfair dismissal remedy. Ms Pascua initially commenced proceedings against an entity known as Legal Practice Holdings Group Pty Ltd. The Independent Contractor's Agreement was made between Ms Pascua and Doessel Group. The Deputy President subsequently granted leave for Ms Pascua to amend her application to identify Doessel Group as her employer. Doessel Group and Legal Practice Holdings Group Pty Ltd are related entities. Doessel Group raised a jurisdictional objection on the basis that Ms Pascua was an independent contractor under a contract for services and not an employee which was dealt with by the Deputy President in the decision subject of this appeal.

Decision at first instance

[10] In assessing whether Ms Pascua was engaged as an employee (as she contended) or an independent contractor (as Doessel Group contended), the Deputy President recorded that this

question is determined in accordance with the reasoning of the High Court in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 165 (***Personnel Contracting***) and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; (2022) 275 CLR 254 (***Jamsek***). The Deputy President set out the summary of the principles to be drawn from those decisions provided by Wigney J in *JMC Pty Limited v Commissioner of Taxation* [2022] FCA 750 and the Full Bench of the Commission in *Chambers and O'Brien v Broadway Homes Pty Ltd* [2022] FWCFB 129.[4] The Deputy President summarised the proper approach as follows:[5]

> … the assessment of the legal nature of the relationship between the parties is to be determined by evaluating the nature of the contractual obligations of the parties arising from their contract. What is required is an evaluative judgment of that contract which will be informed by various indicia, some of which may suggest an employment relationship and others a relationship of independent contractor.

[11] The Deputy President then considered the terms of the contract and the obligations of the parties under it. The Deputy President concluded that the nature of the work to be performed along with the key performance indicators within the contract indicated that the work was that of an employee working within another's business rather than that of an independent business. Additionally, the Deputy President found that arrangements such as the use of a pbx phone account which identified her as calling from the MyCRA office and the use of a signature block on her emails also suggested that she was working as an employee.[6] The Deputy President found that the "nature of the work required under the contract was subordinate to the business of MyCRA Lawyers such that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise conducted by Ms Pascua".[7]

[12] The Deputy President considered the terms of the Independent Contractor's Agreement relating to remuneration. The Deputy President observed that the Independent Contractor's Agreement provides for the payment of an hourly rate of pay which is described as being all inclusive as a Full Time Employee."[8] The arrangement for payment was that Ms Pascua would invoice in a proforma electronic invoice which set a maximum number of hours of 40 and provided for an indication of hours which were not worked. The weekly payment calculated on an hourly rate was said to be indicative of a relationship of employment.[9] The Deputy President further noted that Ms Pascua was not performing work of a specialist nature but was performing work of a type that is performed under industrial instruments, and which meets the description of a Legal Clerical and Administrative employee under the *Legal Services Award*. The Deputy President observed that the low rate of remuneration did not support a conclusion that Ms Pascua was engaged due to specific expertise as a contractor.[10]

[13] The Deputy President then examined the remaining terms of the Independent Contractor's Agreement. The Deputy President observed that the assertion, in section 4, that Ms Pascua agreed to perform work as an independent contractor represented no more than a label and was not determinative. However, the Deputy President accepted that the provision that Doessel Group would not be liable for matters such as taxes, worker's compensation, unemployment insurance, employer's liability, social security or other entitlements and that all such costs are to be borne by Ms Pascua suggests a relationship of independent contractor.[11]

[14] The Deputy President found that sections 5 and 6 of the Independent Contractor's Agreement dealing with proprietary rights and intellectual property which prevented Ms Pascua

from reproducing, disclosing or copying information were not unusual in an employment context, but were not determinative in resolving the question of whether the contract was one of service or for services.[12] However, the Deputy President observed that section 7 of the Independent Contractor's Agreement which deals with warranties and indemnities and provided that Ms Pascua took on liability for anything that went awry in the performance of her work suggested that the relationship was one of an independent contractor arrangement.[13] The Deputy President stated that the termination provisions, in section 8, were also not determinative as to the nature of the relationship although noted that the contract provided for written notice of termination.[14]

[15] In light of each of those considerations, the Deputy President stated his overall conclusion as follows:

> **[47]** Having considered the terms of the contract I am required to make an overall assessment of the nature of the relationship by reference to the rights, obligations and duties created by it. My overall assessment of the rights and obligations created by the contract is that the arrangement entered into was an employment arrangement, not one of principal and independent contractor. The contract required Ms Pascua to perform work in the business of another. The work could not be assigned to someone else. The contract required that she perform it. The nature of the work was paralegal work. It was not work involving a profession, trade or distinct calling. It was paid at a rate below the minimum wage.
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> **[48]** Ms Pascua was not conducting her own business. She was paid an hourly rate of pay that was described as a salary as a full time employee. She took daily instruction as to the work to be performed and was to be supervised in performing the work. The arrangement was ongoing unless terminated in accordance with the terms of the contract. The description of the arrangement as that of independent contractor belied the actual nature of the contract. The contract, in a number of places, referred to the arrangement as employment.

[16] The Deputy President, accordingly, concluded that the relationship was an employment relationship and dismissed the jurisdictional objection.

Grounds of Appeal

[17] Doessel Group filed a notice of appeal on 17 October 2024 which included a table headed "Decision by Fair Work – Matters that are Factually Incorrect" as well as a section titled "Summary". The former part contains a series of assertions disputing aspects of the factual findings made by the Deputy President. The grounds, if they can be so described, proceed by way of assertion and do not identify the basis upon which it is alleged that the factual findings are incorrect. In any event, as the characterisation of the relationship depends on the legal rights and obligations created by the Independent Contractor's Agreement, little turns on most of the factual assertions made by Doessel Group.

[18] The part of the notice of appeal headed "Summary" appears to contain the grounds of appeal. In substance, Doessel Group contends that the Deputy President erred in finding that Ms Pascua was an employee rather than an independent contractor. Various reasons are advanced as to why the conclusion of the Deputy President was said to be in error. Among other things, Doessel Group contends that Ms Pascua was responsible for the provision and was the owner of the equipment she used for her work, had the capacity to control the order of the files she dealt with and, to some extent, her hours of work; used specific skills and experience in

providing credit repair services, was paid an hourly rate in excess of the rates generally paid to paralegals in the Philippines, was never, as a matter of fact, subject to the imposition of control by Doessel Group in relation to her file management and had initiated contact with Doessel Group seeking to enter into a business arrangement prior to the making of the Independent Contractor's Agreement.

[19] Doessel Group relies on the fact that the Independent Contractor's Agreement used the term "independent contractor" 52 times and the term "employee" only five times (of which two are references to "key employee" rather than just "employee). It also submits that the Deputy President applied the new definition of "employee" and "employer" which now appears in s 15AA of the Act even though it was not in force at the time of the termination of Ms Pascua's contract. Finally, Doessel Group submits that Ms Pascua cannot be an employee, rather than a contractor, because she is a Philippine national who has never worked in Australia or held a work visa enabling her to perform work in Australia.

Permission to Appeal

[20] Section 604(1) of the Act does not provide for an appeal to be brought from a decision of the Commission as of right. An appeal may only be made with the permission of the Commission. Generally, a Full Bench must grant permission to appeal if satisfied that it is in the public interest to do so.[15] Otherwise, the Full Bench has a broad discretion as to whether permission to appeal should be granted.[16]

[21] The discretion of the Commission to grant permission is more confined in the case of an application for permission to appeal from a decision made in unfair dismissal proceedings under Part 3-2 of the Act. To that end, section 400 of the Act provides:

> (1) Despite subsection 604(2), the FWC must not grant permission to appeal from a decision made by the FWC under this Part unless the FWC considers that it is in the public interest to do so.
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> (2) Despite subsection 604(1), an appeal from a decision made by the FWC in relation to a matter arising under this Part can only, to the extent that it is an appeal on a question of fact, be made on the ground that the decision involved a significant error of fact.

[22] Both subsections (1) and (2) of s 400 of the Act demonstrate an intention that the avenue to appeal a decision in unfair dismissal proceedings is to be limited.[17] Section 400(1) imposes a higher threshold for permission to appeal in respect of unfair dismissal appeals. Permission to appeal can only be granted if the Full Bench is satisfied it is in the public interest to do so.[18]

[23] Determining whether public interest arises out of a particular issue which is the subject of an appeal involves a broad value judgment.[19] Circumstances in which the public interest might be attracted include where a matter raises issues of importance and general application, where there is a diversity of decisions at first instance so that guidance from an appellate court is required, where the decision at first instance manifests an injustice, or the result is counter intuitive, or that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[20]

[24] In considering whether we are satisfied it is in the public interest to grant permission to appeal, it is convenient to separately consider the question of whether Ms Pascua was engaged as an employee or independent contractor and the fact that Ms Pascua physically performed work outside of Australia.

Employee or contractor

[25] We turn first to consider the issue determined by the Deputy President, namely, whether Ms Pascua was engaged as an employee or an independent contractor. With respect to the employee/contractor question, we do not believe there is a sufficiently arguable case of appealable error to justify permission to appeal being granted or that there is any issue of general importance or significance to make it in the public interest to grant permission to appeal.

[26] Two of the issues raised in the appeal can be addressed at the outset. First, Doessel Group contends that the Deputy President erroneously applied amended provisions of the Act which were not applicable to the present case. The submission is without merit. The method to be used to ascertain the ordinary meaning of the terms "employee" and "employer" for the purposes of the Act has now been amended by adding s 15AA. Those amendments were made by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) and commenced on 26 August 2024. However, the Act as it existed prior to those amendments applies to an application made, or proceedings on foot at the commencement of the amendments as well as an application for review of, or an appeal relating to, such an application or proceedings.[21] As such, s 15AA did not apply to the proceedings at first instance and does not apply to this appeal.

[27] However, there is nothing to suggest that the Deputy President applied s 15AA in assessing whether Ms Pascua was engaged as an employee or independent contractor. The Deputy President expressly referred to the approach in *Personnel Contracting* and *Jamsek* and indicated that he had applied the approach dictated by those decisions. As we understand the submission, Doessel Group suggests that the Deputy President's reference to whether Ms Pascua was performing work in her own business or working in its business suggests that he applied s 15AA. We do not accept that submission. The extent to which the putative employee can be seen to be working in their own business as distinct from the putative employer's business was a matter which the members of the High Court thought was significant in *Personnel Contracting* and *Jamsek*.[22] The Deputy President did not apply s 15AA.

[28] Second, Doessel Group's submissions assume that the fact that Ms Pascua performed work in the Philippines is relevant to the legal character of the relationship between the parties. It is not. There is nothing preventing an Australian employer engaging an employee under a contract of employment to perform work overseas. Sections 34(3) and 35 of the Act specifically address the application of the Act in that circumstance. Except perhaps to the extent that the location of the work contemplated by the contract might affect the degree of contractual control or the nature of the work contemplated by the contract, the fact that Ms Pascua in fact performed work in the Philippines is irrelevant to the character of the relationship created by the Independent Contractor's Agreement.

[29] Otherwise, the approach required by the majority of the High Court in *Personnel Contracting* and *Jamsek* is clear. In short, at least where the rights and duties of the parties are

"comprehensively committed to a written contract" the validity of which is not challenged on the basis it is a sham and the terms of which have not been varied, waived or the subject of an estoppel, the rights and obligations established by the contract are determinative as to the legal character of the relationship.[23] The characterisation of the relationship does not require or involve a "wide ranging review of the entire history of the parties dealings".[24] Except to the extent there is a contention that the contract was varied or an estoppel or waiver has arisen, the subsequent conduct of the parties does not bear upon the legal nature of the relationship.[25]

[30] Once the terms of the contract have been ascertained, it is necessary to characterise the relationship created by the contract. Two considerations will often be critical: the extent to which the putative employer has the right to control how, when and where the putative employee performs the work; and the extent to which the putative employee can be seen to be working in their own business as distinct from the putative employer's business.[26] The way that the contractual terms address the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the delegation of work, and where the right to exercise direction and control resides may also be relevant to whether the relationship is one of employer and employee.[27]

[31] In our opinion, there is nothing to suggest that the Deputy President did not properly apply this approach or that the conclusion he reached was not correct. Many of the matters raised by Doessel Group impermissibly sought to rely on the manner in which the contract between the parties was performed rather than the legal rights and obligations it created. Doessel Group also relied on the description of the legal character of the relationship in the contract itself. The "label" which the parties may have chosen to describe their relationship is not determinative of, or even relevant to, that characterisation.[28]

[32] The Deputy President appropriately considered the terms of the Independent Contractor's Agreement. The most significant aspects of the contract are that the nature of the duties it contemplated did not suggest Ms Pascua was operating her own business, the key performance indicators established a high degree of control over the performance of work (including regulating the number of tasks, hours of work and amount of disbursements, a requirement to notify a supervisor if work could not be completed and the performance of ad hoc tasks as directed) and provision for the payment of an hourly rate of salary. Other aspects of the contract referred to by the Deputy President were perhaps of debatable relevance, such as the level of pay. However, we do not believe there was any error in the overall assessment made by the Deputy President. We believe it was correct. There is no reason to grant permission to appeal with respect to the finding that Ms Pascua was engaged as an employee rather than an independent contractor.

National system employee

[33] A further issue arises in relation to the jurisdiction of the Commission to determine Ms Pascua's application. Ms Pascua lives and works in the Philippines. It appears she has never, relevantly at least, visited or performed work in Australia. These facts might be thought to suggest she might not be an employee to whom the Act applies. The Deputy President understandably raised that issue with the parties at first instance. The decision of the Deputy President records as follows:

> **[5]** The issue was also raised that Ms Pascua worked in the Philippines. The issue being that she may not be a national system employee. Section 380 provides that the protection from unfair dismissal in Part 3-2 of the Act apply to national system employees. Submissions were invited on this point. Doessel was content to rely on its argument that there was no employment and so the issue did not arise. For completeness in the absence of any argument to the contrary I am satisfied for the purposes of s 14 of the Act that Doessel is a constitutional corporation so far as it employs persons and that if Ms Pascua is an employee then she was, for the purposes of s 13, employed as described in section 14 by a national system employer and meets the description of national system employee.

[34] As the Deputy President indicated, Doessel Group did not press a separate argument that Ms Pascua was not a national system employee and, as a result, could not make an application for an unfair dismissal remedy. In those circumstances, the Deputy President indicated that he was satisfied that Ms Pascua was a national system employee for the purposes of s 13 of the Act.

[35] The application of Part 3-2 of the Act is as follows. Section 394(1) provides that a person who "has been dismissed" may apply to the Commission for an order granting an unfair dismissal remedy. A person has been "dismissed" for the purposes of s 386(1), relevantly, if the person's employment with his or her employer has been terminated on the employer's initiative or the person resigned from his or her employment, but was forced to do so because of the conduct, or a course of conduct, engaged in by his or her employer. Section 380 provides that, for the purposes of Part 3-2, "employee" means a national system employee and "employer" means a national system employer.

[36] The terms "national system employee" and "national system employer" are defined in ss 13 and 14 of the Act. There is no doubt that Doessel Group is a national system employer for the purposes of s 14(1)(a) in that it is at least a constitutional corporation in the sense that it is a trading corporation for the purposes of s 51(xx) of the Commonwealth Constitution. In a simple sense, Ms Pascua, to the extent she was employed by Doessel Group, fits within the concept of being a national system employee set out in s 13 in that she is a person employed by a national system employer.

[37] There are, however, territorial limits to the operation of the Act. The subject matter of the Act is employment and, broadly speaking, it is directed at employment which has a relevant connection to Australia. Generally, s 21(1)(b) of the *Acts Interpretation Act* 1901 (Cth) requires that, in the absence of contrary intent, the Act be construed to apply to employment relationships that have a sufficient connection to Australia so as to justify the conclusion that the employment is one that is in and of Australia.[29]

[38] Certain parts of the Act are given extraterritorial operation by regulation. Section 34(3) permit regulations to be made extending the application of the Act, or specified provisions of the Act, outside the outer limits of the exclusive economic zone and the continental shelf in relation to "any Australian employer" and "any Australian based employee". Regulation 1.15F(5) of the *Fair Work Regulations 2009* (Cth) provides in relation to Part 3-2:

> (5) For subsection 34(3) of the Act, Part 3-2 of the Act, and the rest of the Act so far as it relates to that Part, are extended to an Australian-based employee in relation to the employee's Australian employer in relation to all of the area outside the outer limits of the exclusive economic zone and the continental shelf.

Note: Part 3-2 of the Act relates to unfair dismissal.

[39] As such, Part 3-2 is extended to operate with respect to any Australian-based employee in relation to the employee's Australian employer without territorial limitation. The concepts of an "Australian-based employee" and "Australian employer" are dealt with in s 35 as follows:

> **35 Meanings of *Australian employer* and *Australian-based employee***
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> (1) An ***Australian employer*** is an employer that:
> (a) is a trading corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
> (b) is a financial corporation formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution); or
> (c) is the Commonwealth; or
> (d) is a Commonwealth authority; or
> (e) is a body corporate incorporated in a Territory; or
> (f) carries on in Australia, in the exclusive economic zone or in the waters above the continental shelf an activity (whether of a commercial, governmental or other nature), and whose central management and control is in Australia; or
> (g) is prescribed by the regulations.
>
> (2) An ***Australian-based employee*** is an employee:
> (a) whose primary place of work is in Australia; or
> (b) who is employed by an Australian employer (whether the employee is located in Australia or elsewhere); or
> (c) who is prescribed by the regulations.
>
> (3) However, paragraph (2)(b) does not apply to an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories.

[40] As we have said, there is no reason to doubt that Doessel Group is an Australian employer for the purposes of s 35(1)(a) in that it is a trading corporation. Ms Pascua is an Australian-based employee for the purposes of s 35(2)(b) in that she is employed by an Australian employer. The only question that arises is whether the exclusion in s 35(3) applies, that is, whether Ms Pascua is "an employee who is engaged outside Australia and the external Territories to perform duties outside Australia and the external Territories".

[41] Section 35(3) has been considered in a number of authorities. In *Munjoma v Salvation Army (NSW) Property Trust as Trustee for the Social Work* [2013] FWC 3337 (***Munjoma***), Hatcher VP (as his Honour then was) expressed the view that:

> **[38]** The exclusion in s.35(3) has two limbs, both of which must be satisfied in order for the exclusion to operate. The first is that the employee is "engaged outside Australia and the external Territories". The second is that the engagement is to "perform duties outside Australia and the external Territories". It is clear that the second limb applies, since Dr Munjoma's duties under her contract of employment were to be performed primarily if not wholly in Nauru. The question therefore is whether it is manifest that the first limb also applies - that is, was Dr Munjoma "engaged" outside of Australia?

[42] That is, for a person who otherwise falls within the definition of being an "Australian-based employee" by operation of s 35(2)(b) to be excluded by s 35(3), the person must have both been "engaged outside Australia" and engaged to perform work outside Australia and its external Territories.[30] As was the case in *Munjoma*, the second limb is satisfied in this case. Although her work concerned clients of the business in Australia, Ms Pascua's work appears to have been entirely performed outside of Australia.

[43] As outlined above, the question of whether Ms Pascua was "engaged outside Australia" was not considered in detail by the Deputy President because the parties did not address this question at first instance. Doessel Group contended in its written submissions on appeal that, in order for the Act to apply, an appropriate connection aligning the employment relationship sufficiently with Australia must be demonstrated and the work performed was not of itself determinative. Doessel Group submitted that because Ms Pascua is not an Australian resident and the contract of employment was made outside Australia and regulated "by the laws of an external jurisdiction", the employment relationship does not have a sufficient connection with Australia. Doessel Group repeatedly referred to the fact that Ms Pascua performed work in the Philippines. However, those assertions appeared to be advanced substantially in support of its contention that Ms Pascua was an independent contractor rather than in support of a discrete contention that, even if she was an employee, Ms Pascua was not entitled to apply for an unfair dismissal remedy. It conflated the question of the connection of the engagement with Australia and the question of whether Ms Pascua was an employee or independent contractor.

[44] Ms Pascua addressed the question of whether she was a national system employee in her written submissions in the appeal by reference to *Gautam Parimoo v LakeResources N.L.* [2023] FWC 2543 (***Gautam***), a decision to which we refer below. Mr Moriarty, for Ms Pascua, submitted that an issue of importance is raised in the appeal by reason of the case being an example of the engagement of offshore labour by Australian businesses in what he described as a "grey market" for labour. Mr Moriarty indicated that Ms Pascua does not, in those circumstances, oppose permission to appeal being granted and affirmatively submitted that it is in the public interest for the Full Bench to determine the appeal. Mr Moriarty submitted, however, that the Full Bench should be satisfied that Ms Pascua was a national system employee prior to her dismissal and that she was able to apply to the Commission for an unfair dismissal remedy.

[45] The question of whether an employee engaged by an Australian employer, but performing work outside of Australia, is an employee covered by the Act has been considered in a number of authorities. In *Cohen v iSoft Group Pty Limited* [2012] FCA 1071 (***Cohen***), the question as to whether the Act applied to employment where the work was being performed outside Australia was raised, but was not ultimately determinative. Flick J briefly addressed submissions on this question but considered that it was prudent to express no more than "very tentative views".[31] His Honour was satisfied the employer in that case fell within the definition of s 35(1)(a) of the Act, but was not satisfied that the employee fell within s 35(2)(b) by reason of s 35(3), proffering that if "*engaged*" in s 35(3) of the Act was a reference to the physical location where the agreement was executed, the place of "*engagement*" in that case was Singapore, such that the exclusion in s 35(3) arose.[32]

[46] In *Munjoma*, the concept of an employee being "engaged outside Australia" was construed by Hatcher VP (as his Honour then was) as referring to the place where the contract

of employment of the employee was formed. His Honour considered the use of the word "engaged" in s 35(3) was ambiguous and acknowledged that the concept of an employee being "engaged" was capable of being understood as referring to the "hiring" of the employee by way of the formation of the contract of employment.[33] His Honour noted that "an argument to that effect was adverted to in *Cohen v iSoft Group Pty Limited,* but did not need to be determined" and concluded that an approach which interprets "engaged outside Australia" as a reference to the location of the formation of the contract conforms to the ordinary meaning of the word "engaged" and gives the first limb of s 35(3) work to do. His Honour said:

> **[45]** I do not find the respondent's argument that the expression "engaged outside Australia and the external territories" refers to the performance rather than the formation of the employment persuasive. As earlier stated, the exclusion has two limbs. The second limb clearly refers to the purpose or function of the engagement of the employee as being to perform duties overseas. That is, it refers to the location where the employee's obligations under the contract of employment are to be performed. That being the case, the first limb of the exclusion - "engaged outside Australia and the external Territories" - must have some separate and different work to do. The respondent's approach does not give it any separate work to do; it takes the first limb as also referring to the location of the performance of duties under the employment contract also. On that approach, the second limb becomes unnecessary verbiage.
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> **[46]** An approach which has the first limb of the exclusion referring to the location of the formation of the employment contract gives it separate and distinct work to do. It conforms to the ordinary meaning of the word "engaged". And because an employment relationship formed in Australia between an Australian employer and a person located in Australia at that time can be characterised as having a "substantial connection to Australia", it conforms to the intention of the legislature as stated in paragraph 168 of the explanatory memorandum.

[47] As to "formation", it may be accepted that a contract is formed upon receipt by the offeror of communication of its acceptance by the offeree. Formation of a bilateral contract generally requires the receipt of a communication of acceptance in order to be effective.[34] Where a contract is formed by means of email communications, the position that appears to have been adopted is that the contract is made where the electronic communication is received.[35]

[48] That question was considered in *Winter v GHD Services* [2019] FCCA 775; (2019) 285 IR 331 (***Winter***). Heffernan J considered that the decision in *Munjoma* established that engagement outside Australia for the purposes of s 35(3) of the Act requires the identification of the location of formation of the contract. Citing *Chitty on Contracts*,[36] her Honour recorded that a contract is formed on the communication of the acceptance to the offeror and that it has no legal effect until that occurs, with communication normally requiring some act to bring the acceptance to the attention of the offeror. In circumstances where the contract of employment in question was signed in the United States and sent by email to Australia, her Honour considered the location of the formation of the contract was Australia on the basis that the contract was formed only when communication of its acceptance by email was received. That had occurred in Australia.[37]

[49] In *Gautam*, Boyce DP considered the findings made in *Winter* to be on point. The Deputy President found that the applicant in that matter was engaged by the respondent when the employment contract was made, and that the employment contract was made in Australia because acceptance of the offer of employment was communicated by emailing a signed copy

to the respondent in Sydney. The Deputy President concluded that the *Electronic Transactions Act 2000* (NSW) applied to the formation of an employment contract and that s 13B of that Act meant that an electronic communication is taken to have been received at the place where the addressee has its place of business which was, in that case, Sydney.[38] The consequence was that the employee was an "Australian-based employee" for the purposes of s 35(2)(b) and not engaged "outside Australia" for the purposes of s 35(3).

[50] The application of the Act to employees performing work for an Australian employer outside of the country is an important issue. The question of whether at least parts of the Act apply to an employee who is engaged under a contract of employment formed by electronic communication of acceptance of the contract to an employer located in Australia even if the employee performs work outside of Australia has potentially significant implications. However, it is not appropriate for the Full Bench to express a final view on the question in the present appeal given the manner in which the proceedings were conducted at first instance.

[51] The difficulty is that the evidence as to Ms Pascua's engagement by Doessel Group is unclear. The version of the Independent Contractor's Agreement that was in evidence before the Deputy President is unsigned. A document entitled "Employee Non-disclosure Agreement" was signed by Ms Pascua on 21 July 2022. The Employee Non-disclosure Agreement is Annexure B to the Independent Contractor's Agreement. Mr Moriarty asked the Full Bench to infer that the Employee Non-disclosure Agreement must have been signed by Ms Pascua in the Philippines and communicated to Doessel Group in Australia by email and that the Independent Contractor's Agreement was not signed in error. If that is the case, he submitted that the contract was formed in Australia and, as such, Ms Pascua was not engaged outside Australia for the purposes of s 35(3) of the Act.

[52] It may be that the logical inference to be drawn is that Ms Pascua must have communicated acceptance of the contract by email. However, direct evidence of the formation of the contract was not given at first instance. That is unsurprising given that the contentions advanced by Doessel Group was directed at the employee/contractor question. The manner in which Ms Pascua communicated her acceptance of the Independent Contractor's Agreement is likely to be capable of being the subject of direct evidence. It is not appropriate for the Full Bench, in hearing an appeal, to make inferences in relation to factual matters that are capable of being resolved by direct evidence.

[53] In the circumstances, although the question of the application of Part 3-2 of the Act to employees of Australian employers performing work overseas is an important one, we do not believe it is in the public interest to grant permission to appeal in relation to that question in this matter. The issue was not directly argued before the Deputy President and the evidence is incomplete. It may be necessary for the Deputy President to return to this question in resolving Ms Pascua's application to satisfy himself that the Commission has jurisdiction. The Deputy President will, at that point, have the opportunity to hear direct evidence as to the manner in which Ms Pascua was engaged and hear substantive argument in relation to whether Ms Pascua is a national system employee for the purposes of Part 3-2 of the Act, having regard to the terms of ss 34 and 35.

Conclusion and disposition

[54] For the reasons set out above, the Full Bench orders that permission to appeal is refused.

VICE PRESIDENT

Appearances:

G *Doessel*, director, for the Appellant
A *Moriarty*, solicitor, of AXM Law for the Respondent

Hearing details:

10 December 2024.
Microsoft Teams.

Printed by authority of the Commonwealth Government Printer

<PR784634>

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[1] *Pascua v Doessel Group Pty Ltd* [2024] FWC 2669.

[2] [2024] FWC 2669 at [5].

[3] [2024] FWC 2669 at [51].

[4] [2024] FWC 2669 at [18]-[19].

[5] [2024] FWC 2669 at [20].

[6] [2024] FWC 2669 at [28].

[7] [2024] FWC 2669 at [31].

[8] [2024] FWC 2669 at [32].

[9] [2024] FWC 2669 at [34].

[10] [2024] FWC 2669 at [35].

[11] [2024] FWC 2669 at [40].

[12] [2024] FWC 2669 at [41]-[42].

[13] [2024] FWC 2669 at [43].

[14] [2024] FWC 2669 at [44].

[15] *Fair Work Act* 2009 (Cth), s 604(2).

[16] *Wan v Australian Industrial Relations Commission* [2001] FCA 1803; (2001) 116 FCR 481 at [30] (Spender, Kiefel, Dowsett JJ); *Ferrymen Pty Ltd v Maritime Union of Australia* [2013] FWCFB 8025; (2013) 238 IR 258 at [9]-[12].

[17] *Illawarra Coal Holdings Pty Ltd (t/as South32) v Sleiman* [2024] FWCFB 364 at [36].

[18] *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [34] (Buchanan J); *Workpac Pty Ltd v Bambach* [2012] FWAFC 3206; (2012) 220 IR 313 at [14]; *Barwon Health – Geelong Hospital v Colson* [2013] FWCFB 4515; (2013) 233 IR 364 at [6].

[19] *O'Sullivan v Farrer* (1989) 168 CLR 210 per Mason CJ, Brennan, Dawson and Gaudron JJ; applied in *Hogan v Hinch* (2011) 85 ALJR 398 at [69] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; *Coal & Allied Mining Services Pty Ltd v Lawler and others* [2011] FCAFC 54; (2011) 192 FCR 78 at [44]-[46]; *Australian Postal Corporation v D'Rozario* [2014] FCAFC 89; (2014) 222 FCR 303 at [102] (Bromberg J).

[20] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343; (2010) IR 297 at [27].

[21] *Fair Work Act 2009* (Cth), Schedule 1 clause 119(1).

[22] *Personnel Contracting* at [36]-[39] and [73] (Kiefel CJ, Keane and Edelman JJ), [113] (Gageler and Gleeson JJ) and [180]-[183] (Gordon J, Steward J agreeing); *Chiodo* at [4](d) (Kennett J); *EFEX Group* at [13] (Katzmann and Bromwich JJ) and [54] (Lee J).

[23] *Personnel Contracting* at [43]-[44] and [59] (Kiefel CJ, Keane and Edelman JJ) and [183] (Gordon J, Steward J agreeing).

[24] *Personnel Contracting* at [59] (Kiefel CJ, Keane and Edelman JJ) and [185]-[189] (Gordon J, Steward J agreeing).

[25] *Personnel Contracting* at [43]-[46] (Kiefel CJ, Keane and Edelman JJ) and [201] (Steward J).

[26] *Personnel Contracting* at [36]-[39] and [73] (Kiefel CJ, Keane and Edelman JJ), [113] (Gageler and Gleeson JJ) and [180]-[183] (Gordon J, Steward J agreeing); *Chiodo* at [4](d) (Kennett J); *EFEX Group* at [13] (Katzmann and Bromwich JJ) and [54] (Lee J).

[27] *Personnel Contracting* at [113] (Gageler and Gleeson JJ) and [174] (Gordon J, Steward J agreeing); *Chiodo* at [4](e) (Kennett J).

[28] *Personnel Contracting* at [63]-[64] (Kiefel CJ, Keane and Edelman JJ) and [184] (Gordon J, Steward J agreeing).

[29] *Fair Work Ombudsman v Valuair Ltd (No 2)* [2014] FCA 759; (2014) 224 FCR 415 at [74]-[75] and [87] (Buchanan J); *Saudi Arabian Cultural Mission/Saudi Embassy v Saleh* [2024] FWCFB 372 at [113]-[116].

[30] See also *Winter v GHD Services Pty Ltd* [2019] FCCA 775; (2019) 285 IR 331 at [15] (Heffernan J).

[31] *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071 at [162] (Flick J).

[32] *Cohen* at [165] (approved on appeal in *Cohen v iSoft Group Pty Ltd* [2013] FCAFC 49; (2013) 234 IR 386 at [54]).

[33] *Munjoma v Salvation Army (NSW) Property Trust as Trustee for the Social Work* [2013] FWC 3337 at [39].

[34] *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93 at 111 (Dixon CJ and Fullagar J).

[35] See, for example, *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196 at [78]-[79] (Edelman J

[36] *Chitty on Contracts* (33rd ed, Sweet & Maxwell Ltd, 2018), p228.

[37] *Winter* at [17] and [19].

[38] *Gautam Parimoo v LakeResources N.L.* [2023] FWC 2543 at [27] and [30].