HIGH COURT OF AUSTRALIA

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### Details of Filing

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### Important Information

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IN THE HIGH COURT OF AUSTRALIA S27/2021

SYDNEY REGISTRY

BETWEEN: **ZG OPERATIONS AUSTRALIA PTY LTD (ACN 060 142 501)**

First Appellant

**ZG LIGHTING AUSTRALIA PTY LTD (ACN 002 281 601)**

Second Appellant

and

**MARTIN JAMSEK**

First Respondent

**DANIEL CIVTANOVIC** as trustee for the bankrupt estate of **ROBERT WILLIAM WHITBY**

Second Respondent

**STEPHEN HUNDY** as trustee for the Bankrupt estate of **ROBERT WILLIAM WHITBY**

Third Respondent

## SUBMISSIONS OF NEW SOUTH WALES BUSINESS CHAMBER AS AMICUS CURIAE

### PART I: PUBLICATION

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

### PART II: BASIS FOR APPLICATION TO APPEAR AS AMICUS CURIAE

2. New South Wales Business Chamber Limited trading as Business NSW (**Business NSW**) seeks leave to appear as amicus curiae in this proceeding. Business NSW relies on the affidavit of Luis Anthony Izzo sworn on 18 May 2021 (**Izzo Affidavit**) in support of its application to appear as amicus curiae in these proceedings.

3. Business NSW is an independent not-for-profit organisation and is the peak business organisation in the State of New South Wales: Izzo Affidavit [3]-[4]. Business NSW advocates for business interests across areas such as innovation, infrastructure, local

**Filed on Behalf of NSW Business Chamber Ltd trading as Business NSW**
Party applying to appear as amicus curiae

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government and planning, regulation and taxation, regional affairs, tourism, workforce skills, workplace health and safety and workplace relations: Izzo Affidavit [8].

4. Business NSW seeks to intervene in these proceedings because, as the peak body in New South Wales, it has members including businesses engaged in the road transport industry who will be directly affected by the outcome of these proceedings. Business NSW seeks to make submissions in this Court about the operation of NSW legislation relevant to the specific entitlements (specifically, leave entitlements) which the Full Court found were payable to the respondents and to raise an important question about the interaction of the NSW legislation with the common law and the need for coherence in the law.

5. Business NSW submits that, in *Jamsek v ZG Operations Australia Pty Ltd* (2020) 297 IR 210 (**AJ**), the Full Court erred in concluding that Mr Jamsek and Mr Whitby (**the Drivers**) were:

(a) "*workers*" within the meaning of the *Long Service Leave Act 1955* (NSW) (**LSL Act)** during the relevant periods (AJ [256]) by reason of those statutory definitions adopting the ordinary meaning of an employment relationship at common law (AJ [175]) which the Full Court applied to determine the Drivers to be entitled to long service leave (AJ [187]);

(b) "*employees*" at common law for the purposes of the *Fair Work Act 2009* (Cth) (**FW Act**).

6. Business NSW wishes to advance three principal arguments in support of its contention that the Full Court engaged in the above errors:

(a) ***first***, the Full Court failed altogether to examine and consider that: (i) long service entitlements were and are created by NSW Parliament, (ii) s 6 of the LSL Act specifically provided that long service leave entitlements were subject to orders and determinations made by the Industrial Relations Commission of NSW (**Commission**) under the *Industrial Relations Act 1996* (NSW) (**IR Act**), (iii) Chapter 6 of the IR Act was a specific statutory regime enacted to apply to a class of worker in the road transport industry defined to be a "*contract carrier*", (iv) pursuant to the express terms of the IR Act (s 313(1)), the Commission made a "*contract determination*" (akin to an industrial award) which specifically provided that contract carriers are to be paid rates of remuneration that compensate them for long service leave, and (v) as such, the Drivers, to whom the contract determination applied, were not entitled to long service leave. The Full Court had no regard to this statutory scheme;

(b) ***second***, the Full Court failed to examine the same regime as it applied to annual leave, and specifically did not examine or consider that: (i) annual leave entitlements were created by NSW Parliament and there was no Federal legislated standard for annual leave until 27 March 2006, (ii) even though annual leave was later governed by the Federal workplace laws, the relevant transitional provisions applied such that annual leave prior to 27 March 2006 was to be treated and accrued per the laws applicable prior to that time, (iii) thus, the Drivers' alleged entitlements annual leave prior to 27 March 2006 were governed by NSW law, (iv) s 5(1A) of the *Annual Holidays Act 1944*

(**AH Act**) specifically provided that it was subject to orders and determinations made by the Commission under the IR Act, (v) as with long service leave, pursuant to the express terms of the IR Act (s 313), the Commission made a "contract determination" which specifically provided that contract carriers are to be paid rates of remuneration that compensate them for annual leave, (vi) the contract determination also expressly provided that contract carriers were not entitled to paid annual leave, and (vii) as such, the Drivers, to whom the contract determination applied, were not entitled to annual leave prior to 27 March 2006, or at all. The Full Court had no regard to this statutory scheme;

(c) ***third***, the result of the Full Court's reasoning and conclusion leads to an absence of coherence between the common law and the specific statutory regime enacted in NSW that regulated the work of the Drivers not as employees but as a class of worker known as a "*contract carrier*". That regulatory regime supports the Appellant's contentions in the appeal, and also provides an independent ground to uphold the appeal.

7. For the avoidance of doubt, Business NSW supports the contentions advanced by the Appellant with respect to the common law test. The three principal arguments identified above and developed below that Business NSW wishes to advance are in addition to those raised by the Appellant and are separate and independent grounds upon which to find that the Full Court erred.

## PART III: REASONS WHY LEAVE SHOULD BE GRANTED

### Principles applicable to the grant of leave

8. The Court has a broad discretion to allow amici curiae to be heard.

9. An applicant to intervene must demonstrate "*a substantial affectation*" of its legal interests[1]. This need not be a direct affectation bud does need to rise higher than an indirect or contingent affectation[2].

10. Alternatively, an amicus curiae may be head on a different basis, namely, when the Court is "*of the opinion that it will be significantly assisted thereby*" and where any cost to the parties or delay occasioned by the amicus (if any) being heard are not disproportionate to the assistance expected to be given[3]. The occasion for a favourable exercise of the discretion to permit a non-party, with only an indirect interest in the proceeding, to intervene or to be heard as amicus curiae include where the non-party is "*willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted*"[4]. In some cases "*it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer"*[5].

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[1] *Levy v Victoria* (1997) 189 CLR 520 at 602 (***Levy***) per Brennan CJ.
[2] *Roadshow Films Pty Ltd v iiNet Limited* (2012) 248 CLR 37 (***Roadshow Films***) at [2] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[3] *Levy* at 604-605 per Brennan CJ; *Roadshow Films* at [4] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.
[4] *Levy* (1997) 189 CLR 520 at 604 (Brennan CJ).
[5] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 312 per French CJ.

**Application of the principles to the present application**

11. In the present case, Business NSW submits there are two reasons why leave to appear as amicus curiae should be granted.

12. ***First***, Business NSW intends to make submissions with respect to matters not raised, and therefore not considered, in the Courts below which will assist the Court in a way which the Court would not otherwise have been assisted.

13. Business NSW intends to identify statutory provisions relevant to the determination of the issues before the Court that have not been considered or referred to in the:

    (a) primary judgment, *Whitby v ZG Operations Australia Pty Ltd* [2018] FCA 1934 (**PJ**);
    (b) Full Federal Court judgment (the AJ); or
    (c) the Appellant's submissions dated 16 April 2021 (**Appellant's submissions**).

14. The Drivers' entitlements to:

    (a) long service leave at all relevant times were determined by New South Wales laws under the LSL Act; and
    (b) paid annual leave from 1993 to 27 March 2006 were governed by the AH Act.

15. The Drivers at all relevant times were performing contracts of carriage regulated by Chapter 6 of the IR Act and the scheme for remuneration (including in respect of long service leave and paid annual leave) provided by s 313(1) of the IR Act and the contract determination for which that provision provides.

16. The statutory regime under the IR Act is determinative of the entitlements sought by the Drivers in respect of long service leave for the whole of the relevant period and in respect of annual leave between 1993 and 2006 and to date have not been referenced in argument before this Court or the Courts below, nor reflected in the reasoning of the Courts below to their respective determination of the question of whether the Drivers were employees or independent contractors.

17. Specifically, no submissions are before this Court addressing: (i) the interaction between the IR Act, the AH Act and the LSL Act (the IR Act and AH Act are not mentioned at all); (ii) that the regime under the IR Act is determinative of the Drivers' long service leave entitlements, (iii) that the regime is also determinative of their annual leave entitlements between 1993 to 2006, and also thereafter; and (iv) the relevance and impact of this factual and statutory matrix under the IR Act on the application of the common law test in *Hollis v Vabu Pty* (2001) 207 CLR 21 (***Vabu***) in determining whether the Drivers were employees for the purposes of the FW Act.

18. Business NSW submits that the Full Court erred by applying the common law test of employee to all statutes (Federal and State) without examining the comprehensive regulatory scheme in NSW which addressed the very entitlements subject to the proceedings in a different way and thus needed to be reconciled with the common law test. The determination of these issues will have a broad impact on the engagement of owner drivers in the road transport industry and there is accordingly public benefit in the Court considering these submissions in evaluating the entitlements of the Drivers.

19. The submissions which Business NSW intends to make will be of significant assistance to Court by providing the Court with submissions on the law which the

Court will not otherwise be given and accordingly have the benefit of a larger view of the matter than it would otherwise have.

20. ***Second***, Business NSW has more than a mere academic or theoretical or indirect interest in these proceedings. Business NSW is the peak body in New South Wales whose members that are part of the road transport industry in New South Wales have a direct interest in the resolution of the issues raised in these proceedings, and in particular the matters raised by Business NSW. In this regard, Business NSW has approximately 32,629 members, which includes member businesses operating in the road transport industry. Some of these members are 'principal contractors' within the meaning of section 310 of the IR Act who engage 'carriers' under a 'contract of carriage' within the meaning of section 309 of the IR Act and those members accordingly are regulated by Chapter 6 of the IR Act and the associated contract determinations that have been made under that Chapter: Izzo Affidavit [5], [7], [9]. The outcome of these proceedings will have a broad impact on the road transport industry within NSW. In particular, if this appeal is dismissed it will have the effect of disrupting an established legislative scheme for the regulation of contracts of carriage upon which Business NSW members have relied upon in their business arrangements: Izzo Affidavit at [14] to [16]. Accordingly, Business NSW's participation in the proceedings will have a direct bearing on the interests of some of its members.

## PART IV: ARGUMENT

21. In characterising the relationship between the Drivers and the appellants as one of employment, the Full Court failed to have regard to the statutory scheme in force in New South Wales relevant to the Drivers' long service leave and annual leave entitlements, which were governed by the LSL Act, the AH Act and the IR Act. In particular, to the extent that the that the Full Court concluded that the Drivers were "*worker*s" for the purposes of the LSL Act and "*employee*" for the purposes of the FW Act, the Full Court failed to take into account that provisions of ss 309 and 313 of the IR Act and the contract determinations made under the IR Act which effectively regulated the long service leave entitlements (at all relevant times) and paid annual leave entitlements (prior to 26 March 2006) and are determinative of those entitlements.

### Long Service Leave Entitlements

22. ***First***, the entitlement to long service leave is entirely a creature of statute. Relevantly, here it has its source in statute enacted by NSW Parliament.

23. The Commonwealth Parliament has not relevantly legislated in relation to long service leave and the FW Act does not seek to do so. The FW Act does not apply to the exclusion of the LSL Act because ss 27(1) and 27(2)(g) of the FW Act prescribe that laws of a State or Territory pertaining to long service leave are not excluded by the operation of the FW Act. The FW Act does not prescribe for any long service leave entitlements, except for where employees were covered by "*award-derived long*

*service leave terms*" or "*agreement-derived long service leave terms*" prior to the introduction of the FW Act, neither of which are presently applicable[6].

24. ***Second***, the entitlement to long service leave is contingent upon the definition of worker. Section 4(1) of the LSL Act relevantly provides that "*every worker shall be entitled to long service leave*". By s 3(1) a "*worker*" is defined to mean a:

> *"person employed, whether on salary or wages or piecework rates, or as a member of a buttygang, and the fact that a person is working under a contract for labour only, or substantially for labour only, or as lessee of any tools or other implements of production, or as an outworker, or is working as a salesman, canvasser, collector, commercial traveller, insurance agent, or in any other capacity in which the person is paid wholly or partly by commission shall not in itself prevent such person being held to be a worker…"*

25. ***Third***, the entitlement of workers to long service leave is to be read subject to the provisions of the IR Act. Section 6 of the LSL Act provides that the LSL Act does not in any way limit or affect the powers, authorities, duties or functions conferred on the Commission by the IR Act with respect to long service leave. The IR Act is the principal statute regulating the conduct of industrial relations in New South Wales.

26. ***Fourth***, relevantly, Chapter 6 of the IR Act deals with public vehicles and carriers. Chapter 6 was inserted into the IR Act in 1979.[7] The Chapter applies to contracts of bailment and contract of carriage: s 306. A "*contract of carriage*" is defined by s 309(1) of the IR Act to mean, relevantly:

> "*contract of carriage" is a contract (whether written or oral or partly written and partly oral) for the* ***transportation of goods by means of a motor vehicle*** *or bicycle* ***in the course of a business of transporting goods of that kind by motor vehicle*** *or bicycle, but only--*
>
> *(a) where the carrier is not a partnership or body corporate--if no person except the carrier is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the carrier or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or*
>
> *(b) where the carrier is a partnership--if no person other than a partner is, except in the prescribed circumstances, employed (whether pursuant to a contract of employment or not and whether by the partnership or not) in driving or riding on that or any other motor vehicle or bicycle in the course of that business, or…*
>
> (c) *where the carrier is a body corporate….*[8] (emphasis added)

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[6] Division 9 of Part 2-2 of the FW Act provides for long service leave entitlements to a confined group of employees with award-derived long service leave terms or agreement-derived long service leave terms and does not otherwise create any entitlement to long service leave (s 113, s 113A FW Act).

[7] Introduced by the Industrial Arbitration (Amendment) Act 1979, No. 107 (**1979 IR Amendment Act**).

[8] The circumstances that are prescribed relevantly include situations where a 'relief driver' is engaged to temporarily take the place of the partner in the driving of the motor vehicle: Regulation 34(1)(a) of the *Industrial Relations (General) Regulation 2020*. Relief drivers are permitted for all categories of contract carriers specified in section 309 of the IR Act. This provision existed in predecessor regulations throughout the

27. Where a "*contract of carriage*" exists, numerous regulatory obligations arise with reciprocal impact upon the entitlements of contract carriers.

28. ***Fifth***, specifically, s 313 of the IR Act provides as follows:

> "*(1) The Commission may inquire into any matter arising under contracts of carriage and may make a contract determination with respect to remuneration of the carrier, and any condition, under such a contract.*
>
> *(2) In exercising its jurisdiction under this section, the Commission may—*
>
> *(a) include in the remuneration of persons affected by its determination such allowance **instead of annual or other holidays**, sick leave or **long service leave** as it thinks fit, or*
> *(b) otherwise make provision for all or any of those matters*."
>
> (emphasis added)

29. The effect of s 313 is to empower the Commission to set remuneration for contract carriers that provides for allowances to be paid instead of entitlements that are otherwise conferred by New South Wales laws, such as annual leave and long service leave under the AH and LSL Acts respectively.

30. ***Sixth***, in the present case a contract determination was made by the Commission and accordingly it is that determination that set the Drivers' remuneration which included long service leave and annual leave entitlements. Specifically, the *Transport Industry - General Carriers Contract Determination*[9] is a contract determination made by the Commission under s 313(1) of the IR Act (**Contract Determination**).

31. The Contract Determination applies to all contracts of carriage (aside from certain exclusions in cl 2 not presently relevant)[10]. The Contract Determination covers contracts of carriage undertaken within specified geographical limits within NSW.[11]

32. This Contract Determination was first made in 1984 by consent (**Original Determination**).[12] The Original Determination included an agreed rate model, identifying the components of the relevant minimum rates required to be paid to Contract Carriers under the Determination[13].

33. The Contract Determination includes rates schedules outlining the required minimum payments to be made to Contract Carriers under its terms. For the period 31 May 1984 until 29 April 2016, Schedule 1 of the 2016 Determination (as successively updated over time to reflect increases in rates and changes to Schedule numbering) specifically outlined at Schedule 1 (items (c) and (d) respectively) that:

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relevant period. Thus, a sole trader or partner engaged in a contract of carriage will not be excluded from Chapter 6 merely because the partner has utilised the services of relief drivers.

[9] Which is an industrial instrument: IR Act, s8.

[10] Transport Industry - General Carriers Contract Determination 2017, cl 2.1

[11] Transport Industry - General Carriers Contract Determination 2017 cl 19.

[12] See *Transport Industry – General Carriers Contract Determination* [1984] 235 IG 1611

[13] This rate model was adapted from the Exhibit in the original 1984 proceeding, which is located at Exhibit LI-4 of the Izzo Affidavit.

"*It is expressly noted that the rates of remuneration in Schedules 1 and 1A* ***have accounted, and include payment, for the following factors****:…*

***(c) Annual Leave.***

***(d) Long Service Leave…."***(emphasis added)

34. Following 29 April 2016 to date, the Contract Determination included at Schedule A (items (c) and (d) respectively):

"*It is expressly noted that the rates of remuneration in Schedules A and D have taken into account, and include payment, for the following factors:*

*…Annual Leave….*

*Long Service Leave*".

35. In this regard, the Commission in making the Contract Determination exercised its power in s 313(2)(b) by determining the remuneration of a carrier by otherwise making provision for paid annual leave and long service leave. The effect of the schedules in the Contract Determination is that the Drivers were not entitled to long service leave (at all relevant times).

36. Thus, in the light of the foregoing the Full Court's focus on the Drivers being identified as "*workers*" for the purposes of the LSL Act, failed to take into account that provisions of ss 309 and 313 of the IR Act and the Contract Determinations made by the Commission in the exercise of its powers under s 313 , which supersede the long service leave entitlements under the LSL Act.

37. ***Seventh***, to the extent that there is overlap regarding the subject matter contained in the LSL Act and the IR Act, given that they have been enacted by the same legislature, the general rule is that they are to be construed so far as possible to operate as a coherent and harmonious scheme.[14] This principle of harmonious construction applies to the "*construction of provisions within different statutes of the same legislature to create* '*a very strong presumption that the ... legislature did not intend to contradict itself, but intended that both ... should operate*'"[15]. This is reinforced by s 6 of the LSL Act.

38. On this analysis, even if this Court found the Court below to be correct that the Drivers were employees and thus "*workers*" under the LSL Act, this could not affect their long service leave entitlements. These entitlements are created by NSW Parliament and that Parliament has decided to regulate those entitlements in a different way in respect of workers who fall within a particular class – specifically, contract carriers - irrespective of whether they are employees at common law or not.

**Annual Leave**

39. ***First***, the entitlement to annual leave is also entirely a creature of statute.

40. Traditionally, annual leave entitlements were governed by State law. Relevantly, in NSW, annual leave entitlements were governed by the AH Act.

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[14] *Commissioner of Police v Eaton* (2013) 252 CLR 1 at [30], [78], [98]
[15] Ibid at [98] (omitting footnote).

41. ***Second***, prior to 27 March 2006, there was no federal statute providing for an entitlement to annual leave. On 27 March 2006, the *Workplace Relations Act 1996* (Cth) (**WR Act**) was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which enacted a legislative minimum of annual leave for employees.

42. ***Third***, importantly, as a new Federally legislated standard was enacted to commence on and from 27 March 2006, the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) preserved the accrual of paid annual leave prior to that time.

43. Relevantly, in respect of employees in NSW, the transitional arrangements introduced in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) preserved the entitlements under the AH Act before 27 March 2006. The legislative history relating to the accrual of paid annual leave under the AH Act is outlined in Annexure A.

44. The analysis in Annexure A demonstrates that any entitlement the Drivers have to paid annual leave between the period from 1993 to 2006 is derived from the AH Act. That is, absent an entitlement to paid annual leave under the AH Act, the FW Act does ***not*** provide for paid annual leave to be calculated by reference to service prior to 2006.

45. ***Fourth***, it follows that the entitlements of employees to annual leave prior to 27 March 2006 and the treatment of their accrued entitlements up until that point in time, was, and is, sourced from the AH Act.

46. This raises the question as to whether there was any such entitlement that the Drivers had to annual leave prior to 27 March 2006.

47. Section 3(1) of the AH Act relevantly provides that "*every worker shall at the end of each year of the worker's employment by an employer become entitled to an annual holiday on ordinary pay".* By s 2(1) a "*worker*" means:

> "*person employed, whether on salary or wages or piecework rates, or as a member of a butty-gang, and the fact that a person is working under a contract for labour only, or substantially for labour only, or as lessee of any tools or other implements of production, or as an outworker, or is working as a salesperson, canvasser, collector, commercial traveller, insurance agent, or in any other capacity in which the person is paid wholly or partly by commission, shall not in itself prevent such person being held to be a worker*."

48. However, s 5(1A) of the AH Act provides that where provision is made under the IR Act for annual holidays, ss 3 and s 4 of the AH Act (which confer the substantive entitlement to annual leave), do not apply.

49. ***Fifth***, as with the analysis in respect of long service leave noted above, the Commission in making the Contract Determination exercised its power in s 313(2)(b) by determining the remuneration of a carrier by otherwise making provision for paid annual leave. The effect of the Schedules in the Contract Determination is that the Drivers were not entitled to annual leave under the AH Act between 1986 (when they commenced) and 2006 because pursuant to s 313 of the IR Act, the Commission had made a determination that the remuneration to be paid to the carriers also provided for annual leave.

50. ***Sixth***, the absence of any entitlement to ***paid*** annual leave is confirmed by clause 10 of the Determination relating to the specific entitlement to ***unpaid*** annual leave in the following form:

> "*Annual Leave*
>
> *A contract Carrier who regularly performs contracts of carriage for a Principal Contractor shall be entitled to four weeks' annual leave without payment* ***(such payment being provided for in the schedules of rates of remuneration attached hereto)*** *which shall fall due each year on the anniversary of the beginning of the first contract of carriage entered into by the Contract Carrier with the Principal Contractor before or after the date of commencement of this determination. Such leave shall be taken by the Contract Carrier within 6 months of the leave falling due (or within such extended time as the Contract Carriers and the Principal Contractor and if the leave is not taken within the time provided for in the clause, the entitlement to leave shall lapse*."[16] (emphasis added)

51. The effect of the substantive and express provisions of the Contract Determination demonstrates that the Drivers' entitlement to annual leave in fact arose under the terms of the Determination as reinforced by s 5(1A) of the AH Act.

52. ***Seventh***, thus, in the light of the foregoing, the Full Court's finding that the Drivers were employees such that they were entitled to annual leave under the FW Act including for the whole of the period between 1993 and 2006 (relevantly with respect to annual leave entitlements under s 87(1) of the FW Act) also failed to take into account the provisions outlined in Annexure A to these submissions, the provisions of ss 309 and 313 of the IR Act and the Contract Determinations made by the Commission in the exercise of its powers under s 313(1), which supersede the annual leave entitlements under the AH Act.

53. On this analysis, even if this Court found the Court below to be correct that the Drivers were employees for the purposes of the FW Act, their annual leave entitlements under that FW Act would only be for the period between 27 March 2006 to 2015.

## Application of the Contract Determination to the Present Proceedings

*The Drivers were performing contracts of carriage regulated by Chapter 6*

54. Returning to s 309 of the IR Act, the definition of contracts of carriage focuses on any contractual engagement that features:

(a) the transportation of goods under a contract by motor vehicle;
(b) the transportation being conducted in the course of a business of transporting goods of that kind by motor vehicle; and
(c) in the case of either a sole trader carrier or partnership[17], no one must be engaged in the driving of a vehicle in the course of the business except that sole trader carrier or partner.

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[16] Clause 3 of the *Transport Industry – General Carriers Contract Determination* 1984 which is identical terms in clause 10 of the 2016 Determination and the 2017 Determination.
[17] Putting aside relief drivers by reason of the matters described in footnote 8 above.

55. Provided these three threshold requirements are met, then individual carriers and partnerships will be engaged in contracts of carriage.

56. In this case, it is uncontroversial that the Drivers were:

(a) transporting goods;

(b) transporting transporting such goods under a contract for the transportation of goods by way of a motor vehicle;[18] and

(c) operating in a partnership where no person other than a partner was performing the driving of the motor vehicle or (in the case of Mr Whitby from 1 July 2012 who operated as a sole trader[19]) as an individual carrier.

57. Accordingly, the only matter that remains to be determined in order to ascertain whether the contracts come within the meaning of the term "*contracts of carriage*" in s 306 of the IR Act is to understand whether the contract for the transportation of such goods was conducted in "*the course of a business transporting goods of that kind by motor vehicle*".

58. In this regard, the Drivers both established partnerships through which their services were provided and business affairs conducted. Specifically:

(a) the partnerships purchased assets, claimed deductions and made decisions about expenditure affecting profitability;[20]

(b) the partnerships took on all costs associated with their transportation services, including finance of the vehicles, fuel, maintenance and insurance;[21] and

(c) conducted their taxation affairs in "a business-like manner".[22]

59. The vehicles that were used to perform the services were purchased by the partnerships.

60. The Drivers were remunerated through the partnership with income being split with their respective wife partners. The income generated was declared as income being generated by the partnership.[23]

61. The Appellant's Submissions cite that, in cross-examination, each Driver agreed that his respective partnership was conducting a business.[24]

62. From 1 July 2012 until the cessation of his engagement, Mr Whitby operated as a sole trader.[25] Whilst a sole trader, Mr Whitby owned and provided vehicles for the provision of the services.[26]

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[18] Details of the contractual arrangement are identified at paragraph 14 – 40 of the Appellants Submissions).
[19] AJ [188].
[20] AJ [189]-[190], PJPJ at [32].
[21] AJ at [46].
[22] AJ at [189].
[23] PJPJ at [30].
[24] Appellant's submissions at [37].
[25] PJ at [135].
[26] PJ at [156].

63. The manner in which the vehicles were operated and maintained and the features of the relationship between the respective parties appear to have been treated by the trial judge as the same with respect to the period when Whitby's partnership operated compared to the period when Mr Whitby operated as a sole trader.[27]

64. Having regard to these matters, the transportation of goods by the Drivers for the appellants plainly appears to have been conducted in the course of a business transporting goods of that kind by motor vehicle – namely, the transportation was conducted in the business of each of the respective partnerships.

65. For these reasons, the Drivers were engaged in contracts of carriage within the meaning of s 306 of the IR Act. The Drivers were performing contracts of carriage regulated by Chapter 6 of the IR Act.

66. Those contracts of carriage fell within the geographical coverage of the Determination given that the Drivers were working out of a Warehouse in Wetherill Park[28] which is within the County of Cumberland. Moreover, they were delivering products either in the east Sydney metropolitan area (in the case of Whitby)[29] or the north west of the Sydney metropolitan area (in the case of Jamsek)[30]. It is possible some individual journeys were not covered by the Determination, namely those to Newcastle, Canberra or Wollongong,[31] however it is evident from the PJ that such journeys were not frequently undertaken.

67. The Drivers, who transported lighting goods in the course of undertaking the relevant contracts of carriage, were at no stage specifically excluded from coverage of the Determination by clause 2 of the Determination. In that they were not subject to any of these exclusions, the Drivers were 'general carriers' as that term is understood in the transport industry.

68. Accordingly, from the commencement of the Determination on 31 May 1984 until the cessation of their engagements, the Drivers were covered by the Determination.

69. It follows that the Drivers' entitlements to long service leave for the whole of the relevant period (1993 to 2015) was regulated by the Determination.

70. It further follows that the Drivers entitlements for annual leave was regulated by the Determination between 1993 and 2006 (since as explained above the Drivers' annual leave between the period from 1993 to 2006 was governed by the AH Act and the IR Act, and the operation of the transitional provisions to the FW Act (as set out in Annexure A of these provisions) preserved the accrual of annual leave under the AH Act before 27 March 2006)).

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[27] By way of example, see PJ at [148], [166] - [167], [194]-[195].
[28] PJ at [54]- [56].
[29] PJ at [55].
[30] PJ at [56].
[31] PJ at [55], PJ at [56].

**Coherence between the common law and NSW Statutes**

71. This Court has acknowledged the importance of coherence within the common law, and as between the common law and statute law[32].

72. In the present case, the question of whether the Drivers were employees at common law presents a question about the coherence of the common law if they are found to be employees as that conclusion will intersect (in a contradictory way) with the NSW legislative scheme under the IR Act.

73. Under the IR Act, NSW Parliament created the statutory concept of contract for a carrier rather than rely on the common law concept of employee as the criterion by which provision for annual leave and long service leave (relevantly) may be made.

74. An answer in the affirmative to the question of whether the Drivers are employees at common law would give rise to an entitlement to, and an ability to recover for, long service leave and annual leave in a way that is inconsistent with the express regulatory regime identified above.

75. More broadly, the conclusion that the Drivers were employees at common law, would give rise to entitlements under Federal law which the legislative scheme under the IR Act by reason on the Determination, does not allow for.

76. In truth, the IR Act and the Contract Determination resolve the question of the entitlements of the Drivers including whether the Drivers were entitled to long service leave and annual leave. Thus, in the present case to find the Drivers were employees at common law would give rise to entitlements entirely inconsistent with the way the IR Act and the Contract Determination has provided for the Drivers remuneration including making provision for long service leave and annual leave.

77. Business NSW submits that an affirmative answer to the question of whether the Drivers were employees at common law should not be preferred as it would be inconsistent with the IR Act and Determination and would therefore serve to introduce incoherence in the law.

78. An examination of the Contract Determination and others made by the Commission pursuant to the IR Act reinforce the conclusion that the Drivers were, and should be seen as, operating independent businesses in their own right and that NSW Parliament treated them as such for the purposes of a range of entitlements which were left unexamined by the Courts below.

79. Specifically, in addition to the issues of long service leave and annual leave, the Contract Determination:

    (a) required the Drivers, as contract carriers, to supply their vehicles, register them, maintain and repair them, and pay for all running expenses: (see clause 5);

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[32] For example: *Sullivan v Moody* (2001) 207 CLR 562 (***Sullivan***) at [50] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; *Miller v Miller* (2011) 242 CLR 446 at [15]–[16], [93]–[94], [101]–[102] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at [34], [45] per French CJ. Crennan and Kiefel JJ; *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* (2013) 253 CLR 284 at [44], [50] per French CJ.

(b) required the Drivers to comply with the provisions of all employment laws including as to workers' compensation, superannuation, long service leave and annual leave: (see clause 11.2);

(c) required the Drivers to be responsible for all applicable insurances: (see clause 14); and

(d) made provision for a comprehensive set of rates of pay and allowances which were specifically expressed to be inclusive of compensation for not just leave entitlements, but a range of running costs, insurances and capital.

80. In addition, a separate determination, the *Transport Industry – Redundancy (State) Contract Determination*, made provision for redundancy entitlements in the event of redundancy.

81. The Drivers were a class of worker who were clearly operating their own businesses in the manner contemplated by the regulatory regime that applied to them. To approach the question as to whether the Drivers were employees at common law without any regard to the comprehensive regulatory regime that applied to them as a class of worker is to examine the common law question without any regard to the need for coherence in the law.

**Full Court's Errors**

82. To the extent that the findings in the Court below concluding that the Drivers were "*workers*" for the purposes of the LSL Act and concluding that annual leave entitlements arose for the whole of the relevant period under the FW Act (as opposed to only after 2006) by reason of the Drivers being employees at common law, the Full Court failed to take into account that provisions of ss 309 and 313 of the IR Act and the relevant Contract Determination made by the Commission in the exercise of its powers under s 313(1), which effectively superseded the long service leave and annual leave entitlements under the LSL Act and AH Act respectively.

83. Such entitlements flowed from the Contract Determination which in turn depended on the application of the statutory concept of "*contracts of carriage*" which did not depend upon the common law concept of employee or employment. Rather, what was required was an analysis of the scheme for remuneration that flowed from the contract determinations made under the IR Act.

84. The effect of the Contract Determination made by the Commission under s 313(1) of the IR Act in this case is that the Drivers were not entitled to long service leave and annual leave (for the whole of the period claimed, or at all) because pursuant to s 313(1) of the IR Act, the Commission had made a determination that remuneration was to be paid which included sufficient compensation instead of long service leave and paid annual leave entitlements.

85. The Full Court's finding that the Drivers fell within the meaning of "*worker*" under the LSL Act and "*employee*" within the meaning of the FW Act was not dispositive of the question of whether the Drivers were entitled to long service leave or annual leave in the period between 1993 and 2006 (or at all). Rather, the question of whether the Drivers were entitled to long service leave and annual leave in the period between 1993 and 2006 (or at all) in truth turns on an analysis of the relevant Contract Determination made under s 313(1) of the IR Act.

86. A further error consequent upon the Full Court's failure to have regard to the inter-relationship of the LSL Act, the AH Act and the IR Act is that in applying the common law test to the determination of whether the Drivers were employees for the purposes of the FW Act, it failed to have regard to the specific regulatory regime introduced by the IR Act to regulate the engagement of owner drivers, including as to their remuneration and leave entitlements.

87. In this regard, to be clear, Business NSW supports the contentions advanced by the Appellant as to the dichotomy between being an employee and working in one's own business (AJ [6]-[8], [181]). However, Business NSW in addition submits that the specific regulatory regime introduced by the IR Act weighed strongly against concluding that the Drivers were employees having regard to the principle of coherence to preserve the consistency of the common law with other statutory schemes, which govern the relationship between those as between the Drivers and the appellants in this case.[33] Accordingly, Business NSW submits that the application of the principle of coherence should have produced the result that the Drivers were not employees at common law.

**PART V: ESTIMATED TIME FOR ARGUMENT**

88. Business NSW estimates that it will require 30 minutes to present its oral argument.

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[33] *Sullivan* at [50], [53]-[55] per per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ.

## ANNEXURE A

**History of provisions concerning annual leave entitlements accrued to employees in NSW between 1993 and 2006 under the AH Act and preserved under the WR Act**

1. On 27 March 2006, the *Workplace Relations Act 1996* (Cth) (**WR Act**) was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). As part of these amendments, the Australian Fair Pay and Conditions Standard came into force, prescribing minimum annual leave entitlements in relation to employees of a national system employer.

2. Clause 34 of Schedule 8 to the WR Act preserved the AH Act as a "notional agreement preserving state award" (**Annual Holidays NAPSA**).

3. Clause 46 of Schedule 8 to the WR Act had the effect that, from 27 March 2006, an entitlement to annual leave under a notional agreement preserving state award (such as the Annual Holidays NAPSA) was preserved.

4. On 25 June 2009, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (**FW Transitional Act**) came into effect.

5. On 1 July 2009, the FW Act came into operation. The FW Act included the National Employment Standards (**NES**), which contain the present paid annual leave provisions which are subject of the AJ and PJ.

6. Item 2 of Schedule 3 of the FW Transitional Act preserved notional agreements preserving state awards as "transitional instruments". This included the preservation of the Annual Holidays NAPSA as a transitional instrument.

7. Item 6 of Schedule 4 to the FW Transitional Act provided that entitlements to accrued annual leave under the WR Act and transitional instruments (such as the Annual Holidays NAPSA) that accrued before the commencement of the NES would be subject to the provisions of the NES relating to that kind of leave.

8. Absent an entitlement to annual leave accruing before the commencement of the NES, under the WR Act or a previous transitional instrument, item 5(1) of Schedule 4 to the FW Transitional Act provides that service prior to the FW Act's commencement is ***not*** recognised for the purposes of determining annual leave accruals under the FW Act.

9. Accordingly, whilst employees are now entitled to leave under the FW Act for service before the introduction of the FW Act, that entitlement only arises where it ***had accrued*** under a transitional instrument or the WR Act.

10. In the present case, even if the Drivers are employees at common law, any service prior to 2006 does not give rise to an entitlement to annual leave under the FW Transitional Act or FW Act as no transitional instrument provided such annual leave prior to 2006. Rather, the Drivers' entitlements to annual leave accrued under the *Transport Industry - General Carriers Contract Determination*, which is a Contract Determination made by the Industrial Relations Commission of New South Wales under Part 2 of Chapter 6 of the IR Act and which is not a transitional instrument referenced in the FW Transitional Act.

**ANNEXURE B**

**List of the particular constitutional provisions, statutes and statutory instruments referred to in the submissions**

**Provided in Accordance with Practice Direction No 1 of 2019**

| Legislation | Version |
|---|---|
| *Annual Holidays Act 1944* (NSW) | as in force on and from 24 November 2005 |
| *Fair Work Act 2009* (Cth) | as in force on and from 17 November 2016 |
| *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* | as in force on and from 2 July 2009 |
| *Industrial Relations Act 1996 (NSW* | as in force on and from 8 December 2016 |
| *Long Service Leave Act 1955* (NSW) | as in force on and from 8 December 2016 |
| *Workplace Relations Act 1996* (Cth) | as in force on and from 27 March 2006 |
| *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) | as assented to on 14 December 2005 |
| **Statutory Instruments** | |
| *Transport Industry - General Carriers Contract Determination 1984* | as in force from 31 May 1984<br>NSW Industrial Gazette Vol 35, pg 1611 |
| *Transport Industry - General Carriers Interim Contract Determination* | as made on 29 April 2016, [2016] NSWIRComm 3 |
| *Transport Industry - General Carriers Contract Determination 2017* | as made on 15 March 2017, [2017] NSWIRComm 1013 |
| *Transport Industry (State) Redundancy Contract Determination* | as made on 28 September 2007<br>NSW Industrial Gazette vol, 363, pg 853 |