HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S27/2021

BETWEEN: **ZG OPERATIONS AUSTRALIA PTY LTD & ANOR**
Appellants

MARTIN JAMSEK & ORS
Respondents

Appellants' Reply

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Part I: Publication on the internet

1. This reply is in a form suitable for publication on the internet.

Part II: Concise reply to the Respondents' argument

No Dichotomy Proposition

2. *First*, the bulk of the Respondents' arguments on the No Dichotomy Proposition appears to be based on a misunderstanding of ZG's position. The Respondents seem to attribute to ZG a contention that having "a business of any kind" disqualifies a person from being an employee in another business. They disagree with this, pointing out that a person who runs their own business may also be performing *work that falls outside of their business* as an employee of some other business.[1] Thus, they submit that:

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> The point of difference between the parties is the respondents' contention that while a person may have a business entity and conduct some business, this does not compel the conclusion that, in reality, the relevant work they are performing is in that business.[2]

3. With respect, the Respondents are attacking a straw person. ZG's submission expressly recognises the obvious point that "just because a person has a business and works in that business does not mean that they cannot also perform *some other work* as an employee in another business".[3] The dichotomy that ZG posits is that a person cannot "be performing *the same item of work* as a representative of their own business and at the same time also as an employee in another person's business".[4] It is not entirely clear whether the Respondents dispute *that* dichotomy.

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[1] Respondents' Submissions (**RS**) [26], [27(b)], [27(c)], [30]–[31], [33]–[35].

[2] RS [33].

[3] Appellants' Submission (**AS**) fn 55 (emphasis added).

[4] AS [45] (emphasis added, footnote omitted).

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4. *Secondly* and relatedly, the Respondents seem to submit that the delivery work performed by the Drivers fell outside of their Partnerships' businesses:

> the partnership business was the ownership of the trucks (as the wives could rationally be partners in that activity) and the labour undertaken by [the Drivers] was serving the business of [ZG]. The fact that the income from that work was accounted for to the partnership does not, as a matter of principle, change that analysis.[5]

5. This submission should be rejected. This is a new argument that was not raised at trial or before the Full Court. But even if the Respondents were to be permitted to raise it for the first time now,[6] the argument is simply not available on the facts. A business is an
10 enterprise carried on for the purpose of making a profit. Hence, "ownership of the trucks" is not in itself a business — it must be coupled with some source of revenue to be derived from that ownership. Here, the Partnerships' source of revenue was the fees they charged for providing delivery services to the Company.[7] These fees were not merely "accounted for to the partnership" — they were paid on invoices rendered by the Partnerships pursuant to contracts under which the Partnerships contracted to provide delivery services to the Company. Further, the Partnerships treated this revenue as partnership income and they tax-deducted not just the *ownership costs* of the trucks but their *running costs* (such as fuel), which were costs incurred in providing the delivery services.[8]

6. Unsurprisingly, Mr Whitby readily accepted in cross-examination that the profitability of
20 his Partnership's business depended on the rates it charged for delivery services.[9] And that is because the delivery services obviously formed part of the Partnerships' business.

7. *Thirdly*, the Respondents submit that "*the bicycle couriers in [Vabu] also had their own businesses to some extent* as they could contract with Vabu Pty Ltd through partnerships and companies and that did not prevent the High Court's conclusion that they were employees".[10] The italicised proposition is incorrect. The joint judgment in *Vabu* expressly held that "the bicycle couriers could not be said to have been conducting any business of their own".[11]

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5 RS [30].

6 Cf, eg, *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 [51].

7 AJ [110] (CAB 97–8), [119] (CAB 99), [233] (CAB 133).

8 AJ [35]–[36] (CAB 82), [110]–[124] (CAB 97–100).

9 Trial Transcript 35 (lines 19–30) (Appellants' Book of Further Materials 4).

10 RS [27(a)] (emphasis added).

11 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [58]; see also [47]. There is also no suggestion in the report of the decision that any of the couriers did in fact use a partnership or a corporate entity.

8. *Fourthly*, the Respondents submit that the dichotomy posited by ZG would mean that "employees who erroneously understood themselves to be contractors and who had set up companies and partnerships would always be excluded because they have established a business entity and made various arrangements on that basis".[12]

9. This submission should be rejected. ZG is not seeking to displace the multifactorial test. The totality of the relationship between the parties needs to be examined to determine whether a person is performing work as an employee or in their own business (and therefore, on ZG's dichotomy, as a contractor).[13] Hence, ZG's submissions on the facts do not rely on the existence of the partnership structure as determinative in itself but
10 examine the totality of the relationship between the parties.[14]

10. *Fifthly*, the Respondents contend that the dichotomy posited by ZG is "employer friendly".[15] This submission should be rejected. The neutrality of the dichotomy is aptly illustrated by the fact that, in the *CFMMEU v Personnel Contracting Pty Ltd* appeal, the same dichotomy is posited by the union and is resisted by the putative employer.

Factual matters

11. The Respondents dispute several factual propositions set out in ZG's submission.[16] In some instances, the Respondents' version of the facts is not actually inconsistent with ZG's, rather the Respondents have simply misunderstood or mischaracterised ZG's position.[17] ZG also notes that while its submission relied on the findings of fact made in
20 the judgments below, supplemented by only three pages of transcript, the Respondents have sought to put before this Court three folders — over 400 pages — of additional materials, including the entire Part C of the Appeal Book that was before the Full Court.

12. Beyond these general observations, it is unnecessary to specifically rebut each of the Respondents' factual complaints. ZG simply stands by the description of the facts in its submission and relies on the footnotes therein. There are, however, two factual complaints raised by the Respondents that warrant a specific rebuttal.

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12 RS [34] (citations omitted).

13 AS [41], [47]–[49].

14 AS [52]–[68].

15 RS [35].

16 RS [4]–[10].

17 Eg compare RS [7] and Appellants' Chronology (entry for 2010); RS [8] and AS fn 1; RS [9] and AS [29]-[30].

13. *First*, the Respondents submit that:

> The "Whitby Partnership" did not add a second vehicle to its "fleet". Rather, as recorded by the primary judge, Mr Whitby purchased a utility vehicle "initially for private use, but which was later used for making deliveries". Mr Whitby could not recall if the partnership had initially purchased the ute as he was separated from his wife at that time and in the process of dissolving the partnership.[18]

14. It is correct that — as ZG's chronology acknowledges — the ute was *initially* purchased for private use. But before the Whitby Partnership was dissolved, Mr Whitby started using the ute to perform deliveries that the Partnership was engaged to perform, and the
10 Partnership listed the ute as a partnership asset in its accounts.[19]

15. *Secondly*, the Respondents submit that:

> It is not correct to imply that [ZG's] control over [the Drivers'] day-to-day work was "quite limited". Rather, the Full Court's finding (not challenged on this appeal) was that the control exercised by [ZG] over [them] was important and to similar [sic] that in [*Vabu*]. In addition, the unchallenged evidence was that [the Drivers'] freedom to make discretionary decisions about matters such as the order in which they made the deliveries, remained the same as it had been when [they] were employees".[20]

16. ZG's contention that "the Company's control over the way in which the Partnerships provided services to the Company was quite limited" is not a free-standing factual
20 assertion but a *submission* about the proper *overall characterisation* of a series of underlying factual findings about the Company's control over specific aspects of the Drivers' activities. These findings are set out in ZG's submission. Most of them concern matters that on any view post-date the transition to an alleged contractor relationship.[21]

Notice of Contention

17. The Respondents' submissions on the Notice of Contention raise large questions about the construction of s 12(3) of the *Superannuation Guarantee (Administration) Act 1992*:

    a. The Respondents submit that the words "person works under a contract" in s 12(3) do "not require the contract to be with [sic] made with the [person]".[22]

    b. The Respondents' analysis of the facts seems to assume that the question whether a
30 contract with a service provider is "wholly or principally for the labour of the person"

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[18] RS [6] (citations omitted).

[19] See Appellants' Supplementary Book of Further Materials, 9.

[20] RS [10] (citations omitted). As to the second proposition, see also RS [42].

[21] For example, the matters at AS [59(a)] and [59(c)].

[22] RS [57].

is to be answered by asking either whether the amount that the client would pay an employee to perform the labour component of the service is more than 50% of the service provider's fee, or alternatively by asking whether the service provider's expenses make up less than 50% of their revenue.[23]

18. The acceptance of these propositions would have profound implications. For example, almost any unincorporated service provider — such as a plumber, surveyor, accounting firm, doctor or barrister — would likely be captured by s 12(3).

19. This case is an utterly inappropriate vehicle to determine these questions given that (a) the Commissioner is not a party; (b) the private parties have no interest in these questions beyond their application to a very narrow and peculiar factual scenario of this case; and (c) the Full Court below did not deal with these questions.

20. But the Court can dispose of the Notice of Contention on the facts without making any general pronouncements about s 12(3). Relevantly, (a) the Contract was with the Partnerships and not the Drivers individually;[24] (b) the Partnerships were able to delegate the work to a substitute driver with the agreement of the Company; (c) what the Company received under the Contract was not labour but a delivery service, fully insured and requiring the use of a substantial capital asset (the trucks); (d) the Partnerships carried all the risks associated with the trucks; and (e) the Drivers did not lead evidence as to the market cost of hiring similar trucks on similarly favourable terms (ie that the owner would be responsible for all the risks and running costs of the trucks). Whatever the general principles are, *on these facts*, the Court can safely conclude that the Drivers failed to prove that they were working under a contract that was wholly or principally for their labour.

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[23] RS [62]. A similar submission was rejected by the primary judge: TJ [220] (CAB 52–3). See also *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419, 425–6.

[24] Note that s 72(1) provides that the "Act applies as if a partnership were a legal person".

Annexure — Relevant Statutory Provisions

1. *Superannuation Guarantee (Administration) Act 1992* (Cth):

    a. Compilation No 66, dated 1 January 2017 and all previous compilations.

    b. Sections 12 and 72.