

SHORT PARTICULARS OF CASES
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SEPTEMBER 2021

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CONSTRUCTION, FORESTRY, MARITIME, MINING AND ENERGY UNION & ANOR v PERSONNEL CONTRACTING PTY LTD (P5/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 122

Date of judgment: 17 July 2020

Special leave granted: 12 February 2021

In July 2016, the second appellant, a backpacker, signed an Administrative Services Agreement ('the ASA') with the respondent. He was offered work at the Concerto site of Hanssen, a builder of high-rise residential apartments. The second appellant accepted the offer. Thus, he entered into a tripartite or triangular labour hire relationship.

On 20 September 2018, the appellants made an application under the *Fair Work Act 2009* (Cth) (the Act) to the Federal Court of Australia. They contended that the respondent contravened various National Employment Standards and s 45 of the Act by not paying the second appellant in accordance with the *Building and Construction General On-Site Award 2010*. The National Standards and award only apply if the second appellant was an 'employee' as defined in s 15 of the Act. On 6 November 2019, O'Callaghan J found that the second appellant was not an employee and dismissed the application.

The appellants appealed to the Full Court of the Federal Court of Australia. On 17 July 2020, the Full Court found that the second appellant was not an employee and dismissed the appeal. However, Allsop CJ and Lee J, in separate reasons, each noted that, if they were not bound by previous authority, including *Personnel Contracting Pty Ltd T/As Tricord Personnel v CFMEU* [2004] WASCA 312, they may have found that the second appellant was an employee. Jagot J agreed with the reasons of Allsop CJ and the reasons of Lee J.

Special leave to appeal was granted on 12 February 2021. The appellants filed a notice of appeal on 25 February 2021 and the respondent filed a notice of contention on 5 March 2021.

The grounds of appeal are that the Full Court erred in:

- (a) Failing to hold that the second appellant was an employee by applying the wrong tests:
 - (i) concerning the assessment of control in a triangular labour hire arrangement;
 - (ii) concerning the role played by, and weight afforded to, the fact the second appellant was not in business on his own account;
 - (iii) concerning the significance afforded to the terms categorising the relationship as being not one of employment; and
 - (iv) concerning the casual status of the second appellant;
- (b) Holding that the decision of the majority of the Western Australian Industrial Appeal Court in *Personnel Contracting Pty Ltd T/As Tricord Personnel v The Construction, Forestry, Mining and Energy Union of Workers* [2004] WASCA 312 (*Personnel Contracting*) was not plainly wrong; and

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- (c) Holding that the decision in *Personnel Contracting* should be applied and failing to hold that it was distinguishable.

The grounds in the notice of contention are that:

- (a) The Full Court ought to have held having regard to the “totality of the relationship” that the second appellant was not an employee of the respondent;
- (b) The Full Court ought to have found that the respondent had neither a legal nor practical right of control over the second appellant, or, alternatively, had very little control over the second appellant in the performance of the work;
- (c) The Full Court was wrong to hold that the control indicium was not an essential factor nor particularly helpful in the characterisation of multilateral arrangements and that an absence of control by the labour hire agency may be neutral;
- (d) The Full Court ought to have found the second appellant was not the respondent’s representative standing in its place and was not integrated into its organisation and ought to have held that the lack of representation and integration contraindicated employment;
- (e) The Full Court ought to have found that the policy concerns and purposes underlying vicarious liability which, in addition to control and representation, included deterrence and enterprise risk contraindicated employment;
- (f) The Full Court ought to have held that the primary judge did not err as to the weight he gave to the fact that the second appellant did not operate a business on his own account;
- (g) The Full Court erred in its approach to the written terms; and
- (h) The decision of the Full Court may be supported on the further ground that, notwithstanding the intermediate appeal court decisions in *Odco* and *Personnel Contracting*, Parliament has not amended the statutory definition of “employee”, in the *Fair Work Act 2009* (Cth) or its predecessor and has instead enacted the *Independent Contractors Act 2006* (Cth) to provide remedies to independent contractors who consider their terms to be harsh or unfair.

ZG OPERATIONS AUSTRALIA PTY LTD & ANOR v JAMSEK & ORS
(S27/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 119

Date of judgment: 16 July 2020

Special leave granted: 12 February 2021

For nearly 40 years between 1977 and 2017, Mr Jamsek (the first respondent) and Mr Whitby (whose bankruptcy trustees are the second and third respondents) were delivery truck drivers for the appellants. Since 1986, they were not formally considered employees by the appellants and they entered into various contracts with them.

After their working relationship was terminated in 2017, the first respondent and Mr Whitby commenced proceedings in the Federal Court. The key question was whether they were “employees” within the meaning of the *Fair Work Act 2009* (Cth) or the *Superannuation Guarantee (Administration) Act 1992* (Cth), or “workers” within the meaning of the *Long Service Leave Act 1955* (NSW). On 30 November 2018, Thawley J held that they did not meet these statutory definitions and dismissed the application.

The respondents sought leave to appeal out of time to the Full Court of the Federal Court. The Full Court, giving separate reasons, found that Mr Jamsek and Mr Whitby were employees of the appellants, granted leave to appeal and allowed the appeal.

Special leave to appeal was granted on 12 February 2021. The appellants filed a notice of appeal on 26 February 2021 and the respondents filed a notice of contention on 17 March 2021.

The ground of appeal is:

- The Full Court erred by holding that the first respondent and Robert Whitby were employees of ZG.

The grounds in the notice of contention are:

- The Court below should have held in the alternative that section 12(3) the *Superannuation Guarantee (Administration) Act 1992* (Cth) (**SGA Act**) applied to Mr Jamsek and Mr Whitby;
- In particular, the Court below should have held that at all material times after 1985 Mr Jamsek and Mr Whitby worked under contracts (including contracts inferred by conduct) that were wholly or principally for their labour within the meaning of section 12(3) of the SGA Act and thus were “employees” for the purpose of that Act.

PARK v THE QUEEN (S61/2021)

Court appealed from: Supreme Court of New South Wales
(Court of Criminal Appeal)
[2020] NSWCCA 90

Date of judgment: 6 May 2020

Special leave granted: 16 April 2021

In April 2018 Mr Jong Han Park pleaded guilty to offences of intimidation intending to cause fear of physical harm, common assault, aggravated sexual assault with infliction of bodily harm, choking and rape. For his sentencing in the District Court of New South Wales, Mr Park elected to have further offences taken into account via the Form 1 procedure available under the *Crimes (Sentencing Procedure) Act 1999* (NSW) (“the CSPA”). Additionally, related offences of taking and driving a vehicle without the owner’s consent, one of which came to be designated “offence 6”, were transferred to the District Court under s 166 of the *Criminal Procedure Act 1986* (NSW) (“the CPA”). Such offences are indictable offences with a prescribed maximum penalty of imprisonment for 5 years but when dealt with summarily, as they were in Mr Park’s case, s 268(1A) of the CPA prescribes a maximum term of 2 years’ imprisonment (“the jurisdictional limit”).

The sentencing judge, Judge Bennett, imposed an aggregate sentence of imprisonment for 11 years with a non-parole period of 8 years. This was after applying a discount of 25 per cent in respect of each offence, on account of Mr Park’s early plea of guilty. For offence 6, an indicative sentence of 2 years’ imprisonment was given.

Mr Park appealed, on grounds which included that the aggregate sentence was manifestly excessive. One issue in the appeal was whether it was open to Judge Bennett to arrive at the jurisdictional limit for offence 6 after applying the discount to “the sentence that would have otherwise been imposed” (as his Honour stated), as that result necessarily implied a sentence starting point which was above the jurisdictional limit.

The Court of Criminal Appeal dismissed Mr Park’s appeal (Bathurst CJ and R A Hulme J; Fullerton J dissenting). The majority held that Judge Bennett had not erred in respect of offence 6. This was because a court, when imposing a lesser sentence “than it would otherwise have imposed” as prescribed in s 22(1) of the CSPA, was initially to disregard any jurisdictional limit and was to assess all relevant factors in view of the prescribed maximum penalty for the offence. If the resulting sentence, after any discount, would exceed the jurisdictional limit then the sentencing judge must impose a sentence within that limit.

Fullerton J however would have resentenced Mr Park to an aggregate sentence of 9 years with a non-parole period of 6 years and 7 months. Her Honour held that Judge Bennett had erred in respect of offence 6 by taking as a starting point a sentence which was above the jurisdictional limit before applying the discount. This was because s 22(1) of the CSPA obliged a sentencing court to apply a discount to a sentence which the court *would in fact have imposed* but for the plea of guilty, which in Mr Park’s case was a sentence no greater than 2 years’ imprisonment.

The ground of appeal is:

- The majority of the Court of Criminal Appeal erred in interpreting the phrase “than it would otherwise have imposed” in s 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

CHARISTEAS v CHARISTEAS & ORS (P6/2021)

Court appealed from: Family Court of Australia Full Court

Date of judgment: 10 July 2020

Special leave granted: 12 February 2021

In 2006, the appellant ('the Husband') brought proceedings in the Family Court of Western Australia to determine financial issues related to a trust. Those proceedings went through a series of trials, appeals and related applications.

On 14 June 2013, the first respondent ('the Wife') made an application under s 79A *Family Law Act 1975* (Cth) ('the Act') to set aside orders made on 9 December 2011 (those that remained after a prior appeal set some aside). This application was amended on 29 October 2013 to include a declaration that the remaining 9 December 2011 orders were not final or, in the alternative, that they did not exhaust the power under s 79 of the Act to alter property interests. On 10 February 2015, judgment was handed down in relation to the s 79 and s 79A issues. The judge ('the Trial Judge') determined that the substantive proceedings were still on foot, the Court's s 79 powers were not spent and, in addition, the Wife could rely on s 79A.

On 3 August 2016, a third trial commenced with final submissions heard on 13 September 2016. There was a further intervening appeal but judgment in the third trial was delivered by the Trial Judge on 12 February 2018. In delivering judgment, the Trial Judge varied or set aside the remaining 9 December 2011 orders.

On 12 March 2018, the Husband appealed the 12 February 2018 judgment to the Family Court of Australia Full Court. Subsequently, the Husband became aware that there may have been out of court contact between Counsel for the Wife ('Counsel') and the Trial Judge. Counsel confirmed in writing that there had been out of court contact between herself and the Trial Judge both prior to the trial and after judgment was reserved but before it was delivered. This contact included meeting for a coffee or drink, telephone calls and text exchanges. Counsel maintained that these communications did not concern the substance of the case. On 18 June 2018, the Husband amended his Notice of Appeal to include apprehended bias grounds.

The majority of the Full Court, Strickland and Ryan JJ ('the Majority'), dismissed the appeal. They held that the contact prior to the trial did not establish apprehended bias. The Majority found that the contact between the judgment being reserved and delivered met the first limb of the apprehended bias test. That is, it was private communication, without the previous knowledge and consent of the other parties, where there was the opportunity to make private representations to the judge. They found that the Trial Judge should have disclosed his relationship with Counsel before this contact occurred but that his failure to disclose was a mistake not a deliberate act.

The Majority held that Counsel had made no representation to the Trial Judge during the contact and there was no discussion of any matter which might potentially influence the decision. Ultimately, they found that, although the hypothetical observer would have reasonable grounds to be concerned about private

communication between the Trial Judge and Counsel after judgment was reserved, the total circumstances would be enough to dispel concern about bias.

In addition, the Majority found that the s 79 power had not previously been exhausted and the Trial Judge could exercise that power to vary and/or set aside the previous orders. They further held that the Wife could alternatively rely on s 79A of the Act. Further, they found that the Husband had waived his right to appeal against these findings when he did not seek leave to appeal the Trial Judge's 10 February 2015 decision.

Alstergren CJ, in dissent, held that there was a reasonable apprehension of bias on the part of the Trial Judge. He found that there was no timely disclosure of the contact between the Trial Judge and Counsel and when disclosure was made, it was not candid. Alstergren CJ found that such failure to disclose, of itself, can, and in this case, did, give rise to a reasonable apprehension of bias. He found that a reasonable fair-minded lay observer would reasonably apprehend that the Trial Judge might not be impartial and unprejudiced. He was satisfied that there was a logical connection between the contact at a time when the Trial Judge was considering the case and a belief in the mind of the reasonable observer that the Trial Judge may have considered extraneous information or that his decision may have been influenced by that contact. Alstergren CJ, having found that there was a reasonable apprehension of bias, did not consider the s 79 and s 79A issues.

The grounds of the appeal are:

- The majority of the Full Court of the Family Court of Australia (Strickland and Ryan JJ) erred in law in failing to conclude that the hypothetical observer would have had a reasonable apprehension of bias, which apprehension was not dispelled by the unsworn statement by then counsel for the first respondent;
- The majority of the Full Court of the Family Court (Strickland and Ryan JJ) erred in law in concluding that the primary court had power to vary and/or set aside the final orders which had been previously been made by Crisford J and remained undisturbed notwithstanding a successful earlier appeal to the Full Court in relation to which no remittal for further or re-hearing was sought or ordered, when it ought to have concluded that the orders of the primary judge were made in excess of jurisdiction;
- The majority of the Full Court of the Family Court (Strickland and Ryan JJ) erred in law in concluding that the primary court had power to vary and or set aside the final orders pursuant to section 79A(1)(b) of the *Family law Act 1975* (Cth) ('Act') in circumstances where no application had been made in reliance on that power; and
- The majority of the Full Court of the Family Court (Strickland and Ryan JJ) erred in law in concluding that the Husband had waived his right to appeal against an interlocutory ruling in 2015, unaccompanied by a relevant order, because the ruling 'finally concluded an important question of law' when it ought to have concluded that said ruling was not amenable to an appeal because it was not a decree within the meaning of the Act and, in any event, constituted an interlocutory ruling affecting the final outcome and as such was amenable to appeal when final orders were made in reliance on that ruling.

PORT OF NEWCASTLE OPERATIONS PTY LIMITED v GLENCORE COAL ASSETS AUSTRALIA PTY LTD & ORS (S33/2021)

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 145

Date of judgment: 24 August 2020

Special leave granted: 12 March 2021

In May 2014, as part of the privatisation of New South Wales State assets, Port of Newcastle Operations Pty Limited (“PNO”) acquired a long lease of the Port of Newcastle (“the Port”) and took over its operations. The Port is used for various activities including the shipment of Hunter Valley coal. Glencore Coal Assets Australia Pty Ltd (“Glencore”) is a coal producer and user of the Port. The Port is subject to an access regime contained in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (“the Act”). In June 2016 the Australian Competition Tribunal (“the Tribunal”) declared the access and use of shipping channels at the Port a declared service pursuant to s 44K of the Act (“the Service”).

In November 2016 Glencore notified the Australian Competition and Consumer Commission (“the ACCC”) of an access dispute between it and PNO pursuant to s 44S of the Act. It sought the Commission arbitrate the dispute concerning the quantum of a navigation service charge (“NSC”) levied by PNO pursuant to the *Ports and Maritime Administration Act 1995* (NSW) (“the PMA Act”) for the use of the Port and its infrastructure payable by the owner of the vessel at each entry.

On 18 September 2018 the ACCC determined the value of NSC payable and the circumstances in which the arbitrated charges could be levied. The scope of the determination was confined to circumstances where Glencore owned or chartered (directly or as agent) a vessel that entered the Port to load Glencore coal or where Glencore was the “owner of a vessel”, as defined in s 48(4) of the PMA Act, entering the Port to load Glencore coal. PNO and Glencore each applied to the Tribunal for a re-arbitration pursuant to s 44ZP of the Act.

On 30 October 2019 the Tribunal held that the scope of the ACCC’s determination should be confined to the terms and conditions of access where Glencore owns or, either directly or by agent, charters a vessel that enters the Port precinct and loads Glencore coal. It specified, amongst other things, that the ACCC’s determination did not apply to the terms and conditions of access in respect of vessels carrying Glencore coal that are not owned, or chartered by, Glencore. The Tribunal also determined that no deduction for historical capital contributions by users of the Port should have been made in calculating the cost of infrastructure used by PNO and increased the NSC payable by Glencore to PNO.

Glencore applied to the Federal Court for review of the Tribunal’s decision. In its application, Glencore challenged, amongst other things, the ACCC’s and Tribunal’s approach to the scope of the determination. It contended that the ACCC and Tribunal should have determined the NSC payable for all ships carrying coal from Glencore mines, regardless of whether Glencore owned or chartered the vessel. The majority of Glencore coal is sold and exported through the Port on a ‘free to board’ basis such that the customer arranges shipping of the coal, and Glencore does not pay the NSC. Glencore also contended that the Tribunal erred in its

approach to dealing with the value of contributions made in the past by Port users to the cost of infrastructure used by PNO in providing the Service.

The Full Court (Allsop CJ, Beach and Colvin JJ) unanimously allowed the application by Glencore, set aside the Tribunal's determination and ordered that the matter be remitted to the Tribunal for determination according to law. The Court held that Glencore was entitled to arbitrate and receive a determination in respect of any matter relating to access by it as a third party, including, relevantly, the terms of all ships carrying coal from Glencore mines, regardless of whether Glencore was responsible for, or involved in, shipping the coal. The Full Court found that the Tribunal had misconstrued the Service as access to and use of the shipping channels are not limited to, or governed by, the notion of physical access or use by the control and navigation of the vessel entering and leaving the Port to carry coal. Their Honours also held that the Tribunal was incorrect to include the amount of user contributions in the calculation of the NSC, and that such an approach was contrary to the correct construction of s 44X(1)(e) of the Act.

The grounds of appeal include:

- The Full Court erred in concluding that a person who has merely an economic interest in the terms to be imposed by a determination under Part 111A of the Act, or has merely caused a person to access a declared service, is a "third party" within the meaning of s 44B or can arbitrate the terms and conditions of another party who is physically accessing the service;
- The Full Court erred in concluding that a person who has access to one aspect of a declared service can arbitrate the terms and conditions applicable to somebody who has access to a different aspect of the declared service; and
- The Full Court erred in concluding that ss 44X(1)(e) or 44ZZCA of the Act requires a determination to take into account any user contributions to a facility.

ARSALAN v RIXON (S35/2021);
NGUYEN v CASSIM (S36/2021)

Court appealed from: Supreme Court of New South Wales
(Court of Appeal)
[2020] NSWCA 115

Date of judgment: 18 June 2020

Special leave granted: 12 March 2021

Mr Rixon and Mr Cassim each suffered damage to their motor vehicles in unrelated accidents occasioned by the negligent driving of Mr Arsalan and Mr Nguyen, respectively. Each hired replacement vehicles during the repair periods and commenced separate proceedings in the Local Court of New South Wales claiming damages from Messrs Arsalan and Nguyen for the costs incurred in hiring the replacement vehicles.

Mr Cassim was successful in his claim in the Local Court. Judgment was entered for an amount corresponding to the total amount he paid for the hire of a Nissan Infiniti Q50 for part of the repair period for his damaged BMW 535i sedan. Magistrate Farnan was satisfied that Mr Cassim was entitled to recover the market rate of hiring a vehicle of equivalent value to his damaged vehicle notwithstanding that his needs would have been met by hiring a car of lesser market value. Magistrate Keogh however awarded Mr Rixon damages in an amount significantly lower than the amount he paid for the hire of an Audi A3 during the period of repair for his damaged Audi A3. The magistrate held that the needs of Mr Rixon, as established by the evidence, could have been met by the hire of a Toyota Corolla at a cost reflected by the amount of the judgment. Mr Rixon and Mr Nguyen separately appealed to the Supreme Court of New South Wales.

The appeals were heard and determined concurrently in the Common Law Division. Justice Basten dismissed Mr Rixon's appeal and allowed Mr Nguyen's. His Honour held that the damages recoverable for the cost of hiring a non-profit earning replacement vehicle should be confined to the cost of a replacement vehicle that performs the same functions as the damaged vehicle so as to alleviate, as far as possible, the inconvenience resulting from the loss of use, rather than the cost of an equivalent vehicle in terms of value and prestige.

Appeals brought by Mr Rixon and Mr Cassim were allowed by the Court of Appeal (White JA and Emmett AJA; Meagher JA dissenting). The Court agreed that a claimant must first establish a need for a replacement vehicle during the period in which its vehicle is being repaired. Acting Justice Emmett considered that in determining "need" the applicable principle is to put the claimant in the position s/he would have been in but for the wrongdoing. His Honour considered that if the claimant has a need for the damaged vehicle, being an intention to use it had it not been damaged, then the replacement vehicle should be equivalent to the damaged one as far as reasonably possible. His Honour further held that the question of the reasonableness of the claimant's expenditure in hiring the replacement vehicle is first to be determined by establishing whether an equivalent vehicle is available in terms of make, model and year, or if none is available then as close to equivalent as possible. Secondly, determining whether the claimant's cost of hiring is reasonable in all the circumstances.

Justice White, who generally agreed with the reasons of Acting Justice Emmett, considered that it is not only the inconvenience caused by the temporary loss of the use of the damaged vehicle that is compensable but also the feelings associated with using a prestige vehicle. His Honour considered that if a claimant establishes a reasonable need to hire a replacement vehicle then it can be inferred that the claimant will have a reasonable need for a vehicle that is equivalent to the damaged one.

Justice Meagher would have dismissed each of the appeals. His Honour agreed with the primary judge, Justice Basten, that the damages recoverable should be confined to those that are reasonably necessary to make good the compensable loss, being the inconvenience of being unable to use the damaged vehicle. The principle is only engaged with respect to the use to which the damaged vehicle was capable of being, and likely to have been, put during the period of its repair, and therefore satisfied by the hire of a vehicle sufficiently comparable in terms of functionality and specifications to satisfy such uses.

The first ground of appeal in both matters is:

- The Court of Appeal erred in holding that, in the case of a plaintiff who suffers, by the negligence of the defendant, a temporary loss of use of a non-income producing motor vehicle ("Loss of Use") during a period when s/he has a need to use that vehicle, damages in respect of that loss of use are to be assessed on one or other of the bases adopted by the majority. Instead, the Court of Appeal should have held that such damages are to be assessed by reference to the market rate of hiring during the relevant Loss of Use period of a temporary replacement vehicle that would reasonably have satisfied the uses to which the plaintiff's damaged vehicle was capable of being, and likely to have been, put during that period.

**MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND
MULTICULTURAL AFFAIRS v VIANE (S34/2021)**

Court appealed from: Full Court of the Federal Court of Australia
[2020] FCAFC 144

Date of judgment: 24 August 2020

Special leave granted: 12 March 2021

Mr Alex Viane was born in American Samoa and raised, until the age of 14, in Samoa (formerly Western Samoa). At the age of 14, he was adopted by his uncle and moved to Australia. He acquired New Zealand citizenship by virtue of his adoption and has resided in Australia as the holder of a Special Category (subclass 444) visa under the *Migration Act 1958* (Cth) (“the Act”).

On 10 November 2015 Mr Viane was sentenced a term of imprisonment upon having been convicted of a charge of assault occasioning bodily harm to his partner and mother of his child. Consequently, on 6 July 2016, Mr Viane’s visa was mandatorily cancelled under s 501(3A) of the Act (“the cancellation decision”). Mr Viane made representations to the Parliamentary Secretary to the Appellant (“the Minister”) as to why the cancellation decision should be revoked. The Secretary refused and Mr Viane challenged that decision. In August 2018 the Full Court of the Federal Court set aside the decision and ordered that the matter be remitted for redetermination according to law.

Mr Viane made further representations to the Minister on the redetermination, including that if he were removed from Australia there was a real prospect he would reside in Samoa or American Samoa, where he would have little prospects of employment, his child would be denied a first-class education and there existed problematic healthcare and no social welfare. In August 2019 the Minister refused to revoke the cancellation decision. The Minister considered that while Mr Viane’s family would be significantly impacted by moving to either location, English was widely spoken and healthcare, education and welfare services were available which his family could access. The Minister was not satisfied that there was “another reason” to revoke the cancellation decision pursuant to s 501CA(4) of the Act.

Mr Viane sought judicial review of the Minister’s decision in the Federal Court. On 20 February 2020 Justice Flick dismissed the proceedings. His Honour found, relevantly, that the Minister was not required to have specific evidence before him at the time he made his decision that English was spoken in the Samoan Islands. Justice Flick also found that the Minister relied on his accumulated or specialist knowledge on the availability of healthcare and welfare benefits without disclosing such knowledge and inviting Mr Viane to make submissions. However, as the question of potential hardship to Mr Viane and his family was resolved in his favour, no jurisdictional error was demonstrated.

An appeal by Mr Viane to the Full Court was allowed (Kerr and Charlesworth JJ; Besanko J dissenting). Justices Kerr and Charlesworth found that the Minister had not proceeded on his own knowledge as to the cultural and social circumstances in the Samoan Islands and there was no evidence that could support an inference that the Minister had any specialised knowledge on such matters. The Minister therefore failed to comply with the implied condition to his statutory power in s 501CA(4) that his state of satisfaction or non-satisfaction be formed on the basis

of factual findings made on evidentiary materials in respect of both the finding as to the use of the English language and the availability of welfare services. The errors were jurisdictional as they led the Minister to afford less weight to the interests of Mr Viane's child than he might otherwise have and so affected a critical aspect of his reasoning.

Justice Besanko would have dismissed the appeal. His Honour considered that the Minister did not need to have specific evidence before him about the use of the English language in the Samoan Islands at the time he made his decision, and agreed with Justice Flick's reasoning that no jurisdictional error was demonstrated in relation to the Minister's findings concerning welfare services as the real issue before the Minister, being potential hardship to Mr Viane and his family, was resolved in favour of Mr Viane.

The grounds of appeal are:

- The Full Court erred by holding that the Minister did not have any personal or specialised knowledge when he made findings about the general conditions in American Samoa and Samoa in his reasons as to why he was not satisfied, for the purpose of section 501CA(4) of the Act that there was another reason to revoke the cancellation of Mr Viane's visa; and
- The Full Court erred in holding that the Minister's decision was affected by jurisdictional error because there was no evidence for his findings as to the general conditions in American Samoa and Samoa.

Mr Viane has filed a Notice of Contention raising the following grounds:

- It was not permissible for the Minister to rely upon his personal knowledge or accumulated specialist knowledge, in the circumstance of this case, to find:
 - that English was widely spoken in American Samoa and Samoa; or
 - that health and welfare services existed in those jurisdictions, which Mr Viane and his family could access.
- If, contrary to the above ground, it was permissible for the Minister to rely upon the personal knowledge or accumulated specialist knowledge there referred to (and if, contrary to the conclusion reached by the Full Court at [42], the Appellant did in fact do so), the Minister was required by the rules of procedural fairness to disclose that knowledge to Mr Viane and invite him to make submissions or adduce additional evidence or other materials with respect to that knowledge. The Minister failed to do so.