FEDERAL COURT OF AUSTRALIA

Putland v Royans Wagga Pty Limited [2017] FCA 910

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| File number: | NSD 1006 of 2015 | |
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| Judge: | **BROMWICH J** | |
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| Date of judgment: | 9 August 2017 | |
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| Catchwords: | **INDUSTRIAL LAW** – whether radio base (call centre) work performed by the applicants for respondent truck repair company was pursuant to a contract of employment or contract for services – principles on determination of employment vs independent contractor status – held: applicants were employees of the respondent for the relevant period  **INDUSTRIAL LAW** – determination of appropriate award, job classification and nature of employment – claimed breaches of the *Fair Work Act 2009* (Cth) flowing from finding an employment relationship – breach of a modern award under s 45 – misrepresentation of employment being pursuant to a contract for services under s 357 – failure to provide pay slips under s 536 – separate claim for breach of implied term of employment contract for failure to provide notice of termination – held: breaches of ss 45, 357 and 536 made out – separate hearing to determine relief | |
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| Legislation: | *Evidence Act 1995* (Cth), s 59  *Fair Work Act 2009* (Cth), ss 13, 45, 46, 117, 357, 536, 545, 546  *Independent Contractors Act 2006* (Cth), ss 12, 16 | |
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| Cases cited: | *ACE Insurance Ltd v Trifunovski* [2013] FCAFC 3; 209 FCR 146  *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365  *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395  *Hamzy v Tricon International Restaurants* [2001] FCA 1589; 115 FCR 78  *Hollis**v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21  *Humberstone**v Northern Timber Mills* (1949) 79 CLR 389  *Kucks v CSR Limited* (1996) 66 IR 182  *Marshall v Whittaker’s Building Supply Company* (1963) 109 CLR 210  *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16  *Tattsbet Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46  *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561  *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541  *Telum Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434; 230 IR 30 | |
|  |  | |
| Dates of hearing: | 30, 31 March 2016, 29, 30, 31 August 2016, 2, 7 September 2016 | |
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| Registry: | New South Wales | |
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| Division: | General Division | |
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| National Practice Area: | Employment & Industrial Relations | |
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| Category: | Catchwords | |
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| Number of paragraphs: | 343 | |
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| Counsel for the Applicants: | Mr N Furlan |
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| Solicitor for the Applicants: | Connect Legal |
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| Counsel for the Respondent: | Mr B Rauf |
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| Solicitor for the Respondent: | Commins Hendriks Pty Ltd |
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| **Table of Corrections** |  |
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| 22 August 2017 | The original paragraph [336]:  “Having found that the Putlands were employed by Royans Wagga within the job classification “*level three call centre principal customer contact specialist*” under the Clerks Award on a full-time basis, and having found that the National Employment Standards (**NES**) termination provisions applied by reason of that award, there does not appear to be any point in attempting to ascertain what notice period might have been required by terms to be implied under a contract of employment. As no notice was in fact given, the entitlement is that provided by the NES, as is the compensation. That becomes the entitlement under the contract of employment, subject to calculations being provided to quantify that entitlement.”  Has been replaced with the following:  “I have concluded that no notice of termination was in fact given to the Putlands. In those circumstances, it falls for consideration what obligation to give notice was required by s 117 of the FW Act, and whether any different period should be implied in the Putlands’ contracts of employment. This is a further question to be resolved at the separate hearing to determine relief.” |
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| 22 August 2017 | The original paragraph [340]:  “The Putlands are also entitled to an order for payment of damages for breach of their employment contracts on the basis of Royans Wagga’s failure to provide notice of termination. I am presently of the view that the award of damages should be for the relevant period from start date determined in September 2012 until 2 May 2015 and therefore in the sum dictated by the notice of termination entitlement in the National Employment Standards, as applied by clause 13.1 of the Clerks Award. I will hear the parties as to any reason why that is not the proper approach.”  Has been replaced with the following:  “The Putlands are also entitled to an order for payment in lieu of notice of termination of their contracts of employment. The period of notice that was required to be given, and the rate at which compensation should be ordered to be paid for that period, are further questions to be resolved at the separate hearing.” |

ORDERS

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|  | | NSD 1006 of 2015 |
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| BETWEEN: | LINDA PUTLAND  First Applicant  SHANE PUTLAND  Second Applicant | |
| AND: | ROYANS WAGGA PTY LIMITED  Respondent | |

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| JUDGE: | BROMWICH J |
| DATE OF ORDER: | 9 AUGUST 2017 |

THE COURT ORDERS THAT:

1. The matter be listed for a case management hearing at a time convenient to the parties for the purposes of making procedural orders for the hearing to determine the outstanding issues as to final relief.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

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# INTRODUCTION AND OVERVIEW

1. This is a multifaceted employment law dispute arising out of a particular kind of call centre and related work performed from September 2012 to early May 2015. The work was performed for the respondent, **Royans Wagga** Pty Limited, by the first applicant, Ms Linda Putland, and by her husband, Mr Shane Putland, the second respondent (together, **the Putlands**).
2. Royans Wagga’s principal business is that of repairing trucks. The work performed by the Putlands involved obtaining or otherwise receiving and passing on information about vehicle accidents or other incidents resulting in damage to trucks. It is convenient to describe the overall work product as providing an **accident reporting service** forRoyans Wagga. The benefit of that service also extended to other companies associated with Royans Wagga.
3. The business conducted by Royans Wagga has been operating for many decades under various legal owners and structures, the details of which are not material. It was not in dispute that in the period leading up to 2005, prior to any involvement by the Putlands, Royans Wagga had an in-house, employee-based accident reporting service which referred potential leads for work to its core truck repair business.
4. The central issues in this case concern and flow from the capacity in which the accident reporting service workwas performed by the Putlands for Royans Wagga. This entails consideration and application of long-standing authority dealing with the distinction between contracts of service between an employer and employee (**employment contracts**), contracts for services between a principal and **independent contractor** and related issues. Terms such as “*worked for*” or “*work performed for*” are used neutrally in these reasons to mean work done by the Putlands for Royans Wagga, whichever kind of contract was involved. Litigation in this area often involves situations that involve features of both kinds of contract. This was such a case.
5. The accident reporting service work was performed for Royans Wagga by Ms Putland from about May 2005, and also by Mr Putland from about 2008. The Putlands ceased performing the accident reporting service work in early May 2015. While the period in contention was from September 2012 until early May 2015, the prior arrangements by which Ms Putland in particular worked for Royans Wagga are relevant and important in ascertaining the nature of the legal relations that existed in the contested period.
6. At all times, the accident reporting service work included answering telephone calls from a range of sources (including members of the public), monitoring radios and scanners to detect reports or communications about accidents, and dealing with Royans Wagga sales representatives, who would use the information provided to attempt to secure the repair work arising out of the accident or incident.
7. In early 2005, Royans Wagga had difficulty in retaining staff to perform the accident reporting service work after various employees left Royans Wagga to move interstate. In 2005, Royans Wagga recruited Ms Putland (then Ms Pullen) to perform the accident reporting service work, including working from her home. In 2007, Ms Putland became responsible for performing the accident reporting service work 24 hours a day, seven days a week, solely from her home. At some point in time in 2008, Mr Putland commenced assisting Ms Putland with the work at their home. Those arrangements were background to the contractual arrangements that were the subject of the present dispute.
8. In early 2012, while the Putlands were still responsible for performing the work 24 hours a day, seven days a week, Royans Wagga had a growing dissatisfaction with the accident reporting service for a variety of reasons. In June 2012, Mr William (**Bill**) **Andrews**, the managing director of Royans Wagga, went to the Putlands’ home and had a conversation about proposed changes to the way the accident reporting service would operate. Thereafter, from about the end of July 2012 until approximately October 2014, the weekday accident reporting service work was performed from a new demountable shed at the Royans Wagga premises known as “*the Hut*”. From sometime in October 2014 until early May 2015, the accident reporting service work was conducted from the Putlands’ home. The term “*radio base*” was used to refer interchangeably both to the accident reporting service and to the various locations from which it was provided, these being the Hut, the Putlands’ home and another home from which the work was sometimes performed.
9. Mr Putland worked from the Hut from mid-2012 until approximately October 2014, during what might be termed business hours, although not confined to 9.00 am to 5.00 pm. Ms Putland worked from home on weekends from mid-2012 until approximately October 2014. Following the resignation of a radio base employee, Ms Kylie Yerbury, in approximately October 2014, the Putlands again worked solely from home with responsibility to perform the accident reporting service work 24 hours a day, seven days a week. The Putlands did not perform this work for anybody else at any time, including during the relevant period.
10. In early May 2015, Royans Wagga outsourced its accident reporting service to an independent call centre, Fonebox. Consequently, the Putlands ceased performing any work for Royans Wagga. This dispute arises partially from the alleged conduct of Royans Wagga in terminating the arrangement (however ultimately characterised) with the Putlands, and partially from the conduct of Royans Wagga throughout the relevant period in relation to wages and other benefits and conditions.
11. As noted above, the central issue is whether the contracts by which the Putlands performed the accident reporting service work were employment contracts, as was their primary position, or whether that work was performed as independent contractors, as was the Putlands’ alternative position and Royans Wagga’s contention.
12. If either of the Putlands were found to be an employee of Royans Wagga, back pay was sought according to the *Clerks*—*Private Sector Award 2010* (**Clerks Award**). Civil penalties under the *Fair Work Act 2009* (Cth) (**FW Act**) were also sought for the following alleged contraventions:
13. failure to pay wages and other benefits in accordance with an award in breach of s 45;
14. failure to provide pay slips in breach of s 536; and
15. falsely representing that the Putlands were employed as independent contractors in breach of s 357(1).

Payment in lieu of reasonable notice of termination was also sought.

1. Alternatively, even if the Putlands were independent contractors, they sought relief in that capacity by way of contract variations for harsh or unfair terms under s 16(1)(b) of the *Independent Contractors Act 2006* (Cth)in order to secure payment in lieu of reasonable notice and payment of the difference between what they were paid and payments that would have been made if they were employed and paid in accordance with the Clerks Award.
2. Royans Wagga denies that there was ever any employment relationship or contract with either of the Putlands, asserts that there was an independent contractor arrangement with both, and asserts that proper notice of termination was given orally in December 2014. In the alternative, Royans Wagga asserts that even if there was any contract of employment, then such a conclusion was contrary to Royans Wagga’s knowledge (via Mr Andrews) and not reckless such that the defence in s 357(2) of the FW Act was made out. Aside from a concession that pay slips were not provided, Royans Wagga otherwise denied any entitlement to relief arising from any employment relationship found by the Court. Royans Wagga also denied any entitlement to alternative relief under the *Independent Contractors Act*.
3. The evidence, both oral and documentary, was wide-ranging and detailed. The main difference between the parties was the conclusions, both factual and legal, that they contended should be reached. There were also sharp differences in the evidence in a relatively small number of key areas. The resolution of both the legal and factual disputes has been difficult, requiring a detailed consideration of the oral evidence in particular.
4. Ultimately, I have found that the Putlands were employees of Royans Wagga. As a consequence of that finding, I have also considered the breaches of the FW Act and the breach of contract claimed by the Putlands. In respect of those breaches, I have found that the Putlands were employed pursuant to the Clerks Award as “*call centre principal customer contact specialists*” on a permanent, full-time basis, and that Royans Wagga breached ss 45, 357 and 536 of the FW Act. I will hear the parties in respect of final relief in the context of the findings made and conclusions reached in these reasons.

# LEGAL PRINCIPLES AND STATUTORY PROVISIONS

## Case law on the characterisation of employment contracts and independent contractors

1. The legal principles applicable to establishing whether work is performed pursuant to an employment contract or pursuant to a contract for services (i.e. as an independent contractor) were not in dispute. The difficulty arises in their application, especially in circumstances such as these in which certain features of the working arrangements indicated an independent contractor relationship, whereas other features indicated an employment relationship. The oral evidence, in particular of the Putlands, and of Mr Andrews on behalf of Royans Wagga, including its testing in cross-examination, ended up being of considerable importance.
2. Although modified by modern circumstances and technology, a prominent factor in determining whether a relationship is one of employer and employee or one of principal and independent contractor remains the degree of control which the person who engages another to perform work *can* exercise over the person so engaged: ***Stevens*** *v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24.2 per Mason J (as the former Chief Justice then was), citing ***Zuijs*** *v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 at 571; ***Humberstone*** *v Northern Timber Mills* (1949) 79 CLR 389 at 404 and *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 402.
3. The reference in *Stevens* to the control that “*can*” be exercised reflects the focus on the existence of *authority* *to* control, rather than its exercise. The exercise of control is virtually conclusive evidence of its existence, but the absence of the exercise of control does not deny its existence. The existence of authority to control remains a critical consideration in many cases, because that underlying reality of the power dynamic can still go to the heart of the difference between the two types of contract. However, control, like other indicia, is an analytical tool by which to measure and assess the relationship. Assessment of the existence and extent of any right of control assists in guiding and advancing the inquiry, rather than necessarily providing a conclusive answer on its own as to the nature of the legal relationship. The nature of the relationship is the ultimate issue.
4. The importance of considering authority to control was also canvassed by Wilson and Dawson JJ in *Stevens.* Their Honoursopined at 36.3 that in many, if not most, cases, it is appropriate to apply the control test in the first instance because it remains the surest guide as to whether a person is contracting independently or serving as an employee. Their Honours noted that modern work conditions and norms of behaviour enable personal skills to be exercised so as to prevent control over the manner of doing work, such that the control test in the original master and servant sense is no longer a sufficient or necessarily appropriate test. Their Honours noted that this led to the observation in other authorities that the right to control rather than its actual exercise is the important component. However, their Honours also cited authority for the proposition that, in some circumstances, it may also be a mistake to treat a reservation of control as decisive: *Stevens* at 36.4.
5. Authority to control is a test of substance and not form, calling for distracting appearances to be brushed away when not reflective of reality. Properly and rigorously applied with appropriate caution and adjustment, the authority to control test is still capable of translating well to modern circumstances. As Dixon J noted in *Humberstone* at 404 (also partially extracted in *Stevens* at 24), albeit in the now-redundant language of “*master and servant*” and confined in expression to post-war period male workers:

… the test of the existence of the relation of master and servant is still whether the contract placed the supposed servant subject to the command of the employer in the course of executing the work not only as to what he shall do but to how he shall do it. …

The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter’s order and directions.

That passage has particular resonance in this case in considering the competing evidence and arguments, having regard to the importance of the concept of ultimate authority, as opposed to its exercise in the particular circumstances.

1. Mason J in *Stevens* also held that while the existence of control is significant, and in many cases even dominant, it is but one of a number of indicia which must be considered. Other factors may include the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work and provision for holidays, the deduction of income tax and the delegation of work by the putative employee: *Stevens* at 24.5. That list is not exhaustive.
2. Wilson and Dawson JJ in *Stevens* noted that various other indicia have been added over time which may point towards employment rather than independent contractor status, including such things as the right to have a particular person do the work, the right to suspend or dismiss a person so engaged, the right to the exclusive services of that person and the right to dictate the place of work, the hours of work and so on: *Stevens* at 36.9. By contrast, indicators in favour of independent contractor status include such things as “*a profession, trade or distinct calling*”, the provision of the person’s own place of work (perhaps less significant in more recent times with relatively cheap and portable technology facilitating employees working from home with relative ease), the provision by the worker of his or her own equipment, the creation of goodwill or saleable assets, the payment of business expenses as a significant proportion of remuneration and payment of remuneration without the deduction of income tax: *Stevens* at 37.1. However, it must be kept steadily in mind that all of these indicia, and any others that might be thought of and sought to be applied as workplaces continue to evolve, can be no more than a guide leading to the answer to the ultimate question of whether a person is working for another in what is in truth an employment relationship or on his or her own behalf as an independent contractor, with the indications varying from case to case: *Stevens* at 37.3.
3. The importance of control must be considered keeping its historical context steadily in mind. Its source as a conceptual marker of an employment relationship was a predominantly agricultural society that has largely disappeared for most people. Many of the conditions that gave rise to that test have since disappeared, and occupations have emerged which do not so readily lend themselves to control as a dominant consideration. As was pointed out in ***Hollis*** *v Vabu Pty Ltd* [2001] HCA 44; 207 CLR 21 at 40-1 [43]-[45], *Stevens* entailed an adjustment of the concept of control to more modern life, and to that end, *Stevens* continued the developments over many years in this area reflected in cases such as *Humberstone* in 1949 and *Zuijs* in 1955.
4. It was this modernisation that produced the shift from actual control to the right to exercise it: *Stevens* at 29.1, as quoted in *Hollis* at 41 [44]. The distinction reflected in the control test remains fundamentally between serving an employer in the employer’s business and carrying on a trade or business of his or her own: *Hollis* at 39 [40], citing Windeyer J in *Marshall v Whittaker’s Building Supply Company* (1963) 109 CLR 210 at 217.
5. It may be difficult to give much independent weight to such things as taxation arrangements because they reflect a subjective view of the nature of the relationship and may therefore be considered in the same category as declarations of intent, which, while not necessarily wholly irrelevant, must be approached with caution and may not assist at all. In that event, such features may be taken into account, but will not be conclusive and should be subordinate to conduct which constitutes a stronger and more objective indication of rights and obligations fundamentally inconsistent with the basic requirements of a contract of employment, such as the ability to delegate or a lack of ultimate control over how work is done, and who may perform that work. See ***ACE Insurance*** *Ltd v Trifunovski* [2013] FCAFC 3; 209 FCR 146 at 153 [37].
6. Even in cases in which the form of the arrangement is that of an independent contractor, a lack of real independence of action or true independence of organisation may lead to the conclusion that, in truth, there was no adequate foundation for finding the relationship to be anything other than one of employment: *ACE Insurance* at 186 [148]. Ultimately, whether a person is an employee or an independent contractor requires an objective assessment of the relationship. Which side the person falls on may not be easy to answer.
7. The outcomes of prior cases cannot simply be applied to reach the necessary conclusion in a given case. What really matters is principled analysis of the facts and circumstances of the case at hand. In *ACE Insurance*, ostensible independent contractor insurance agents were found to be employees, while in ***Tattsbet*** *Ltd v Morrow* [2015] FCAFC 62; 233 FCR 46, a person who worked entirely within the putative employer’s premises was nonetheless ultimately found to be an independent contractor due to a range of factors which, on appeal, were found to deny the existence of an employment relationship. In each case, careful attention to the detail of the totality of the arrangements and circumstances informed the ultimate conclusion reached. In *ACE Insurance*, Buchanan J, with whom Lander and Robertson JJ agreed, surveyed a wide range of appellate authority across a variety of circumstances in which the issue fell to be determined, and made the following pertinent observations at 173:

102 It is trite to say that the foregoing survey yields no single or unifying test to determine whether an employment relationship exists. Some features of a particular relationship may tend strongly against such a conclusion. Principal amongst such features, in my view, are contractual terms which deny any requirement for personal service or represent clear indications of the pursuit of an independent business. Even where such features are absent the proper conclusion may be that a particular relationship is not one of employment, but the analysis is less straightforward.

103 Of the indicia of employment it is clear that a right of control remains an important consideration in many cases. It may be found in a right of organisation and allocation of work, as much as in some theoretical right to say how actual work should be done.

1. *ACE Insurance* was followed in *Tattsbet* and may be regarded as one of the leading cases in this area. The analysis by Buchanan J in *ACE Insurance* has been of great assistance in deciding this case.
2. While the degree of control remains important, the modern approach is multifactorial and the totality of the relationship must therefore be considered. A range of indicia may, and usually will, need to be examined and those more useful favoured over those that are less useful as an indicator of the true relationship.
3. On any view, the central issue in this case was the characterisation of the nature of the relationship between the Putlands and Royans Wagga, applying the legal principles outlined above. As may be seen, the balance of the case largely fell to be considered in the context of the determination of that question. There is no single test, and indeed any attempt to find one may divert attention from the ultimate question of whether or not the Putlands were, in all the circumstances and at each relevant point in time, employees or independent contractors.

## Statutory provisions

### FW Act

1. The following provisions of the FW Act are relevant to the primary case advanced by the Putlands that their relationship with Royans Wagga was that of employer and employee:

**13 Meaning of national system employee**

A national system employee is an individual so far as he or she is employed, or usually employed, as described in the definition of national system employer in section 14, by a national system employer, except on a vocational placement.

Note: Sections 30C and 30M extend the meaning of national system employee in relation to a referring State.

**45 Contravening a modern award**

A person must not contravene a term of a modern award.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).

**46 The significance of a modern award applying to a person**

1. A modern award does not impose obligations on a person, and a person does not contravene a term of a modern award, unless the award applies to the person.
2. A modern award does not give a person an entitlement unless the award applies to the person.

Note: Subsection (2) does not affect the ability of outworker terms in a modern award to be enforced under Part 4-1 in relation to outworkers who are not employees.

**357 Misrepresenting employment as independent contracting arrangement**

1. A person (the employer) that employs, or proposes to employ, an individual must not represent to the individual that the contract of employment under which the individual is, or would be, employed by the employer is a contract for services under which the individual performs, or would perform, work as an independent contractor.

Note: This subsection is a civil remedy provision (see Part 4-1).

1. Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

the contract was a contract of employment rather than a contract for services.

**536 Employer obligations in relation to pay slips**

1. An employer must give a pay slip to each of its employees within one working day of paying an amount to the employee in relation to the performance of work.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Section 80 of the Paid Parental Leave Act 2010 requires an employer to give information to an employee to whom the employer pays an instalment under that Act.

### Independent Contractors Act

1. The following provisions of the *Independent Contractors Act* are relevant to the alternative case advanced by the Putlands that their relationship with Royans Wagga was that of principal and independent contractor (emphasis per original):

**12 Court may review services contract**

1. An application may be made to the Court to review a services contract on either or both of the following grounds:

(a) the contract is unfair;

(b) the contract is harsh.

Note: A proceeding pending in the Federal Circuit Court of Australia may be transferred to the Federal Court of Australia: see Part 5 of the *Federal Circuit Court of Australia Act 1999*.

1. An application under subsection (1) may be made only by a party to the services contract.
2. In reviewing a services contract, the Court must only have regard to:

(a) the terms of the contract when it was made; and

(b) to the extent that this Part allows the Court to consider other matters—other matters as existing at the time when the contract was made.

1. For the purposes of this Part, ***services contract*** includes a contract to vary a services contract.

Note: The effect of subsection (4) is that a contract to vary a services contract can be reviewed under this Part, as the contract to vary will itself be a services contract.

**16 Orders that Court may make**

1. If the Court records an opinion under section 15 in relation to a services contract, the Court may make one or more of the following orders in relation to the opinion:

(a) an order setting aside the whole or a part of the contract;

(b) an order varying the contract.

1. An order may only be made for the purpose of placing the parties to the services contract as nearly as practicable on such a footing that the ground on which the opinion is based no longer applies.
2. If an application under this Part is pending, the Court may make an interim order if it considers it is desirable to do so to preserve the position of a party to the services contract.
3. An order takes effect on the date of the order or a later date specified in the order.
4. A party to the services contract may apply to the Court to enforce an order by injunction or otherwise as the Court considers appropriate.
5. Subject to section 14, this section does not limit any other rights of a party to the services contract.

Note 1: The rights of a party to a services contract may be affected by the exclusion provisions.

Note 2: An appeal may be brought to the Federal Court of Australia from a judgment of the Federal Circuit Court of Australia: see section 24 of the *Federal Court of Australia Act 1976*.

# PLEADINGS, CHRONOLOGY OF KEY EVENTS AND EVIDENCE

## Summary of the Putlands’ case

1. On the first day of the hearing, counsel for the Putlands, Mr Nicholas Furlan, advised that the Putlands were not pressing their adverse action claim and, accordingly, were not pressing particular paragraphs of the statement of claim (as subsequently reflected in a second amended statement of claim filed on 8 July 2016).
2. The key aspect of the Putlands’ claim of a contract of employment was an asserted breach of s 45 of the FW Act, for underpayment (including overtime, penalties and superannuation contributions) pursuant to an asserted award. The balance of the Putlands’ case arising from the primary employment contract claim was articulated as having three dimensions (putting to one side the alternative claim under the *Independent Contractors Act*, the subject of disputed pleadings discussed further below), namely:
3. a sham contracting claim under s 357(1) of the FW Act;
4. a breach of an obligation to provide pay slips under s 536 of the FW Act; and
5. a claim for breach of contract for failure to provide reasonable notice of the termination of a contract.
6. The alternative case under the *Independent Contractors Act* advanced by the Putlands was that the contracts for services by which they were engaged were unfair or harsh at the time they were made. The contracts were pleaded to provide total remuneration that was, or was likely to be, less than that of an employee performing similar work, and pleaded not to include a term requiring Royans Wagga to give reasonable notice of termination. The Putlands sought relief by way of contract variations under s 16(1)(b) of the *Independent Contractors Act* in order to secure payment in lieu of reasonable notice and back payment.
7. The gravamen of the Putlands’ case was conveniently summarised by their counsel on the first day of the hearing as follows:

… these proceedings are, in essence, a claim for relief in connection with work arrangements between each of the applicants and the respondent in respect of the period September 2012 to 5 May 2015. Now, in order to properly understand the significance of what happened during that period, it will be necessary to lead evidence of things that happened a good deal earlier in time, especially in relation to Ms Putland, the first applicant.

… principally, these proceedings are a claim that each applicant was an employee and not an independent contractor of the respondent during that period, September 2012 to 5 May 2015, and that they were entitled to pay and other benefits prescribed by the *Clerks—Private Sector Award 2010*, and that they did not receive those benefits, which was a breach of both the award and section 45 of the *Fair Work Act*.

… they’re essentially award underpayment claims, these proceedings. The *Clerks—Private Sector Award 2010* is an award made pursuant to Part 2-3 of the *Fair Work Act*, and it is therefore a modern award, and the significance of that … is a failure to comply with a provision for the modern award, such as the Clerks Award, is a breach of section 45 of the *Fair Work Act*.

Section 45 … is what is described as a civil remedy provision, and that is the effect of section 539(2) of the Act, and as a result of that, the applicants are entitled to apply to [the Court] for orders under Chapter 4, Division 2 of the *Fair Work Act* in respect of contraventions of section 45, and [the Court] will see that from section 540(1)(a).

[The Court] has [the] power to make orders … if satisfied there has been a breach of section 45. [The Court] has that power under section 545(2)(b), and that is a power to award compensation which the applicants seek to remedy the loss that they have suffered as a result of the underpayments they say have occurred. … the applicants claim pecuniary penalties under section 546(1) of the *Fair Work Act*.

…

If [the Court] is not satisfied that each of the applicants are employees, then that claim fails in its entirety, and [the Court] doesn’t need to go on to consider compensation or penalties for breach of section 45. Of course, [the Court] could take one view of Ms Putland’s situation and a different view of Mr Putland’s situation. The circumstances … are not entirely the same throughout that period.

## Summary of Royans Wagga’s case

1. Counsel for Royans Wagga, Mr Bilal Rauf, indicated that the Royans Wagga’s case was that:
2. There was a contract for services (i.e. an independent contractor arrangement) with Ms Putland which came into existence in 2005.
3. There were variations to that contract, especially in 2007.
4. There was no variation of that contract in 2012 in relation to the legal arrangements between the parties; rather, there was only a change in the manner in which the contract was to be performed. Accordingly, it was not a contract to vary a services contract such as to engage s 12(4) of the *Independent Contractors Act*.

## Pleadings

1. The pleadings in this case provide a starting point for defining some of the areas of agreement and dispute, before turning to the evidence and submissions to determine the facts upon which reliance should be based, both agreed and requiring resolution, and the application of the above legal principles to those facts.
2. The parties join issue by way of a second amended statement of claim and an amended defence. An issue arose on the first day of the hearing in relation to the scope of the defence filed by Royans Wagga in reply to the Putlands’ alternative claim for relief under the *Independent Contractors Act*. That issue was clarified in the amended defence filed on 25 August 2016, and the parties were sufficiently able to address the issue in closing written and oral submissions on the final hearing day, 7 September 2016.
3. In some areas, the defence pleading provides a sufficient account for the purposes of the Putlands’ claim, with there being no need to resolve differences in expression. For example, the second amended statement of claim pleads that Royans Wagga operated a business that “*includes truck accident and repair centres and a* *truck incident and emergency telephone reporting and response service*”. In reply, the defence states that, at all material times, Royans Wagga operated a “*heavy vehicle accident repair specialist business*”, and an aspect of that business was an “*accident management service*”. The difference in expression does not appear to be material and in any event is not treated that way. These reasons will continue to refer to that part of Royans Wagga’s activities as the accident reporting service.
4. The second amended statement of claim pleads that Ms Putland entered into a contract for the performance of work by her in relation to the accident reporting service in or about May 2005. Royans Wagga’s defence describes that contract as being for the provision of services by Ms Putland (contract for services). While Royans Wagga did not take issue with the original commencement of the arrangement with Ms Putland being in 2005, it pleads in its defence that from about November 2007, the contract with Ms Putland was partly oral and partly in writing. Royans Wagga particularised a written proposal provided to Royans Wagga by Ms Putland and her father, Ronald (**Ron**) Pullen, dated 16 September 2007, and relied upon the written terms of the proposal. The relevant text of that document is of some importance and is reproduced in the course of the analysis of the evidence.
5. In relation to the relevant period from September 2012 to May 2015, it is pleaded on behalf of the Putlands that their relationship with Royans Wagga was, in substance and reality, an employment relationship governed by an unwritten contract of employment, the existence of which is to be inferred from conduct. Certain aspects of the pleaded conduct included stipulated hours of work, stipulated rates of pay, Royans Wagga supplying and installing equipment in the Putlands’ home and the duties and responsibilities of the Putlands in terms of what work was to be done and how work was to be carried out in general terms. Certain terms of the inferred employment contract were pleaded, including a term allowing either party to terminate the contract on reasonable notice. These allegations were all denied by Royans Wagga, on the basis that there was no employment relationship or contract of employment.
6. The parties had a starkly different stance in relation to who was responsible for how the work would be carried out, itself an important feature of the legal distinction between employment contracts and independent contractor arrangements as outlined above. Much of the pleading response by Royans Wagga to the details relied upon by the Putlands, apart from rates of pay, was either denied or pleaded by way of not knowing and therefore not being able to admit the allegations.

## Chronology of primary evidence – documentary and from the key witnesses

1. Much of the following chronology of key objective events was either not in dispute, or was established by evidence that was not contradicted. Considerable assistance was gained from chronologies helpfully furnished by both parties, supplemented as needed by reference to the evidence.

### Before the relevant period: 1944 – June 2012

1. The Royans business was started by Bill Andrews’ grandfather in 1944. Royans Wagga commenced operating from Copland Street, Wagga Wagga in 1980. In the period between the late 1990s and early to mid-2000s, an in-house call centre known as the radio base was in operation at the Copland Street premises.
2. In the period between 1999 and 2001, Ms Margaret Scott (also known as Margaret Hinchcliffe) was employed by Royans Wagga as an operator of the radio base. At various times, the radio base serviced not only Royans Wagga but also other Royans businesses in Dubbo, Brisbane, Sydney and Newcastle (known as O’Reilly’s Newcastle). Nothing apparently turns on which other Royans branches received the benefit of radio base work performed by the Putlands, nor when. The work included answering telephones, monitoring police radios/scanners and dealing with sales representatives in order to provide the accident reporting service. A written record of the information received about each accident or incident was made. Margaret Scott created a “*log report*” template for that purpose. Ms Scott carried out some of this work from her home, particularly on weekends.
3. In 2002, the Royans group of companies was split into separate entities with separate management structures. Mr Andrews was appointed as managing director of Royans Wagga and director of the holding company of Royans Wagga, Royans Dubbo Pty Limited.
4. In the period from March 2001 to 10 September 2016, Brett Haberecht was employed by Royans Wagga as a sales representative, and had dealings with the Putlands. His evidence is considered below.
5. On 4 April 2003, Ms Putland obtained an Australian Business Number (ABN) as an individual/sole trader. The ABN extract in evidence, obtained on 19 November 2015, recorded:
6. two trading names – “*Linda-Lewis”* from 4 April 2003 and “*MPOWER PT*” from 13 May 2010;
7. one business name – “*TRILOGY FITNESS”* from 2 March 2011;
8. a last updated date of 27 October 2013; and
9. a GST status of *“Not currently registered for GST*”.

No business names are recorded for Mr Putland. There was no evidence of any business name being registered which was associated with the accident reporting service.

1. In about May 2005, one of the then operators of the radio base, Kelly Flint, ceased working for Royans Wagga. Mr Andrews met with Ms Putland (at that time, Ms Pullen) and she commenced working for the Royans Wagga radio base from her home. Ms Putland’s evidence was that when she first started, only weekday hours were available but there might be an opportunity to cover some weekends for others. She later did weekend work and other hours.
2. In or about 2007, Ms Putland was asked to train a Royans Wagga employee, Nicole Debritt. Ms Putland attended the radio base at Royans Wagga to provide this training to Ms Debritt.
3. On 1 May 2007, Mr Putland obtained an ABN as an individual/sole trader. The ABN extract in evidence, obtained on 2 December 2015, recorded one trading name (“*Shane Putland*”), a last updated date of 13 June 2013 and a GST status of *“Not currently registered for GST*”. No business names are recorded for Mr Putland.
4. In September 2007, discussions took place between Mr Andrews, Ms Putland and Ron Pullen (Ms Putland’s father) concerning a proposal for the provision of radio base services. On 18 September 2007, Mr Andrews received an email from Mr Pullen enclosing a written proposal to Royans Wagga. On about 19 or 20 September 2007, further discussions took place between Mr Andrews and Mr Pullen concerning details of the proposal. The relevant portions of the proposal were as follows (as per original):

**Please Note: The Following Proposal is Private and Confidential.**

***Attention: Bill Andrews***

**PROPOSAL to ROYANS WAGGA 16th-Sep-2007.**

**REFERENCE: Consideration of 24/7 Customer Service & Base Operation.**

**BASE LOCATION: [Putlands’ home address in North Wagga Wagga]**

**OVERVIEW:**

We believe the Base Operation as it stands lacks the polish it needs to be complete and professional in its outlook for representing the very best interest of the Royan Group. We also believe the objectives to fix this problem can be achieved by way of the obligations outlined in the detailed proposal as listed.

An agreement subject to the conditions listed can be achieved by a contractual arrangement between the two parties from here on in called.

1. **The Company: ROYAN GROUP.**
2. **The Prime Contractor: “NWB” NORTH WAGGA BASE.**

An agreement would allow the NWB to focus on streamlining the entire operation to gel with newly implemented programs which includes training of staff to a standard that’s required i.e. emphasising the importance of the monitor situation and the proper liaising with open clients and Royan staff.

[In] accordance with our proposal the NWB intends to explore any available new technology … methods of scanning for possible accidents in areas we currently do not target. In addition the NWB have a plan to set up a complete new network of possible call out “part timers” and “spotters” also in areas we currently do not target.

…

Please see PROPOSAL attached and Note: {Any or part of this proposal is subject to either approval or negotiation.}

**OBLIGATIONS OF THE NWB**

(a) To ensure the smooth running of a customer service base operation which includes professional handling of the phone system, intense monitoring of scanner reports.

(b) To move forward with commitments pertaining to new programs as stated.

(c) Train staff …

(d) To invoice the company “Royan” once every week for wage commitments etc.

(e) To invoice the company “Royan” with phone A/c etc along with the attached phone A/c readouts as they become available.

(f) Appointee of the NWB “Linda Pullen” to inform the Appointee of the company of any major changes to the current situation of the NWB that may effect the company.

The Employee

# The NWB will be responsible for all staff employed by NWB i.e.

…

(b) Allocation of hours to the employee will be at the discretion of the NWB.

…

(d) Any complaint to the company “Royan” about an employee of the NWB will be liaised between an appointee of the company “Royan” and the management of the NWB.

(e) The NWB will not hesitate to remove any staff member found to be disloyal or not performing in the best interest of the company “Royan” or the NWB.

(f) Wages are the total responsibility of the NWB and employees will be required to hold an ABN No.

**OBLIGATIONS OF THE COMPANY “ROYANS”**

* The Royan management or their staff are not to interfere with the general running and management of the NWB unless of course deemed justified through discussion by NWB and the company “Royan”.
* The payment of wages etc will be paid by bank transfer on a given day on a weekly basis upon receipt of an invoice. The amount is yet to be determined by both parties.

…

* After the initial amount is determined, it is requested by NWB that this amount be negotiated every 2 two years from the given start date.

…

**THE BENEFITS TO THE COMPANY “ROYANS”**

…

* Lifting the burden of the radio base operation from its current Royan company manager would automatically open a door of valuable time he could use somewhere else and the company can then get on with what it does best.( Repairing Trucks)

…

* Contracting the base operation to an independent automatically creates incentives for the prime operator to succeed. This success would have to benefit the company.
* Linda Pullen and Ronny will lead the team and Ronny would begin to use his initiative to canvass work for the company …
* Instead of just sitting and waiting for phones to ring the NWB will exploit ways to filtrate the scan system enabling a better scan ear throughout a wider country area *“I will explain details of this when we meet”* in addition to engaging a truckie forum setup. We at NWB *“and our staff”* will make use of some down time to benefit the company.
* The NWB already has the infrastructure and the know how to run a commitment as proposed …

**Please note:** This proposal is draft form only and further discussion needs to take place between the stakeholders to achieve agreement status compatible to both parties.

PS. Bill I will call you soon so that we may discuss some of the finer items.

Thank you Ronny

1. On 10 October 2007, Ms Putland emailed a document to Bill Andrews. The covering email had the subject line “*For the representatives*” and was as follows:

Hi Bill,

Go over it and see what you think should/could be added, or changed.

Kind Regards, Linda

1. The document relevantly provided as follows (as per original):

**Attention:** Branch Managers/Representatives of the Royan Group.

You may be already aware, as of the 1st week in November 2007, the Royan base operation will undergo a major change in terms of the present, and the future interest of the Company. There has already been a considerable amount of time and effort injected into criteria that will be set in the new plan.

The base will appreciate your involvement in these changes and we welcome and encourage you to forward any ideas that you feel are relevant in the success of the new operation.

We have set a formula criteria in writing that all new and existing operators will stringently have to follow. { A copy of this action can be emailed at request }

All staff will undergo an intensive training period to ensure a professional customer service centre is in operation 24/7.

With the support of the Group, you can be sure that the base will continue in its efforts, striving for a professional outlook at all times, and implementing the new ideas.

**Some Recommendations to Consider:**

* To guarantee a more fair spotter payment policy.
* First Call to the base ideally should be from the spotter direct, not from a branch representative as this has proven to cause some friction in the past. However this would still have to be at the Reps discretion as we understand they too have their followers and in the short term this may be difficult to change but in the long term spotters should be encouraged to ring the base.

**Please note:** The integrity and honesty of the new base is to ensure the 1st Call is the 1st Call, without further ado.

* Branch representatives are asked to contact the base after they attend an accident scene, and inform the base of updates and outcome. This ensures a better and more complete log system without the need for callbacks, and memory jogs.
* Branch Representatives/ Royans Staff should be discouraged from discussing personal issues with base staff, unless it is directly involved with a current job. It is not acceptable to include base staff in personal disagreements/issues between branches/staff of the Royans Group.
* If an issue should arise with a base operator, you should contact Linda Putland as soon as possible with the problem so a suitable plan of action to rectify it can take place.

The base welcomes your suggestions/comments on how the base can further help you, and the Royans Group as a whole.

I wish to thank you for your support and of your consideration on the points above.

Kind regards,

Linda Putland …

…

1. In November 2007, Ms Putland commenced providing radio base services 24 hours a day, seven days a week from her home and the radio base situated at Royans Wagga closed. Royans Wagga describes this as being the point at which the written proposal furnished by Mr Pullen took effect.
2. On 23 November 2007, Mr Andrews sent an email to three Royans group managers, the relevant details of which are as follows (per original):

can we please keep in mind the radio base redistribution of charges as proposed. [Barry Blomeley, branch manager of Royans Brisbane] had to follow up with [Craig Martin, former head sales representative at Royans Brisbane] regarding former nemisis [sic] Ronny Pullen and any known acts of scullduggery [sic]. Please advise asap as this situation was first proposed a few months ago. In the meantime other branches are paying the bulk, but not getting the bulk of the calls. Perhaps their [sic] maybe other better suggestions.

Hope to hear from you soon.

1. In the middle of 2008, Mr Putland began assisting Ms Putland with the radio base work from home. In the period between August or September 2009 until February 2010, Ms Margaret Scott was paid (mostly via Ms Putland’s bank account, albeit Ms Scott gave evidence of some initial cash payments) to do some of the radio base work, mainly on weekends. Ms Scott received payments from Ms Putland into her bank account for that work, as reflected in Ms Scott’s bank statements. Ms Putland was taken to those bank statements in cross-examination, and specifically to 11 payments made to Ms Scott from Ms Putland’s bank account in the period from September to December 2009. It was put to Ms Putland more globally that the statements for the period from September 2009 to February 2010 included 18 payments to Ms Scott totalling $5,866.90. Ms Putland neither adopted nor dissented from that figure, but denied that payments took place outside that five‑month period.
2. As outlined at [50] above, on 13 May 2010, Ms Putland registered a trading name “*MPOWER PT*”. On 2 March 2011, Ms Putland registered a business name “*TRILOGY FITNESS*”. As at 3 April 2011, the website for Trilogy Fitness had a class schedule. In the period from 2011 to 2012, Ms Putland leased premises for the purpose of conducting a fitness business venture. These events are recorded for completeness, but they are incapable of making any difference to the conclusions required to be reached because they are not in any way connected to the nature of the relationship Ms Putland had with Royans Wagga. It would not make any difference, either way, if MPOWER PT or Trilogy Fitness amounted to a business conducted by Ms Putland, noting that the evidence did not go that far in any event. Although perhaps of marginal significance, Ms Putland knew about business names but apparently did not register the name “*North Wagga Base*” nor any variation of it in either of the Putlands’ names. However, she registered another business name after the 2007 proposal i.e. MPOWER PT. If anything, this tends to suggest that the Putlands did not subjectively regard themselves as running their own business and, objectively, did not in this respect behave as though that was what was taking place.
3. On the evidence of Mr Putland, in the period from about 2010 to about 2011, David Sloan was paid by the Putlands to listen to scanners.
4. In late 2011 or early 2012, Mr Andrews had discussions with Ms Putland regarding radio base reports being late. This was evidently part of the reason for the discussions that led to the radio base work during the week returning to the Hut on the Royans Wagga premises after July 2012.

### Leading into the relevant period: June 2012 to September 2012

1. In June 2012, Mr Andrews came to see the Putlands at their home. They had a conversation in the backyard. The Putlands were told, amongst other things, that Royans Wagga management wanted to see the radio base returned to the premises of Royans Wagga. This was so that management could be sure that calls were being answered and the log reports were being completed.
2. On 29 June 2012, Mr Andrews emailed Ms Putland his “*initial thoughts*” on radio base shifts and pay rates as follows:

Hi Linda,

Initial thoughts are;

Radio base at Rep Hut during the week.

Monday 5am – 1pm, 1pm – 9pm, 9pm – 5am

Tuesday 5am – 1pm, 1pm – 9pm, 9pm – 5am

Wednesday 5am – 1pm, 1pm – 9pm, 9pm – 5am

Thursday 5am – 1pm, 1pm – 9pm, 9pm – 5am

Friday 5am – 1pm, 1pm – 6pm

Weekend Fri 6.30pm – Mon 5am

Weekend is valued at $800 and could be done at home.

Shifts from 5am -9pm are at $20 p/hr

Shift from 9pm – 5am is at $25 p/hr

Have a think about what shifts you would want to nominate for.

You could still submit your company invoice and add GST to the total.

Let me know what you think.

The Reps hut does have a reverse cycle air cond. & I would put a television in there.

Regards

Bill

1. Mr Putland ultimately agreed to do weekday shifts at a demountable building known as “*the Hut*” located at Royans Wagga’s premises in Wagga Wagga. Ms Putland ultimately agreed to work the weekend shift (Friday evening until Monday morning) from home.
2. From the end of July 2012, radio base work was performed during the week from the Hut.
3. In about July or August 2012, Mr Putland started working from 11.00 am to 5.00 pm in the Hut, Monday to Friday of each week. He filled in timesheets, submitted weekly invoices in his name and was paid by the hour for his work except on public holidays when he was paid a flat rate of $500 and later $400. Two other individuals, Mr Rodney Roy and Ms Kylie Yerbury, who were employees of Royans Wagga, were also doing radio base work in the Hut. Their agreed salaries were $20 per hour for day shifts and $25 per hour for night shifts. Mr Joel Roy, another employee of Royans Wagga, also briefly did some radio base work in the Hut before he was dismissed. Ms Yerbury’s work as an employee of Royans Wagga, in a role described in her contract of employment as “*call centre receptionist*”, was paid pursuant to the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (**Vehicle Award**).
4. Also in July or August 2012, Ms Putland started working weekend shifts which commenced at 6.00 pm on Friday and ended at 5.00 am the following Monday. She submitted weekly invoices in her name only and was paid a total of $800 per weekend-long shift.
5. In the period from the middle to the end of 2012, Vicki McCully did radio base work in the Hut. She was paid by the hour, had an ABN and submitted a weekly invoice. Ms McCully was trained by Mr Putland. There was no evidence to suggest that the work she did differed in any way at all from the work that Ms Yerbury did as a designated employee.
6. On 13 August 2012, Mr Putland made a formal complaint in writing to Royans Wagga about “*intimidation and bullying*” in “*the workplace*”.

### The relevant period: September 2012 – May 2015

1. On 25 September 2012, Mr Putland issued an invoice numbered “001” in his own name and for work completed by him only.
2. In the period from October 2012 to December 2012, Mr Putland’s shift patterns were irregular.
3. In the period from the end of December 2012 to March 2013, Mr Putland generally worked 5.00 am to 9.00 pm, Monday to Thursday and 5.00 am to 6.00 pm on Friday of each week.
4. On 9 January 2013, Mr Andrews wrote a letter to assist Mr Putland to obtain finance to buy a motor vehicle. The letter represented that Mr Putland “*works for Royans Wagga on a subcontractor basis and earns $1520.00 per week*”. In cross-examination, Mr Andrews could not recall whether he turned his mind to the question of whether Mr Putland was an employee or a contractor, although this evidence was not specifically tied to the time of the letter and referred instead to the period around August 2012 when discussions were happening about Mr Putland moving into the Hut.
5. From about March 2013, Mr Putland generally worked 5.00 am to 9.00 pm on Monday, 6.00 am to 9.00 pm on Tuesday to Thursday, and 6.00 am to 6.00 pm on Friday of each week.
6. On 19 December 2013, the Putlands were informed by an email from Mr Andrews that Mr John Cusack, a sales representative of Royans Sydney, would be doing the radio base work for the Sydney branch of Royans from his home from 3 February 2014.
7. On 3 February 2014, Mr Cusack started to do the Sydney radio base work from his home, referred to as “*The Rock*”, confined to weekdays during business hours. This appeared to be a nickname or convenient label, rather than any formal designation. The reference to the service provided from the Putlands’ home as “*North Wagga Base*” did not appear to have any substantially greater degree of formality.
8. On 5 August 2014, Steve O’Reilly (the Royans Group administration manager) sent an email to Mr Andrews, David Church (director of Royans Melbourne) and Peter Royan (director of Royans Brisbane) attaching a presentation from a Royans meeting in Port Douglas. The text of the email was as follows:

Hi All

Attached is the Presentation displayed during the Port Douglas meeting (I have also copied it in email form below)

I hope you have success in your directors discussion on the matter and hope you can form a unanimous position.

I think the opportunity exists to create a turning point on the way we do business, and another step up in professionalising the Group.

Let me know what I can do to help.

…

1. The text in the body of that email, which was copied from the presentation slides, included the following:

**Why change anything ?**

Our current system has been running for decades without any real change.

Regular complaints include – calls not being answered / incorrect information / operators half asleep / working out of a house / no updates

We currently have 3 bases – which increases costs and reduces efficiency

We cannot professionally promote the current set up to Insurers / Brokers / Fleet customers

NTI has had a professional assist line for over a decade

ISS have been going for 9 years & have many fleet customers on board.

…

If they [ISS] remain the *only option* for insurers, they will take over the market ( they are already well on their way )

We could benefit from a united approach that focuses our resources.

We can create an alternative to ISS – an option for insurers …

We can create an alternative to ISS, for Fleets …

We can create a new market – an Accident Assist service for *Brokers* …

**Proposal to consider**

* Outsource our bases (or at least the first point of contact)
* Engage professional call centre to handle inbound 1800 calls
* …
* htttp://www.welldone.net.au/
* …
* Independent, established, professional
* …
* Call based charging (minimal calls = minimal costs)

**Basic Process**

…

Advantages over our existing set up’s

* A service to market to *brokers* that is capable of removing the advantage ISS has built with insurers
* An alternative to ISS for *insurers*
* One professional set up with equipment & systems ready to go
* Likely savings
* a live base system – where reps log in and update on the go
* a live base system – that we can all log in to at any time
* a live base system that can generate very useful reports (can be exported to XL and sorted -- so, by rep, by branch, by location etc)
* no need for daily emails of 3 base sheets that many do not even read.
* We could have a *user pays* split up amongst our branches – with costs split by actual usage (not rough estimates that can change year to year)

htttp://www.welldone.net.au/index.php

* …
* time on calls $1.90 per minute (average inbound 2-3 mins, outbound 1-2 mins)
* …

Summary

* a Group solution that would improve our services and also allow us to compete with the very real threat from ISS.
* an instant alternative to ISS
* something that can trump ISS – via Brokers
* reduced costs for all
* …
* It could actually turn a profit

1. On 10 September 2014, Mr Andrews attended a meeting at the offices of “*Well Done*”, a call centre contractor, in Nowra concerning Well Done becoming the service provider for the Royans companies.
2. In October 2014, Ms Yerbury resigned from her position. She was the last remaining person working in the Hut apart from Mr Putland. The only way in which the Putlands considered they could continue to provide the accident reporting service on their own was to move all of the work to their home. As a result, the radio base work was then performed exclusively from the Putlands’ home. At the time that Ms Yerbury resigned, Mr Andrews was overseas. He did not subsequently demur from the decision taken in his absence.
3. On 14 November 2014, Mr Andrews attended a Royans managers meeting in the Hunter Valley. The minutes record that “*Wagga base operators*” are to be given three months’ notice “*shortly*”.
4. In early December 2014, Mr Andrews went to the Putlands’ home. On his account, he provided three months’ notice of termination of the contract. The Putlands each say that he told them there would be a trial of a call centre but did not say that their engagement would necessarily end. Mr Andrews claims to have spoken to Ms Putland over the telephone shortly after the face-to-face meeting in December 2014 – on his account, minutes later. He said that Ms Putland was hostile. According to Mr Andrews, during that telephone conversation, Ms Putland asserted that she and her husband were employees of Royans Wagga. In response, Mr Andrews became angry and said:

You can’t be serious. You are contractors. You work from home. You give an ABN invoice. You’re charged GST. I can see right through what you’re trying to do here.

Ms Putland gave evidence of a hostile telephone conversation taking place, but much later in time, in February 2015. The evidence from her on that conversation was not very clear.

1. In late December 2014, a trial of Well Done commenced in respect of only Royans Brisbane and its affiliate, O’Neills Newcastle.
2. In about January or February 2015, the Royans Group commenced discussions with an alternative supplier of call centre services, Fonebox.
3. In April 2015, Mr Andrews provided a reference by telephone for Ms Putland in relation to a position with Wagga Radio Cabs.
4. On 9 April 2015, Royans Wagga entered into a contract with Fonebox.
5. On 2 May 2015, Mr Andrews had a discussion with Steve O’Reilly, who confirmed that the phones were diverted from the Putlands to Fonebox on 1 May 2015. The Putlands therefore ceased all radio base work on 1 May 2015. Evidence was given by each of the Putlands and Mr Andrews that the Putlands were notified by John Cusack on 2 May 2015 that all phones had been transferred to Fonebox.
6. On 4 May 2015, final invoices were issued by each of the Putlands. The final invoices reflected payment for half of the final weekend worked by the Putlands, an amount arrived at following negotiation between Mr Putland and Mr Andrews, in recognition of the fact that the Putlands were not aware that the phones had been transferred to Fonebox.
7. Mr Andrews wrote letters on behalf of each of the Putlands dated 4 May 2015, apparently in fact written on 5 May 2015, regarding the termination of their contracts. The text of each letter was relevantly as follows:

To whom it may concern,

[Ms Putland or Mr Putland] … has ceased to be used by any of the companies in the Royan Group for Radio Base Operations. [Ms Putland or Mr Putland] was provided a minimum of three months notice as per contract requirements. The final date of operations was May 1, 2015. I believe [she/he] is no longer contracted to any other Companies for [her/his] Radio Base Services.

1. For completeness, it should be observed that, on 19 May 2015, Well Done were told their services would not be used by Royans Wagga.

## Additional evidence for the Putlands

### Linda Putland

1. Ms Putland was the first witness called for the applicants and gave oral evidence in chief, cross-examination and re-examination for most of the first and second hearing days. She came across as being an intelligent woman, who had commenced but not concluded tertiary studies. In the greater part, Ms Putland seemed to be doing her best to give a truthful account of events. Overall, she came across as a frank and forthright witness. There did not appear to be any immediate issue as to her honesty or whether she was doing her best to give a truthful account, even after cross-examination. However, it was put to Ms Putland at various points that certain events deposed to by her did not occur.
2. It was not squarely put to Ms Putland at any time that she was lying. Any shortcomings in her evidence are therefore best viewed as reflecting on reliability rather than dishonesty or other forms of adverse credit finding. Some issues did emerge about Ms Putland’s memory (which was not surprising given that the earlier events took place in the mid to late 1990s), her reliability, the accuracy of some parts of her evidence and her understanding of anything of a technical nature, including as to financial matters.
3. Ms Putland repeatedly said that she did not understand maths or numbers. She did not know what “*CPI*” meant. She credibly said that she provided information to her accountant for the purposes of tax returns, and completely relied on him as to what she could or could not include in her tax return, including, most particularly, allowable deductions.
4. The key parts of Ms Putland’s evidence warranting particular attention covered the following topics:
5. Engagement of Ms Putland by Royans Wogga;
6. Radio base between 2005 to 2007;
7. Radio base between 2007 and 2008;
8. Radio base between 2008 and 2012;
9. Establishing the Hut: June 2012 onwards;
10. The commercial call centre proposal, the issue of termination, and the Putlands ceasing to work for Royans Wagga; and
11. Ms Putland’s evidence as to general matters.

#### Engagement of Ms Putland by Royans Wogga

1. On the topic of contract formation, in relation to the initial retention of Ms Putland by Royans Wagga, Ms Putland said that in May 2005 she had been looking for paid secretarial, receptionist or clerical work, and that her uncle, Mr Bert Cool, an employee of Royans Wagga, had organised a meeting between her and Mr Andrews. She said that when they met each other, Mr Andrews:
2. confirmed that Royans Wagga was looking for somebody and that Mr Cool had told him of her prior experience;
3. asked her if she would like to continue working from home, which she had been doing with a prior employer, Re-Car;
4. outlined what the job would entail and what her duties would be, including:
   1. answering an 1800 number for the eastern seaboard of Australia;
   2. answering branch diversions whereby each Royans branch would divert their office phones through to the 1800 number at 5.00 pm every afternoon and she would have to pick that up and deal with any calls;
   3. monitoring and listening to police, ambulance, fire and rescue scanners and really concentrating for the words “*accident*” and “*truck accident*”;
   4. logging all call details; and
   5. at the end of the shift, emailing the logs through to the branch managers and representatives;

(4) told her that at this time, he could only offer her work on week days, although there might be the opportunity to fill in for the other two base operators, Ms Vicki Hayden and Ms Casey Hilton, for weekend shifts;

(5) took her into the radio base room, which was then located between an office and the staff room, and introduced her to Ms Hayden; and

(6) told her to sit there for a while and watch Ms Hayden take a few calls.

1. This description of the proposed work is largely consistent with the evidence Ms Putland gave of the work that she ultimately performed and which apparently never really changed.
2. On the question of remuneration, Ms Putland said that Mr Andrews told her that she would be paid in accordance with the Clerks Award, which he said he thought was $18 per hour. In cross-examination, it was suggested to Ms Putland that, as the Clerks Award had not come into existence until 2010, Mr Andrews had not referred to any award. Ms Putland denied that. I find it unlikely that Ms Putland either lied or made up the reference to an award, although she was clearly mistaken as it was an award that did not, at that time, exist. I find that she was given to believe that she would be paid in accordance with some kind of employment industrial award.
3. From 2005 onwards, the work or services carried out for Royans Wagga was not provided to anyone else. Ms Putland never offered to do the work for anyone else and never approached anybody or asked them if she could do work for anyone else, an assertion that was not challenged in cross-examination.

#### Radio base between 2005 to 2007

1. In 2005, Ms Putland had one telephone, one computer and an airways scanner by which the transmissions of the police, ambulance and fire brigade could be listened to. Royans Wagga supplied her with an extra telephone handset for the extra telephone line that she had installed, two old scanners, a CB radio and perhaps an office chair; they gave her more “*stuff*” over the years. Ms Putland’s telephone bills (including bills for the installation of the additional phone line) were ultimately paid by Royans Wagga. In May 2013, the ownership and account name for the telephone lines at the Putlands’ home was changed over to Royans Wagga.
2. In about August or September 2005, Mr Andrews asked Ms Putland if she would take on the weekends, or some weekends, filling in for Vicky or Casey, and at that time said that she was doing a good job. In contrast to the afternoon shifts which were paid at $18 per hour, payment for the weekend work was to be made against an invoice charging $750, being for the period from 5.00 pm on Friday until Monday morning. Ms Putland said that she was not allowed to put an hourly rate on the invoice, but rather just a number, $750.
3. The following comments can be made about some of the documents that were originally annexures to the affidavit of Ms Putland (which was not read, but instead was oral evidence required to be adduced) to which she was taken in oral evidence in chief:
4. An ABN registered in the name of Ms Putland was obtained for her by her father (she not having any understanding of what they were at the time it was obtained) and was used on all of her invoices throughout the period that she was retained by Royans Wagga.
5. A collection of incident reports from 2005 and 2006 which did not of themselves indicate the nature of the relationship between the Putlands and Royans Wagga.
6. In relation to a sample copy of invoices from 16 November 2005 to 26 October 2007:

(a) For the first period from 16 November 2005 to 5 July 2006, the description on the invoices was “*North Wagga Base Operations for*” and then either “*Weekends of*” or “*Afternoons of*” followed by an identification of the particular days and then a flat rate figure for those days consistent with work being done by Ms Putland (at that time referred to on the invoices by her maiden name of Linda Pullen). As noted above, the flat rate for weekends for that period was $750.

(b) Ms Putland gave evidence about the different email addresses that appeared on the invoices for 2005 to 2007. This did not advance the case one way or the other.

(c) Ms Putland was taken to an invoice from July 2007 which had the words “*Additional Hours per Vicki Dayshift*”. She said that she believed Vicki (Ms Hayden) was either sick that day or may have been looking for another job at that stage and had to go away for the day, so she did Vicki’s dayshift. This evidence did not advance either case in any readily discernible way.

(d) In the period from 2005 to July 2006, Ms Putland’s invoices stated there was no registration for GST.

(e) An invoice claiming payment of Telstra telephone accounts by Royans Wagga in July 2006. (In about 2009 or 2010 the lessee of the phone lines at the Putlands’ home was changed from the Putlands to Royans Wagga so as to get “*corporate benefits*”.)

(f) For the later period from 12 July 2006 until later that month on 26 July 2006, GST was charged but soon after that it ceased being charged again.

Very few of these invoices make a reference to the number of hours worked.

#### Radio base between 2007 and 2008

1. Starting on or about 1 November 2007, Ms Putland had responsibility for the radio base 24 hours a day, seven days per week. Payment was made against invoices, with those invoices always including an ABN, and at various stages charging GST.
2. A substantial issue arising from the annexures to Ms Putland’s affidavit concerned a proposal to Royans Wagga that was, on the evidence of Ms Putland, apparently prepared by her father, Ron Pullen, the details of which are extracted at [54] above. The proposal in terms expressly refers to a “*contractual arrangement between the parties*”, with “*North Wagga Base*” being referred to as a prime contractor responsible for staff being employed, wages being paid and other independent contractor‑type features. This was not as much in favour of such an arrangement existing as might first appear. There was a live dispute between the parties as to whether this document forms any part of the arrangements that started on 1 November 2007 or whether it was a proposal that went nowhere and gave way in fact to a contract of employment arrangement. Ms Putland said that at some point in the middle or towards the end of 2007:
3. Mr Andrews approached her and asked her if she would be interested in taking on the base full-time (“*like, full on. Like, 24/7*”);
4. this conversation was initiated by Mr Andrews;
5. Mr Andrews told her that the whole job would be worth $2,800 and that he wrote this down, but also said he couldn’t “*just say this is going to be your job from now on, Linda*”; he would invite other people to put in an expression of interest as well, being Vicki Hayden and John Cusack, who were respectively the original base operator and a prior base operator and sales representative of Royans Wagga;
6. Mr Andrews told her that she had to put in an expression of interest and that she had no idea how to do it, but that Mr Andrews had said not to worry and gave her some things to put in the document, telling her that there needed to be such a process, but not to worry because she already had the job;
7. she told her father about her conversation with Mr Andrews, and that he was a little bit worried at first about the 24/7 operation, but would support her in whatever decision she made;
8. Mr Andrews invited her and her father out to Royans Wagga and sat down with them and gave them points to include in the expression of interest. Her father and Mr Andrews had a discussion on what she should put in and what might sound good; and
9. the proposal was prepared by her father following that meeting and she was reasonably sure he had emailed it to Mr Andrews. There was never any further conversation about the document, she never saw it again, she forgot it even existed, and she never received a copy signed by Royans Wagga.
10. Ms Putland was questioned about another document which had been annexed to her affidavit, entitled “*Employment Contract Agreement*”. Ms Putland said that it may have been prepared by her father and that she thought it had been emailed to her by Mr Andrews, but that she had never discussed it with Mr Andrews, had never signed it and had never received a signed copy. An interesting feature is that the document refers to either party being able to terminate on 120 days’ written notice, and in Royans Wagga’s case, this was the notice period demanded by and given to the Putlands.
11. Ms Putland agreed that she assumed responsibility for all of the radio base work on a 24 hours a day, seven day a week basis at about the end of 2007, and continued to work from home. Ms Putland’s evidence was that she dealt with between 20 to 60 calls per day. She estimated that each incoming call required about four outgoing calls due to the need to follow up with the Royans Wagga sales representatives and ask them to call other people.

#### Radio base between 2008 and 2012

1. By the middle of 2008, Ms Putland was getting tired from the 24 hours a day, seven days a week operation, and described it as “*a big job for one person to try and do*” and “*almost impossible*”. Ms Putland said that one of her children had been born in 2007 and she had needed some help desperately, so she asked her husband, Mr Putland, if he would consider giving her a hand. When he agreed to assist, she went to Mr Andrews and asked him if it would be okay if he (meaning Mr Andrews) would “*put Shane on board as well*”, to give her a hand. Mr Andrews said “*yes*” and was fine with it as long as it did not cost him any more than $2,800 (i.e. the amount that Ms Putland was being paid for working the entire week). Mr Andrews recalled the conversation quite differently and, in particular, denied that his approval had been sought for Mr Putland to be involved. Instead, Mr Andrews’ evidence was that Ms Putland mentioned that Mr Putland was helping because she was short-staffed. I prefer the evidence of Ms Putland on this topic, not least because there was no evidence of “*staff*” being employed by the Putlands as opposed to a small degree of paid assistance. The evidence of Ms Putland indicated deference to Mr Andrews in relation to Mr Putland being involved.
2. Ms Putland trained her husband and did not charge any more for him. The work was subsequently divided up between the two of them, four hours on and four hours off, at the suggestion of her uncle, Mr Cool, and Mr Andrews.
3. Ms Putland saw her accountant, Mr Prest, in about 2009. He advised her that as she was approaching the threshold of having to charge GST, she should include GST in her invoice. Ms Putland also told Mr Andrews that she would now have to start including GST, to which he said, “*yeah, that’s fine.*”
4. Ms Putland was taken to a further set of sample invoices for the period 1 July 2009 to 28 October 2009. Again, the description given on those documents is “*North Wagga Base Operations*” and against the actual amount charged is “*Normal Base Operation*”. There is no reference to hours or even days, it being apparently a weekly payment for the 24 hours a day, seven days a week work that was being performed. This is more consistent with an independent contractor arrangement. Charging for GST was not consistent across the invoices and did not invariably take place. GST was charged for the invoice dated 1 July 2009, but not for invoices dated between 7 July 2009 and 9 September 2009. It was then charged again from 16 September 2009.
5. Later that year (also in 2009), Ms Putland went to see Mr Prest for some further advice. He said it would be more sensible if she and her husband were to split their wages, because the tax was starting to be “*incredible*” and she didn’t have anything to claim as a normal business would. Ms Putland said that Mr Prest had told her that the best thing she could do was to ask Mr Andrews if she could be “*put on the books*” so that she would be paid superannuation and holiday pay, and have income tax withheld. Ms Putland gave evidence that she went and spoke to Mr Andrews about this but he said that it was not something that he was considering at the time. He said he would speak to the different branch managers at a meeting that was coming up in a few weeks because it was everyone’s decision.
6. Ms Putland’s evidence was that the suggestion of income splitting was put into effect in 2010 following a discussion with Mr Andrews during which Ms Putland raised the conversation she had had with her accountant. In response, Mr Andrews had asked whether Ms Putland could invoice for half the year and her husband could invoice for half the year. This arrangement was reflected in the invoices that started to be issued in the name of Mr Putland from about 12 January 2010 (albeit that those invoices erroneously stated Ms Putland’s ABN instead of Mr Putland’s).
7. Repayments of loan moneys advanced by Royans Wagga are reflected in a number of the invoices issued in 2010 and 2011, some of which were recorded as “*Less [amount] Staff Account”* while others were recorded as “*Less loan repayment”*. Ms Putland explained that those loans took place because the Putlands could not demonstrate employment and instead borrowed money from Royans Wagga, deducting repayments from the invoices rendered. In my view, this was not an event of significant moment and had little bearing on the nature of the employment relationship. It was no more or less likely under either an employee or independent contractor arrangement.
8. Mr Andrews sent a copy of minutes of a group sales meeting held on 27 August 2009 to Ms Putland. Ms Putland identified this as taking place in mid-2009, which presumably means at some time proximate to the creation of the document. On the second half of the first page there is a heading that reads “*Radio base*”. Underneath that heading, the document stated, among other things, “*We need to instruct the base operator of tasks we want them to do.”*  Ms Putland agreed that she did receive instructions of tasks that Royans Wagga wanted her to do.
9. Ms Putland said that there was a problem with representatives not telling the base when public holidays were occurring in their state, especially with the Brisbane branch. This resulted in callers being referred back to a closed office. This issue was also the subject of an email sent by Ms Putland.
10. In early 2010, Ms Putland started to charge a higher amount of $3,264.80, including GST, following a request for a pay rise, to which Mr Andrews agreed.
11. The evidence also included two quotes for a backup electrical power supply system from a company described as either Reconnect Communications or ReConnect Tumut, addressed to Royans Wagga, dated 4 June 2010 and 13 October 2010, respectively. It was not in dispute that the quotes were in relation to the installation of such a system for the Putlands’ home. This arose because of severe thunderstorms in the Wagga area in 2010, which affected the radio base work. The telephone system relied upon electricity to work, so when there was a power outage there were no telephones and therefore no accident reporting service. When the power outage happened during the storms, Ms Putland spoke to Mr Andrews and he suggested contacting Reconnect Communications about getting an alternative power supply. The equipment was paid for by Royans Wagga.
12. On 3 February 2012, Mr Andrews forwarded an email to the Putlands and Mr Haberecht (a sales representative for Royans Wagga) that he had sent to branch managers minutes earlier about the attempts of the Royans group of companies to maximise efficiencies between branches and the “*Wagga radio base*”. In that email, Mr Andrews directed every branch to adhere to a list of 10 procedures set out. Relevant to the issue of the characterisation of the relationship between Putlands and Royans Wagga are the following “*required*” procedures (verbatim; emphasis added):

…

As most of you are aware, as a group we are attempting to maximise efficiencies between branches & the Wagga radio base which requires adherence to the following points by every branch. **This is stage one of proposed improvements** which will **require** both reps & **base to perform as per management requirements & expectations** which branch managers will need to discuss with all their reps as a matter of urgency. Whether or not other stages of improvement are necessary will depend on a trial period of the following.

…

5. **Radio Base to** send daily report no later than 7.00am every morning, otherwise other changes to the base will be required sooner.

6. **Radio Base to** follow up reps if necessary on Owners Name & Where the vehicle went, perhaps obtaining this information may need several calls. Circumstances may sometimes arise that despite the best efforts of all concerned the information requested cannot be reported until after the base sheets have been sent. An ‘Update Report’ will then be sent when the information is available. If the information is not forth coming to the base without any obvious good reason, then the **base will need to** write something like, e.g. Base unable to get details from Rep XYZ despite numerous attempts, Branch Manager ABC to follow up & inform all.

7. **Radio base to** text Sydney & Brisbane reps of 2nd, 3rd, 4th etc calls received from car towy spotters. These spotters will usually hang up immediately if they realise they are not the first call, but may have actually arrived at the scene or have extra information. The reps can then follow them up as appropriate.

…

10. Whilst Royans Melbourne have a separate base themselves, **common courtesies need to be complied with concerning all the above**. …

Can all branch managers return email ‘To All’ if in agreement with the above & stating your support or otherwise to the conditions above & with an undertaking to see & tell your reps of the importance of adhering to these rules asap.

1. The only apparent purpose of Mr Andrews immediately forwarding to the Putlands and Mr Haberecht the above email sent to the branch managers was to advise of the directions in that email that applied to them and that were required to be performed to meet management requirements. This was a strong indication of the management control that Mr Andrews considered he could, and did, exercise over the way in which the Putlands performed their functions. With certain irrelevant qualifications, Ms Putland said that she did as was required by paragraphs 5 to 7 of the email sent to the branch managers, reproduced above. It is convenient to reproduce Mr Andrews’ evidence on this document at this point (emphasis added):

All we’re doing with this is having the reps do what they should be doing **and the base doing what they should be doing** and it was putting it out there so that they could all – well, the reps could hear it, and I sent it to the base, forward it to them so they could see what I’ve put to the reps. A lot of these rep things are things the base had complained about and it was things that I was trying to fix.

1. Also in evidence was a document entitled “*Request for clarification on terms in relation to Police rostered “Owner to pay” towing and salvage contract*”. The subheading and contents concern the responsibilities and obligations of a tow truck operator, and payment, when a New South Wales police officer has requested towing take place, arising from the operation and application of guidelines to the *Tow Truck Industry Act 1998* (NSW) and the *Tow Truck Industry Regulation 2008* (NSW). While the document is undated, one of the references at the beginning is to a document on a New South Wales government website, with a title including the date November 2012, such that I infer this document postdates that time. Ms Putland gave evidence that she prepared this document on behalf of Mr Andrews, who perused it and sent it back to her with a few suggested corrections to spelling mistakes, which she then fixed up. Ms Putland’s evidence was that she prepared this document because Mr Andrews and Mr Bert Cool (her uncle and an employee of Royans Wagga) had asked her to.
2. Ms Putland gave evidence that in 2012 there was some serious flooding in Wagga Wagga. The Putlands’ home was under water to a depth of 4 feet (that is, just over a metre). She said that they (in context, the Putland family) stayed in a motel for a week until they found a new place. The motel bill was paid for by Royans Wagga and instalments were deducted from the Putlands’ invoices under an entry titled “*Less Motel acc*”. It was put to Ms Putland in cross-examination that she received a government subsidy of some kind (perhaps a disaster relief fund), but she had no recollection of that taking place. Whether that occurred or not does not change the fact that the motel was at least initially paid for by Royans Wagga, as evidenced by the invoices rendered by the Putlands in mid-2012.
3. In the aftermath of the flooding, the radio base calls were diverted to the Putlands’ mobile phone numbers. All of the equipment costs for re-establishing the radio base at the Putlands’ new home were paid for by Royans Wagga.

#### Establishing the Hut: June 2012 onwards

1. Ms Putland gave evidence of having a conversation with Mr Andrews at her home in the middle of 2012 about the radio base operations. She said that there was a bitter conflict at that time within the company because there were suggestions that John Cusack of Royans Sydney wanted to get his own base situated at his home known as “*The Rock*”, which was 25 kilometres out of Wagga Wagga. On her evidence, Mr Andrews thought that a way to stop that from happening would be if he took control of the base again and put it out at the Hut.
2. According to Ms Putland, Mr Andrews told her that she and her husband would still be carrying out the base operations, but he would be putting a few extra people on. She thought he had already interviewed two people and had installed a whole lot of new software out in the Hut, such as new software for scanners. As a result of this change, the Putlands’ hours would decrease because other people would be put on. Mr Andrews initially said that they would have to go to the base in the Hut and could not do the work from home anymore, but she told him that would be almost impossible. That was because her parents, who were the main carers for the Putlands’ two children while they were working, had now moved to the other side of Wagga Wagga because of the flood, and their children had quite high needs due to certain medical conditions (which were described but do not need to be detailed). Ms Putland said it would have been quite hard for her to leave her children for the hours that Mr Andrews wanted and everything would have to change considerably.
3. On 29 June 2012, Mr Andrews sent her an email with the subject “*Radio Base*”, which showed the shifts that she was to select from, as extracted above at [64].
4. After this conversation (and email), from at least September 2012, and possibly as early as later July or August 2012 (see [67]-[68] above), Mr Putland attended the Hut and did shifts there and Ms Putland did weekend work from home. Ms Kylie Yerbury also worked in the Hut in September 2012.
5. Ms Yerbury was trained by Mr and Ms Putland. In relation to that training, Ms Putland gave Ms Yerbury a “*call procedure list*” that she had previously prepared and provided to Mr Andrews. In a similar vein, Ms Putland prepared a list of contact numbers to put in the Hut, gave it to Mr Andrews and provided a copy to Ms Yerbury. She also prepared and gave to Ms Yerbury a “*WHO TO CALL*” list.
6. In August 2013, Ms Putland sent an email requesting cleaning supplies for the Hut. This evidence, while of slight weight on its own, was apparently relied upon to demonstrate that first, that Ms Putland requested such supplies, and secondly as to the nature of the service the Putlands were providing, being confined essentially to labour.
7. In evidence was a series of emails on various dates in August 2012, including an attached letter addressing problems with rudeness. In one of those emails from Ms Putland to Mr Andrews, sent on 16 August 2012, she states (verbatim):

It is of my understanding that the radio base operates almost as a seperate [sic] entity, and is of a neutral position in regards to its service of the whole royan group.

1. The significance of that passage is the use of the word “*almost*”, which by necessary implication conveys the understanding that the service was not in fact an entity separate from the company, despite operating with a degree of ostensible separation. Weight can be placed on the quoted passage in particular because it is an implied representation, rather than anything that is self-serving, and accordingly can be accorded considerable weight. Even without reliance on the business records exception to the hearsay rule, such an implied representation would not be hearsay, but rather evidence of the truth: see s 59 of the *Evidence Act* *1995* (Cth) in relation to the concept of an asserted fact. The tone, content and tenor of the emails all indicate deference to Mr Andrews. His approval was sought as to the text and content of the material she drafted, and he dictated such things as the text for a covering email, which was then used without variation.
2. In late 2012, Ms Putland had a conversation with Mr Andrews about how she and her husband would be paid for the work and how they would invoice for the work. This conversation was in the context of Ms Putland working from home on weekends and Mr Putland working from the Hut during the week. As previously noted, Ms Putland’s evidence was that Mr Andrews asked if they could bill separately. When Mr Putland started going to the Hut, he had to provide his own separate invoices and she had to provide her own invoices. This was then done until the contract ended in May 2015 (whatever its legal character). This was consistent with the invoices in evidence for the second half of 2012 and the evidence that this practice continued until the end of the relationship in May 2015. Ms Putland’s evidence was that if Mr Putland had already worked a 15‑hour shift then Mr Andrews permitted him to divert calls from the Hut to the Putland home. The final say rested with Mr Andrews.
3. From about late 2012, when Mr Putland went into the Hut at Royans Wagga, he was allowed to charge $20 per hour, and $25 per hour at night if he worked in the Hut, but if he filled in for Ms Yerbury’s shifts from home it was back to $20 per hour.
4. Ms Putland gave evidence that Ms Yerbury resigned from Royans Wagga in late 2014 (at [81] identified as being October 2014). Ms Yerbury had resigned by email while Mr Andrews was overseas, and Ms Putland said that she and Mr Putland could not contact Mr Andrews, so they just had to take over the phones because they were the only ones left and the phones needed to be answered. At that time, Mr Putland was the only person left to perform work in the Hut. Ms Putland said that Mr Andrews had called her upon his return from overseas to find out what had happened.
5. Ms Putland’s evidence was that after Ms Yerbury resigned, Mr Putland had submitted invoices for covering Ms Yerbury’s shift at Ms Yerbury’s hourly rate, which were refused by Mr Andrews. Mr Andrews apparently said that the Putlands could only invoice at Ms Yerbury’s rate of $25 per hour if the work was performed from the Hut. Ms Putland says that she questioned Mr Andrews on the fairness of the payment arrangement by saying:

Is that really fair, because Kylie [Ms Yerbury] got the same – she done exactly the same work. We didn’t do anything different to her. It’s just the fact that we were at home. Why should we get any less?

1. Ms Putland’s evidence was that Mr Andrews responded:

“Yes, but Kylie used to go out to the Hut to do it. You’re a contractor, Linda.”

1. Perhaps ironically, the unilateral nature of that subjective statement was itself telling evidence of the nature of the relationship between the Putlands and Royans Wagga via Mr Andrews. He retained the final say.
2. Ms Putland was asked whether she had a discussion with Mr Andrews at any stage about whether she was an employee or a contractor as follows:

Q. Did you have a discussion with him at any stage about whether you were an employee or a contractor?

A. Yes. That – that came up a fair bit with – Mr Andrews would often say to me, like, when I was – like, when I put my bill in for – for Kylie’s shift, he would say that I’m allowed to do my hourly rate as a – like, charge as an employee through the week but as a contractor on the weekend. That’s why I just couldn’t understand that. I still don’t really.

Q. Did you say anything in response to that statement by Mr Andrews?

A. “Well, it seems to – I’m a contractor when it suits – suits you, Bill, not – at any other time, I’m treated like one of the bunch, like a team member.” I’ve always, sort of – I haven’t been treated any differently until it comes to pay, and when I did look up the – the difference between the employee and the contract …

1. This was another example of evidence where its weight comes from implication rather than from the direct testimony. On her account, Mr Andrews was in control. However, as detailed below, Mr Andrews denies having discussions with either of the Putlands about them becoming employees.

#### The commercial call centre proposal, the issue of termination, and the Putlands ceasing to work for Royans Wagga

1. At the end of 2014, Ms Putland said that Mr Andrews had a discussion with her and Mr Putland. She said that Mr Andrews told them that there had been discussions with the other branches and the branches had decided a “*new thing*” might be taking place with an insurance company. Mr Andrews was not clear as to exactly what was going to happen, but he did mention that other places had “*accident assist*” or something similar where an insurance broker might be able to call through on a 1800 number. Accordingly, he wanted all branches to trial a call centre called “*Well Done*” in Nowra. Ms Putland says she asked him “*so what does that mean for our job? What – what happens there?*”. He said “*well, look, it’s only a trial at the moment. We – We’ll just see how it goes*.” Ms Putland says he did not really answer her question.
2. Ms Putland said that the issue of trialling a call centre came up again in the New Year (that is, early 2015). It came up many times over the Christmas holidays when all of the phones were diverted to them. There were no calls from O’Neills Newcastle. Ms Putland asked Mr Andrews about it and he said “*they must have put them through to Well Done in Nowra*”.
3. There was a further discussion about Well Done before May 2015, probably around late April, in a conversation between Ms Putland and Mr Andrews. Ms Putland told Mr Andrews that she had received a lot of complaints from spotters, in particular, and representatives who had a hard time getting hold of someone on the 1800 number. Counsel for Royans Wagga objected to this evidence, which was admitted not as to the truth and was subject to relevance. This evidence is relevant, admitted as to the fact that Ms Putland was told this, and that she conveyed it to Mr Andrews as something she had been told, but not as evidence of the truth. As such its evidentiary significance was limited, but it did indicate two things. First, that Ms Putland continued to raise issues concerning the radio base with Mr Andrews. Secondly, and of greater evidentiary weight, is that it is consistent with Ms Putland not having any subjective knowledge of having been given notice. If she thought that she had been given notice with effect in the immediate future (probably between late April and the end of contractual relations in early May), it is difficult to see why she would be raising issues to do with the quality of the services being provided by the alternative supplier. Rhetorically, why would she care if she was on the way out, so to speak? One answer might be that she was simply diligent despite being aware of the impending loss of work; but the better and more probable explanation is that she still hoped that the work might continue and had no idea that the end was nigh.
4. On 2 May 2015, John Cusack rang Ms Putland on her mobile number and said to her “*the calls have stopped, they’ve gone through to the call centre now*”. Ms Putland’s evidence was that she was told by Mr Andrews a few days or a week prior to 2 May 2015 that there was a possibility that some of the calls would stop because they were still trialling it (which I understood to mean the call centre), but there was never a proper end date and she says she was never told anything like that. Ms Putland maintained that she was told that some branches would put their telephones over to the alternative service.
5. Mr Andrews signed a letter dated 4 May 2015, although apparently written the next day, 5 May 2015, extracted at [90] above. Ms Putland said she was given a copy of the letter by Mr Andrews following her request to be supplied with a separation certificate for Centrelink purposes. Her evidence was that Mr Andrews refused to give her a separation certificate because he said “*you weren’t ever an employee. You were a contractor. I can write you a letter if that will do*.” I attach very little objective weight to the representations contained in that letter as to the nature of the relationship, and the statements allegedly made by Mr Andrews preceding it, for several reasons. First, it was a response to being asked for a separation certificate, which is a document that in ordinary usage is connected with employment. At least as much weight must be attached to the request for the separation certificate as an implied representation that Ms Putland was an employee as can be attached to any statement by Mr Andrews and any document signed by him to the effect that she was a contractor. Secondly, the letter (in this case for Ms Putland) refers to a purported belief on the part of Mr Andrews that Ms Putland was “*no longer*” contracted to any other companies for that work, when there was no evidence either that she had done any such work for any other company, or that Mr Andrews had any such belief or any basis for any such belief. Viewed in the most beneficial light, it may be seen as an attempt by Mr Andrews to help Ms Putland secure unemployment benefits. That conclusion applies equally to the letter in relation to Mr Putland, which was identical in content.
6. There are two more substantial conclusions to be drawn from that conversation and that letter. First, it does evidence the subjective beliefs of both Ms Putland and Mr Andrews. Although subjective belief has little role to play in contract formation, in the case of Mr Andrews, that assists him on the defence to the FW Act claim, at least as to actual knowledge of the Putlands being employees. Secondly, the reference to “*a minimum of three months notice*” in a letter dated 4 May 2015 is at least partially inconsistent with actual notice having been given well over four months prior, as asserted by Mr Andrews. If notice had in fact clearly and unambiguously been given the previous December, it is difficult to see why that degree of vagueness was deployed in the letters. It may be that Mr Andrews again was focussing on what would best help Ms Putland (and Mr Putland) to secure unemployment benefits.

#### Ms Putland’s evidence as to general matters

1. The practice of invoicing, and more general evidence as to when one or the other of the Putlands carried out the invoicing, suggested that for at least one of the years, some 75% of the invoiced amounts were by Ms Putland and 25% by Mr Putland. By contrast, Ms Putland’s tax returns, at least for 2011 and 2012, indicate that the income as declared to the Tax Office was divided down the middle, which indicates an income‑splitting arrangement consistent with an independent contractor arrangement. The four tax returns in evidence each indicated that Ms Putland had claimed substantial expenses by way of deductions for contractor/subcontractor and commission expenses, depreciation expenses, motor vehicle expenses and other expenses.
2. The evidence indicates that GST, although charged and paid, may not have been remitted to the Tax Office.
3. On the topic of employees or anyone else assisting with the radio base work, Ms Putland said:
4. In the second half of 2005, when she just started working for Royans Wagga, her father may have assisted a bit and might have answered a few calls if she was really stuck and busy, but he was not paid by her or anyone else to do this. He answered one or two calls if she was really flat out and was handling two calls at once.
5. From about the beginning of 2006, when she had taken on additional hours, to the time at the end of 2007 when she started doing the whole of the operation 24 hours a day, seven days a week, nobody else helped her out or assisted with the work.
6. In the period commencing at the beginning of 2008 when she was doing 24 hours a day, seven days a week, to the point at which Mr Putland commenced doing some of the work in the middle of 2008, she believed she took a two‑day holiday to Merimbula and in that period used Margaret Scott (Hinchcliffe) to answer calls for her over that weekend. Ms Putland thought Ms Scott was suggested by and paid by Mr Andrews; she was pretty sure that it was only for a two day period and she could hardly remember any other time off.
7. In the period from when Mr Putland started working with her at her home 24 hours a day, seven days a week from the middle of 2008 until about the middle or end of 2012, nobody else helped her with the radio base work. I understood this to be a reference to nobody helping her at the same time, as opposed to any form of relief work, which she otherwise gave evidence did take place.
8. In the period from about late 2012, when Mr Putland went into the Hut until the end of 2013, nobody gave her a hand on the weekend other than her husband, who may have done so when things were very busy. At times she relieved Mr Putland when he was working in the Hut such as for an appointment. She estimated that she probably helped him about 10% of the time and he helped her, at a wild guess, maybe 25 or 30% of the time. Ms Putland noted that she was hardly ever in the Hut to assist Mr Putland as he rarely needed assistance and did the solid 15 hour shift by himself. (Mr Putland did not live at the same house as Ms Putland in the period from October 2012 to April 2014).
9. In the final 18 months from late 2013 to May 2015, Mr Putland relieved her or helped with her duties on the weekends at times, probably a bit more than she had helped him in the Hut.
10. Cross-examination of Ms Putland at the tail end of the first day generally challenged the proposition that Ms Putland had provided the entire service on her own until Mr Putland became involved in 2008 and, in particular, the proposition that she had been able to do this 24 hours a day, seven days a week over many months. Evidence in Royans Wagga’s case established that Ms Putlands’ evidence understated the extent to which paid assistance in particular was obtained during the period in which the Putlands were responsible for the radio base 24 hours per day, seven days a week, albeit before the relevant period. The level of paid assistance provided to the Putlands is explored further in the context of Ms Scott’s evidence below.

### Shane Putland

1. Mr Putland impressed as a witness without guile, simply giving truthful evidence to the best of his ability. His account was largely corroborative of Ms Putland’s evidence. It reinforced the notion that Mr Andrews dictated who was to do the work, but also that Mr Andrews was subjectively endeavouring to achieve an independent contractor arrangement.
2. Mr Putland gave evidence in chief that prior to the middle of 2008, he was working for a company called Ausply as a full-time labourer on a night shift. At that time, he was aware that Ms Putland was working for Royans Wagga and had been doing so since about 2005. In the first half of 2008, he noticed that Ms Putland’s workload had increased a lot, especially due to the Sydney branch of Royans requesting that their scanners be listened to, whereas previously it was mainly Wagga Wagga scanners and Albury scanners. Once that had started, Royans also requested that the RTA site be monitored more, and the workload for Ms Putland just increased. The significance of this evidence needs to be considered in the context of the rates of payment for the Putlands not changing consequent upon this increase in work.
3. Mr Putland was aware that from late 2007, Ms Putland had been responsible for the radio base 24 hours a day, seven days a week. Mr Putland said that it started getting to the point where Ms Putland was getting mentally exhausted and he told her she had to do something about it and maybe speak to Mr Andrews and hire someone else to do the work. He said that Ms Putland thought that because he had been helping her to listen to the scanners when he was home, she could talk to Mr Andrews and see if he could “*come on board*”. He was aware that Ms Putland subsequently had a conversation with Mr Andrews, who approved that course as long as Mr Putland could obtain an ABN and invoice with her “*or however it needed to be*”. Mr Putland said that after Ms Putland had received approval from Mr Andrews, he finished a week later at Ausply and then left that job.
4. Mr Putland described the training that Ms Putland gave him as entailing:
5. showing him how to answer the phones, which he had listened to her do a number of times;
6. explaining the things to listen for on the scanners, which he was already well aware of; and
7. explaining how to deal with each call as work came in, including who to call in which areas.

The impression to be gleaned from this evidence was that whilst the content of the work could undoubtedly be pressured and demanding, it was not a highly‑skilled job in the sense of requiring high levels of technical ability or training, although inter-personal skills, judgment and initiative, especially under pressure, were no doubt of importance. There was not a wide scope to vary how things were done in the sense of monitoring the scanners and making and receiving phone calls and so on. It is not an area in which there was much scope for any fine level of control as to how those particular tasks were carried out, irrespective of whether the work was carried out as an employee or as an independent contractor. As Mr Putland described it, it took probably the first week until he was confident enough to do the job himself, by which time he “*had it pretty much down pat*”.

1. Mr Putland gave further and more detailed evidence on what was involved in carrying out the job, confirming the above impression as to its nature, most of the details of which are not necessary for the purposes of these reasons. In response to questions as to how the work was divided up between the Putlands from around 2008, Mr Putland indicated that he and Ms Putland:

… would help each other out. If someone was tired or needed to go do something, the other would just jump on board, and at times both of us would have to be required to answer calls. We just took it as each day comes.

1. Mr Putland was taken to his ABN document. He said that he remembered his wife getting him an ABN and that she did it on a computer. He could not recall exactly when she did it or for what reason. He had no recollection of talking to her about it.
2. Mr Putland remembered Ms Putland showing him the Royans Wagga group sales meeting minutes dated 27 August 2009 (as referred to in Ms Putland’s evidence at [114] above). He was taken to the bottom of the first page of that document which contained the words “*We need to instruct the base operator of tasks we want them to do*”. He confirmed that he did receive instructions about what he was to do.
3. Mr Putland was taken to the invoices that were issued by his wife and by himself. He gave evidence about entries in the invoices reflecting loans being made by Royans Wagga to the Putlands because they weren’t able to get a loan from elsewhere due to their contractor status. He described telling Mr Andrews about their difficulty in obtaining a loan and Mr Andrews offering to give them a loan “*on the staff account, and just paid off weekly*”.
4. Mr Putland was taken to another invoice, dated 13 April 2010, which had the entry:

Base Scanner Aerial $ 175.00

His evidence about this entry was that the Putlands needed to get a new aerial for one of the police scanners, so Mr Andrews told them that if they just went and bought one and submitted an invoice for the costs they would be reimbursed, which is what happened.

1. Mr Putland confirmed that during the period of his involvement in the radio base, from about the middle of 2008 through until May 2015, the work was only performed for Royans Wagga and nobody else. He also confirmed that nobody else ever asked him to perform those services for them. He never sought out an opportunity to do so because 24 hours a day, seven days a week was hard enough with one company. Even in the periods in which those hours were not worked, it was still a lot to take on.
2. Mr Putland also remembered seeing the 3 February 2012 email that had been sent to the branch managers and forwarded to the Putland email address, extracted above at [118]. Ms Putland showed it to him after receiving it through their joint email account. He read the document when he received it. He recalled that he and Ms Putland had discussions with Mr Andrews following this email and that they spoke to him about a lot of things, especially about updates for the log reports. This evidence, in keeping with the evidence of Ms Putland, was to the effect that while the details of individual call handling was generally carried out on their own initiative, the general scope of the work and the overall approach that should be taken was very substantially under the control and direction of Mr Andrews.
3. For example, paragraph 5 of the 3 February 2012 email was as follows:

Radio Base to send daily report no later than 7.00am every morning, otherwise other changes to the base will be required sooner.

Mr Putland said that he undertook that task after seeing that email and that when the representatives stopped doing what the email had asked of them and there were no updates given, Mr Andrews had requested to hold back on the emails sending the log reports to make sure the managers were aware of what was happening. He recalled that happening a few weeks after Mr Andrews’ 3 February 2012 email.

1. Mr Putland similarly confirmed compliance with the requirement in paragraph 6 of the same email that the radio base follow up the representatives if necessary on particular information. The same evidence was given concerning other directions in that email at paragraph 7 addressed to “*radio base*”, although Mr Putland noted that there was a degree of discretion involved because different Royans representatives had different requirements of the radio base.
2. Mr Putland also confirmed that after the floods in Wagga Wagga, Mr Andrews had asked the Putlands to get a second telephone line installed at their temporary rental house, and that this was paid for by Royans Wagga. Mr Putland said that Royans Wagga also paid for the telephone system at the Putlands’ flooded house to be disassembled, transported and reinstalled in the rental property. At the end of the Putlands’ six months in the rental property, Mr Putland said that Royans Wagga had again paid for the telephone system to be disassembled, transported and reinstalled, this time in their home.
3. Mr Putland recalled a conversation in the middle of 2012, when Mr Andrews came to the Putlands’ house to discuss the future of the radio base work. He remembered Mr Andrews talking about relocating the phones back to Royans Wagga so that they could be in more control of it. Mr Putland gave evidence that “*One of the main things was to stop John Cusack having his own base*”. A key part of Mr Putland’s evidence on this conversation was as follows:

We said to Bill [Mr Andrews] that, “is this going to affect our pay?” And he said, “well, what we’re thinking at the moment is – if we take it back and get a few other people there, and we’ll just taken [sic] as it goes.” So Bill really wanted more control.

When asked whether he said anything in response to what Mr Andrews had said to him in this conversation, Mr Putland said that he wasn’t very happy about it, but that he told Mr Andrews he would do some shifts out there (meaning in the Hut) as Ms Putland could not because the children were small. Mr Putland’s evidence on this topic described the situation as being very hard. The clear impression from his evidence was that he really had no choice but to agree to Mr Andrews’ proposal, albeit that Mr Andrews responded with an offer to do shorter hours.

1. Mr Putland gave evidence that Mr Andrews also told them in that conversation that he had already organised for two other people to work in the Hut, being Mr Rodney Roy and Mr Joel Roy. Mr Andrews also asked if the Putlands knew anyone else who might be interested in taking on some shifts.
2. Mr Putland was also taken to the email from Mr Andrews of 29 June 2012 which set out the proposed shift times. He remembered seeing the email after it was sent to Ms Putland’s email address, and discussing it with Ms Putland and Mr Andrews in a joint discussion. Mr Putland described being told by Mr Andrews that the Hut was being set up and that once it was ready, he could go there and start pretty much straight away.
3. It was plain from the burden of Mr Putland’s evidence that Mr Andrews was very much the controlling force in this movement of the work back to the Hut. On the basis of the Putlands’ evidence about this conversation in 2012, it was very clear that it was Mr Andrews who was determining how things would be done, and where. The evidence of Mr Andrews about this conversation, outlined below, did not change that impression. To the contrary, it tended to reinforce it, notwithstanding the use of the language of a “*proposal*”.
4. Mr Putland described work in the Hut as “*the same job, just a different location*”. He gave further evidence about the different people working in the Hut at that time, whom he described as all doing exactly the same work but just in different shifts. By that time, Ms Yerbury was also working in the Hut with Mr Putland and the Roys.
5. Mr Putland gave evidence that he eventually ended up taking on Mr Joel Roy’s shifts, and Mr Rodney Roy did not work in the Hut for very long. Some time later in 2012, Mr Putland suggested his friend’s mother, Ms Vicky McCully, to Mr Andrews as someone who might be interested in doing some shifts in the Hut. Mr Putland said that Mr Andrews asked him to organise Ms McCully to come in for a trial, which he did. Mr Putland said that Mr Andrews explained the role to her, and told her that if she obtained an ABN and invoiced her hours each week then Mr Putland would train her. Mr Putland was thereafter responsible for training Ms McCully. Invoices issued by Ms McCully that displayed her ABN formed part of the documentary evidence relied upon by Royans Wagga.
6. Mr Putland gave evidence in chief that between August 2012 and May 2015, Ms Putland’s father, Ron Pullen, would sometimes answer radio base calls at the Putlands’ home. Mr Putland said that this happened without any payment being provided to Mr Pullen, and did not happen at all in relation to shifts in the Hut. Mr Putland said that he and Ms Putland also paid Mr Sloan for listening to scanners in about 2010 or 2011. Mr Putland’s evidence was that Mr Sloan had worked for Mr Andrews “*a long time ago*” and Mr Andrews was aware that Mr Sloan was listening to the scanners “*from day 1*”. Mr Putland said that in relation to work performed by Ms Scott, the Putlands had spoken to Mr Andrews about needing to find someone to allow them to take some time off. Mr Putland said:

It was up to Bill’s discretion on who we get, because he wanted to pick the right person. And he advised Margaret [Ms Scott] would be a good candidate for it, because – as she had worked for Royans before.

Mr Putland thought that Mr Andrews did not put any requirements around when the person was to do the job, but he wanted to be able to pick who did the job. This evidence had a ring of truth about it and is accepted, even if it was inconsistent with the tenor of Mr Andrews’ evidence and the Royans Wagga pleading to the effect that not much was known about how the Putlands ran the radio base on a day-to-day basis.

1. Mr Putland gave evidence that in late 2014, after Ms Yerbury had left and he and Ms Putland were doing the radio base work exclusively from home, Mr Andrews came to their home and spoke to them about the radio base work. Mr Andrews advised them that Royans Wagga was going to trial the radio base phone calls going to a call centre. Mr Putland indicated that he thought Mr Andrews had said this call centre was located in Nowra, and emphasised that it was Australian-owned. Mr Andrews insisted that it was only a trial at that point in time. The Putlands were not sure how to take it, because they had always been told that the job was theirs indefinitely. He described Ms Putland as being very annoyed because she did not know how to take it, but that Mr Andrews kept insisting that it was a trial.
2. After that conversation, Mr Putland did not understand that the radio base work was going to be removed from him and Ms Putland. In his evidence he reasoned, perhaps with a degree of hindsight, that the first alternative place that Royans Wagga had tried [Well Done] had not worked out. He pointed out that Royans Wagga eventually chose not to use their services because the calls were taking up to five minutes to be answered (but I note that was not communicated to Well Done until after the Putlands had ceased working for Royans Wagga). Mr Putland said he thought it “*just wasn’t working out at all*” with the call centre in Nowra [being Well Done]. Mr Putland was told this, as was Ms Putland, by many of the sales representatives (necessarily a reference to part of the trial period with Well Done). The sales representatives had told them about the trial and said they were not happy about it. This was not evidence of the truth of what was said by the sales representatives, but was relevant in relation to the state of mind of the Putlands as to whether they thought they had been given notice.
3. Mr Putland said that after the initial meeting with Mr Andrews at the end of 2014, they had spoken to him quite a few times and had been told about the problems with the first call centre they had trialled. Mr Andrews told them that Royans was going to try another call centre but, again, he said it was only a trial. Mr Putland recalled this conversation taking place around the end of January 2015. Mr Putland said there were further conversations with Mr Andrews after January 2015 about this trial, and that Mr Andrews would ring up and let them know that it was not going as planned. He said that Mr Andrews told them that some Royans branches would divert their phones to these call centres, and he asked that they just keep doing the rest of the phones until Mr Andrews got back to them (that is, to the Putlands).
4. The evidence of the trials was consistent with Mr Putland genuinely not understanding that any notice of termination had been given.
5. Mr Putland was questioned about the final weekend that the Putlands worked for the radio base in early May 2015. He said that he and Ms Putland had noticed that no calls were coming through. He received a call from John Cusack on the Saturday morning that one of the other sales representatives, John Gould, had been trying get through to the radio base on the Saturday and was unsuccessful, so he had called Mr Cusack. After some investigating, it was realised between Mr Cusack and Mr Gould that all of the radio base phones had been diverted through to the call centre (which, at that stage, was Fonebox). Mr Putland said that Mr Cusack’s call was the first he had heard about the phones finally being transferred to the call centre and that he and Ms Putland were not aware it was happening.
6. The cross-examination of Mr Putland started with his tax returns. There is no need to go into this evidence in a great deal of detail as it is accepted that the taxation arrangements were consistent with an independent contractor arrangement. The same may be said about the invoices that were issued, and the use of an ABN. However, on the basis of the authorities discussed above, this sort of evidence often can, and in the context of this case does, have a similar weight to evidence of subjective intention. It reflects subjective belief as to what the arrangement was and is not necessarily determinative, or even very important, in trying to ascertain the true nature of the relationship. That was very much the situation in this case.
7. Mr Putland was cross-examined to the effect that there were advantages to him working from home rather than working in the Hut. This was focused on the period after Ms Yerbury had resigned in October 2014 while Mr Andrews was away. The work was taken back to the Putlands’ home from late 2014 until the termination of the arrangements between Royans Wagga and the Putlands in early May 2015. There were questions about the way in which the work had previously been organised in the Hut and when Ms Putland would fill in for him in the Hut. He also confirmed that there were occasions when the phones would be diverted back to their home and the service provided from there. He similarly agreed that the work was varied but not complex, describing it as easy for him to do. That, along with a letter provided by Mr Andrews that described Mr Putland as a subcontractor, did not much advance the key question of control, nor do much more than point to the subjective intention established, particularly in the mind of Mr Andrews, to have a subcontractor arrangement. That evidence did not persuade me as to the real substance of what was taking place.
8. On balance, Mr Putland’s evidence, while differently expressed, was consistent with Ms Putland’s evidence. The burden of his evidence was that the substance of the work he did was under the overall direction and control of Mr Andrews. There was no reason to doubt that this was so.

## Additional evidence for Royans Wagga

### Margaret Scott (also known as Margaret Hinchcliffe)

1. As noted earlier at [47], Ms Margaret Scott was an employee of Royans Wagga between late 1999 and 2001, and had assisted in setting up the radio base at Royans Wagga with Mr Andrews and Mr Bob Cool (Linda’s uncle). Her evidence in chief described the tasks she undertook as an employee of Royans Wagga between 1999 and 2001 in terms that were not materially different from the work description given by Ms Putland. She said that she had designed the forms used for recording incidents in conjunction with Mr Bob Cool, indicating that this was a part of her duties as an employee of Royans Wagga. Ms Scott’s evidence described the radio base in 1999 – 2001 in terms that were quite similar to the way in which work was organised in the Hut after July 2012, including the organisation of shifts.
2. Ms Scott gave evidence to the effect that she had done work for the Putlands over about a six month period, which she recalled commencing towards the end of 2009. She adopted her bank statements as reflecting the payment she received from the Putlands for doing that work, save for some work done for the Putlands for a period of approximately one month before the first bank transfer for which she had been paid cash in hand. Ms Scott stated that she understood the transition from cash payments to bank transfers arose from a discussion between the Putlands and their accountant. This served to confirm the reliance placed by the Putlands on their accountant, by way of the implied representation to that effect, which is not caught by the hearsay rule.
3. In her evidence in chief, Ms Scott described the work she was asked to do for the Putlands as “*the same as what I had done when I was employed for Royans*” and that she “*agreed to do the phones for them of a weekend*”. She said that none of this work was done from the Putlands’ home. Ms Scott indicated that the Putlands had provided her with a pre-paid mobile phone to make outgoing calls while the Royans Wagga phones were diverted to her house during the weekend. She gave evidence that she already owned two scanners and used those when working for the Putlands.
4. In cross-examination, Ms Scott said that while she was an employee of Royans Wagga in 2000 and 2001, she never had to fill in timesheets. Ms Scott stated, “*Bill had me on a wage to come in Monday to Friday, 9 [am] to 5 [pm], and I was paid an award wage, and that’s what I did*”. Ms Scott could not remember the name of the award, and confirmed that Royans Wagga “*had me in a super fund*”.
5. Ms Scott agreed in cross-examination that the total amount she was paid by the Putlands would be the total of the amounts recorded in her bank statements from September 2009 until February 2010, plus an amount of approximately $1,200 for the month of cash‑in‑hand work conducted prior to payment by bank transfer (that figure being calculated on the basis of approximately $300 per weekend for four weekends of work). She also agreed that the intensity of the work on the weekend for the Putlands varied. She said that while it was sometimes quiet, it was sometimes “*crazy*”, and she had to do the work from the beginning to the end of a shift, at all hours. She described the work as follows during cross-examination:

A. [spontaneously] … What actually happens – you’ve got your scanners going there all the time. The phone will ring. You answer it. So, look, I could go to bed if I wanted to. The phone would ring. As soon as the phone rang, I would jump up, rip into the office and the computer was turned on and I would just start writing things down and calling everyone.

Q. All right. So there was no point in time at which it was okay for you to turn everything off and not monitor the phones or the scanners at all? You had to be ready to jump up and spring into action if you got a call?

A. That’s right.

Q. Thank you. And that was the case the whole time you were doing this work for the Putlands over the weekends?

A. Yes.

1. In a line of questioning in cross-examination about runners, who were individuals relied on by Royans Wagga to attend the scene of accidents and provide information on the owner of the trucks to assist in obtaining the repair jobs, Ms Scott gave evidence that she assumed that Mr Andrews was responsible for collecting forms with information about the runners and then determining how much the runners were paid for their assistance, albeit never having spoken to him about this process.
2. In re-examination, Ms Scott gave the following evidence in relation to her time as an employee of Royans Wagga between 1999 and 2001:

Q. Ms Scott, you were asked questions about the hours which you worked, and you gave an answer that, generally 9 to 5, Monday through to Friday, and so I understand by that that you would attend at the premises to do the work?

A. That’s right.

Q. Were you able to divert the phones to your own home?

A. Yes. I often did a weekend at home, because it’s really hard for them to get anyone to do the phones of a weekend. So what would happen, I would knock off work at, say, 5 o’clock. Bill was always back at – at the Royans premises, and I would just – I would go and get whatever I needed at the shop and what not, and I would say to him, “Okay. When you’re knocking off at, say, 6, give me a call and I will be ready to take over.” And that’s what Bill would do. He would ring me and say, “Are you right?” And I would say yes, and the phones would be switched through, and I would take them from there. I would have them all weekend.

Q. And that was just on weekends, was it?

A. When there was no one to do them. I did – did them quite often at home for Royans of a weekend.

1. In the end, Ms Scott’s evidence in support of the case for Royans Wagga was confined to her being paid what must have been approximately $7,000 by the Putlands over a six‑month period between August 2009 and February 2010. That figure has been arrived at by adding $5,866.90 (the total amount paid to Ms Scott, as reflected in her bank statements and as noted above at [59]) and $1,200 (for the month of cash-in‑hand weekend work). This did not do much at all to advance the case for the Putlands being employed as independent contractors, given the relief nature of the work performed. It is certainly not unheard of for employees to make arrangements for others to do their work in their absence, although ordinarily it would be expected that for an employee replacement, payment would come from the employer. In any event, this took place well before the relevant period. It does not alter the magnitude of the change from the work being done from the Putlands’ home in 2007 – 2012, to what was in place with the Hut after July 2012 until October 2014.
2. The greater value of Ms Scott’s evidence was in aid of the case for the Putlands. That is because it follows from Ms Scott’s evidence that the nature of the work she performed for the Putlands was consistent with work done as a Royans Wagga employee. It did not make any difference if it was done at the Putlands’ home or at her own home. It was indistinguishable from employee work. Moreover, when she was an employee of Royans Wagga she did weekend work of much the same kind, which went a long way towards extinguishing any material difference between the weekday work done in the Hut by Mr Putland, and the weekend work done from home by Ms Putland. Indeed, the way she described the work when she had been employed by Royans Wagga during the week seemed similar to the way in which the work was organised in the Hut.

### Brett Haberecht

1. Brett Haberecht was employed by Royans Wagga in the period from March 2001 to February 2016 as a sales representative. He stated that his role involved going to truck accidents when required and travelling around to see transport companies. His evidence in chief was that part of his role as sales representative involved working in the Hut approximately one day per week to complete computer work, files and reports. Mr Haberecht gave the impression of someone who was eager to give evidence in favour of Royans Wagga and equally eager to discredit the Putlands. However, nothing much turns on this as he was not a particularly impressive witness and, in any event, did not have a very good recollection of even relatively recent events.
2. Mr Haberecht gave evidence in chief about seeing either Mr or Ms Putland in the Hut at various times. He said he had conversations with others at Royans Wagga about issues with irregular attendance by the Putlands in the Hut. He said that Mr Andrews would come in to the Hut sometimes in the morning and he would say to Mr Andrews “*There’s no one in the Hut today. No one working today on the radio base.*” When pressed for the exact words that he said to Mr Andrews, he recounted his part of the conversation as, “*No one is in the Hut today. We’ve got no one on the radio base today*”. His evidence was that Mr Andrews responded by saying “*apparently not, Brett*”. While that evidence was evidently called to discredit the work performance of the Putlands, it ultimately went nowhere, not least because that was not an issue in the case and, even if it had been, there was very little evidence to that effect. Mr Haberecht was also vague about the timing or frequency of the events he deposed to. However, his evidence in chief provides some evidence of the fact that Mr Andrews was regarded as being in control of what did or did not happen in the Hut, both by reason of his apparent regular attendance there and the fact that he was the person to whom comments or concerns would be directed.
3. In cross-examination, Mr Haberecht explained that his role at Royans Wagga in his last four years was different, insofar as he became responsible for travelling around and conducting sales work more than attending to accidents and incidents. He agreed that in those last four years he spent a great deal more time travelling on the roads (approximately four days per week), which must have been in the period from approximately 2012 until February 2016, when his employment at Royans Wagga ceased.
4. Mr Haberecht agreed in cross-examination that the radio base operators would, on occasion, identify people at the scene of an accident and assist the sales representatives with locations of accidents. He also agreed that it was important to try to get to the scene of an accident as quickly as possible so that competitors of Royans Wagga would not be the first to the job and procure the work. This evidence indicates that there was some degree of initiative and variety in the radio base work and it went comfortably beyond just answering telephones.
5. Mr Haberecht agreed that friction developed between sales representatives from time to time, and that in the “*earlier piece*” of his 15 years working at Royans Wagga, there had been some friction within the different branches of the Royans group.
6. In cross-examination, Mr Haberecht confirmed that there were a number of Royans Wagga employees who did some of the work in the Hut from August 2012. This was a small piece of evidence supporting the notion that the work in the Hut was employee work.
7. Also in cross-examination, after a number of questions on the topic, Mr Haberecht eventually recalled being told by Mr Andrews about a trial of a call centre in Nowra towards the end of 2014, although he was not aware of the name of the call centre company. He also recalled being told by other sales representatives that a call centre being trialled was taking too long to answer calls. He also recalled being aware that the Sydney radio base work was transferred to John Cusack in 2014.

### Bill Andrews

1. Mr Andrews gave evidence in chief over approximately half a day and was cross-examined for almost a day and a half, with brief re-examination. Mr Andrews impressed as an intelligent and highly experienced businessman, with an adult lifetime working in senior positions with Royans company entities, including, in particular, Royans Wagga. The manner and content of his evidence showed him to be an articulate and forceful advocate for the best interests of Royans Wagga, as he perceived them to be. He was plainly a skilful negotiator who was well able to drive a hard bargain, exercising the power that came with the position he occupied. The bargaining position and skill between Royans Wagga and the Putlands was far from equal, and was as much a matter of Mr Andrews’ force of personality as his underlying financial power.
2. The key parts of his evidence warranting particular attention covered the following topics under the headings below:
3. History and structure of Royans, including Mr Andrews’ role;
4. Establishing the radio base and until Ms Putland commenced work – 1990s to 2005;
5. Radio base with Ms Putland between 2005 and 2007;
6. Radio base move to the Putland home in 2007;
7. Radio base between 2007 and 2012;
8. Establishing the Hut – June/July 2012;
9. The commercial call centre proposal, the issue of termination, and the Putlands ceasing to work for Royans Wagga;
10. After the Putlands’ termination;
11. Other aspects of the radio base operations during the time the Putlands worked there.

#### History and structure of Royans, including Mr Andrews’ role

1. Mr Andrews gave a reasonably detailed account of how Royans was started in 1944 by his grandfather, how his uncle and father started Royans Wagga in 1980 and the roles he had occupied at senior levels over a very long period of time. He described Royans Wagga as primarily a truck and trailer repair facility, which also repaired boats, motorhomes, horse floats, agricultural equipment, and construction and earthmoving equipment. Most of the work was insurance work, but there was also a large portion of private work as well.
2. Mr Andrews outlined in his evidence in chief the structure of staff and their roles at Royans Wagga, which included staff in the field, in the workshop and in the office. He confirmed that all employees were employed pursuant to the Vehicle Award, aside from two office staff who were employed pursuant to the Clerks Award, which Mr Andrews thought was a state-based award. As the later discussion about award classifications makes clear, the differential use of the two awards was consistent with their terms and helpfully informed the proper approach to that issue. All staff wore uniforms, which were ordered once per year for tradespeople, or were ordered on demand for the office staff and managers such as Mr Andrews.
3. In his evidence in chief, Mr Andrews outlined the structure and history of the Royans group of companies. He explained that each branch in the group has geographical boundaries which are referred to between the branches as “*grey areas*”. Those grey areas required cooperation between branches, and were usually divided between branches by postcode for the purposes of accident recovery work.
4. Mr Andrews gave evidence in chief about Royans Wagga engaging a number of contractors for things such as wheel alignment, auto electrics, signwriting, fabrication, lawn mowing and garden maintenance, cleaning and, by the time he gave evidence, an accident recovery service provided by Fonebox. He described many of the contractors as using equipment at the Royans Wagga premises, including scissor lifts, hydraulic rams, a vehicle pit and other equipment in the storeroom. This appeared to be an attempt to place those contractors in the same position as the Putlands. If so, it was not a convincing analogy in evidence in chief. It was even less so following cross-examination, in which Mr Andrews accepted that none of those contractors came and sat permanently at a designated location at Royans Wagga (unlike, as the evidence disclosed, Mr Putland did for over two years between about September 2012 to October 2014). Such contractors were generally contacted and asked to come and do specific work at the company premises. A number of them had employees who provided services that were not provided by staff at Royans Wagga. None of them had their phone or internet bills paid for by Royans Wagga. Each of them was a professional operation. Royans Wagga had never loaned any of them or their staff money. Notwithstanding that, Mr Andrews maintained that the circumstances of the Putlands were the same as these other contractors and denied the proposition that they were not in the same category. While I would not regard Mr Andrews as being untruthful on this evidence, I consider that he was stretching his evidence and that the comparison sought to be drawn by him was not properly there to be had. I therefore reject the intended effect of that evidence.
5. Mr Andrews gave the following evidence in chief about his role at Royans Wagga:

My role is to basically manage the key employees or the key staff at Royans Wagga as well as the branch manager of Royans Dubbo. My role is to ensure that they’re doing their job; to look at strategic planning; staff training; to make sure the workplace health and safety procedures are being followed; to monitor and guide the expenses; to peruse management or, rather, profit and loss and accounting details; and, I guess, advertising and just general things like that. There’s many other things, of course, but that’s just a guide.

1. The above description ended up also reflecting, in large measure, the nature of Mr Andrews’ relationship, on behalf of Royans Wagga, with the Putlands.

#### Establishing the radio base and until Ms Putland commenced work: 1990s to 2005

1. Mr Andrews said that the radio base started in the late 1990s and, until about 2005, it was fairly stable with employees “*in the base*” on the Royans Wagga premises. He said that those employees in the base were in the room behind reception and would be utilised for other purposes such as relief reception and other administrative tasks. However, that employee stability changed in about 2005 or 2006 when, within a period of about six months or perhaps over a year, one or two employees wanted to move to Queensland and one other employee moved to Canberra. Royans Wagga could see that if more staff were going to be leaving, different ideas needed to be considered as to what to do about continuing to provide the accident recovery service.

#### Radio base with Ms Putland between 2005 and 2007

1. Mr Andrews gave evidence in chief as to how he met Ms Putland and how she came to work for Royans Wagga. This builds on the general outline above. Ms Putland’s father, Mr Ron Pullen, was known to Mr Andrews from about 1992 as a person who procured work for Royans Wagga’s opposition, “Re-Car”. Re-Car was “*sort of across the road and just a little bit down*”, meaning located nearby. Mr Andrews regarded Mr Pullen as having a fairly good name for being a tough competitor and hard to win work against. Mr Andrews also sat on a few boards with Mr Pullen, including for the Trans-Help Foundation, for which Ms Putland later did some volunteer work. Mr Andrews could not recall exactly when he was first introduced to Ms Putland, but he thought it was when she came in for an interview with him in about 2005. Ms Putland’s uncle, Mr Bert Cool, who was an employee of Royans Wagga, had suggested that she would be good at the radio base work as she had experience working at Re-Car.
2. Mr Andrews gave evidence in chief that Ms Putland operated from home and that her duties were the “*normal duties of a radio base*”. This evidence was consistent with Ms Putland’s evidence of the work she performed for Royans Wagga from 2005.
3. In his evidence, Mr Andrews referred to finding some office ledgers which showed that Ms Putland was employed as a contractor back in the “*early years*”. It should be noted, however, that the only ledger in evidence, tendered by Royans Wagga, referred to Ms Pullen being paid “*wages*”. Accordingly, the documentary record and this evidence were in conflict. In any event, this record is of limited evidentiary value because it reflects subjective intention and not necessarily objective reality. It reinforces the importance to Mr Andrews, and thus to Royans Wagga, of his subjective view as to the employment arrangements that were most desirable to the business, rather than reflecting a disciplined approach to legal requirements. Additionally, that ledger relates to the 2007-2008 financial year, which is well before the relevant period commencing in September 2012.

#### Radio base move to the Putland home in 2007

1. Mr Andrews gave evidence in chief that in about September 2007, Royans Wagga were again having difficulty in maintaining employees at the radio base. He received a phone call from Ron Pullen, who said to him words to the following effect:

Bill, Linda [Pullen/Putland] has been doing the base now for a few years. I’ve been talking with Linda. We have … a very good proposal to put to you, and I’m sure you will find it most helpful and take a lot of weight off your mind. You won’t have to worry about the base. It’s a lot of good ideas in this. Do you mind if Linda and myself make an appointment with you and come and see you?

Mr Andrews said that he said “*fine*”.

1. Mr Andrews said that Ms Putland and her father came in for a meeting at his office one or two days later. Ms Putland said to him:

Look, I’ve been doing this for a few years now. I’ve noticed that, you know, there’s a few improvements we could do with the way we listen to scanners, the way we, you know, gather reports.

Mr Pullen then said:

Look, you know, what we’re proposing is that we take over the base 24/7.

Mr Andrews described his understanding of the proposal outlined in their discussion as follows:

All the phones, they will contract the base from us, and that they will hire the staff. They will train the staff. They will look at new technology in updating the scanners and listening to obtain information. That they would – if there were people that were sick and on holidays, I wouldn’t have to worry because it was their staff, and they were training them and looking after them.

It seems that the word “*contract*” was deliberately used, rather than this being a transcription error of the word “*contact*”. Mr Andrews was describing his understanding of what had been proposed. That evidence may well have been influenced, in terms of recollection, by the terms of the proposal document considered below, which came later, containing the “*North Wagga Base*” concept. Or it may be that the conversation came to be reflected in that document.

1. Mr Andrews said that during the conversation, they also spoke about the possibility of Ms Putland and Mr Pullen taking over the telephones, perhaps for other insurance brokers or insurance companies. Mr Andrews said that the conversation ended upon the basis that Mr Pullen would send a written proposal on the things that were discussed so that he could talk to the rest of the Royans group about it.
2. Mr Andrews was then taken to the proposal document, extracted at [54] above. Mr Andrews said he did not assist with drafting the proposal document and did not provide any suggestions as to its content. According to Mr Andrews’ evidence in chief, one or two days after Mr Pullen emailed the proposal document to Mr Andrews, he then called Mr Andrews. Their discussion covered some of the “*finer points*”, such as the amount that would be paid for the contract services, being a weekly amount of $2,800, and invoicing. Mr Andrews could not recall exactly how the weekly amount was determined, other than that it took into account what was being paid at the time and was an agreed figure. The starting date proposed was 1 November 2007. The discussion also covered termination of the agreement. Mr Andrews said that the notice of termination period was four months by either party.
3. Mr Andrews gave evidence of having discussions with managers of the different Royans branches relating to the proposal document. He described Mr Pullen as having been a thorn in the side of many of the branches over the years when he was in competition with Royans, so he had to find out whether or not the other managers felt that this proposal was to their liking. He said he would have had a conversation with most of the branch managers as a common courtesy. He said that most of the branch managers were very receptive and were happy to proceed.
4. Mr Andrews said he was happy with the proposal document and happy with the fact that the branch managers were happy. He was confident because Ms Putland had performed the radio base work at that stage for two years, and she had prior experience. He thought that what they proposed would take away some of his headaches and thought it would be quite successful. It was proposed that the work would be done from “*North Wagga Base*”, which was at the Putlands’ home address in North Wagga.
5. The independent contractor proposal, both in the initial discussions, and in the document provided to Mr Andrews, never resulted in a written contract or formed the basis of any other formal adoption or agreement. On the evidence, the document ended up being largely confined to helping to determine, or at least confirm, rates of pay. No such separate business with most of the characteristics described in the proposal ever eventuated, which is consistent with it never being ultimately the subject of any binding agreement. The state of the evidence was that the proposal document was incapable of being used to dictate the nature of the legal relationship between the parties.
6. Mr Andrews was also taken to an email of 10 October 2007 and an attached document sent by Ms Putland, extracted at [55]-[56] above. He described the attachment as a document that Ms Putland intended to have sent out to branch managers and representatives of the Royans group after he had told her that the proposal was “*all go ahead*”. It was not a document that he requested or assisted with. However, he could not recall having either replied to that email or having discussed it with Ms Putland. On the evidence, both the proposal document and the follow-up document for the representatives did not result in any final agreement being reached bearing the terms proposed by Mr Pullen and Ms Putland.

#### Radio base between 2007 and 2012

1. Mr Andrews gave reasonably detailed evidence in chief about how the weekday radio base work performed from the Putlands’ home between 2007 and 2012, as part of the full‑time service provided by the Putlands, came to be moved back to the Royans Wagga premises in the Hut. In cross-examination, Mr Andrews maintained that this was not a significant change. However, this was not consistent with either the nature of the change or his motivations for it taking place, as detailed below.
2. In cross-examination, Mr Andrews agreed that from about late 2007 until July 2012 when weekday radio base work returned to the Hut, the Putlands were responsible for the work in its entirety 24 hours a day, seven days a week, with no person from Royans Wagga doing any of that work and all of it being done from the Putlands’ home (except, for example, when calls were diverted to a mobile phone). During that period, the Putlands were paid a lump‑sum amount following the issue of a single weekly invoice, although the amount had been worked out by reference to an hourly rate and then agreed upon. There was no designated shift breakup between the Putlands such that they were interchangeable, and no such requirement was imposed or suggested by Royans Wagga. The Putlands were not required to send timesheets or tally up the number of hours they had worked; rather, they were paid a lump-sum figure for all the work done in a particular week. This evidence was apparently adduced in cross-examination to draw a contrast with the situation that prevailed once the weekday work did move to the Hut.
3. In his evidence in chief, Mr Andrews denied, as deposed to by Ms Putland, that in 2009 she asked if she could go onto the books of Royans Wagga as an employee. He similarly denied that such a request was made during 2010. More generally, Mr Andrews denied having any conversation with Ms Putland in which his approval was sought for Mr Putland to assist with the radio base work. He also denied having any conversations with Ms Putland in which she requested to be put on the books (i.e. to become an employee), save for a telephone conversation that Mr Andrews said he had with Ms Putland in December 2014 following the meeting at the Putlands’ house. During his evidence in chief, Mr Andrews was asked to respond to Ms Putland’s evidence that she had raised the unfairness of not being paid at the same hourly rate as Ms Yerbury. Mr Andrews said that Ms Yerbury was being paid $25 per hour for the night shift, and that Ms Putland may have raised that with him but he really could not recall. During cross-examination on this evidence, Mr Andrews was asked whether that was a circumstance of Ms Putland requesting to be treated like an employee, and similar questions seeking to establish the same point. Mr Andrews resisted that inference, although he did not seek to alter his evidence in chief. I am reluctant to make any adverse credit finding about Mr Andrews on this evidence merely because I accept the evidence of both of the Putlands on this topic. The better view is that while such matters were, on the balance of probabilities, raised with Mr Andrews, he genuinely had no recollection of this being said to him.
4. During the 2007 to 2012 period, the legal nature of the relationship between Royans Wagga and the Putlands was, perhaps, more finely balanced. Had I been required to reach a concluded position about this, I would have been quite strongly inclined to the view that while there were aspects of the relationship bearing the hallmarks of an independent contractor arrangement, the balance would fall in favour of it nonetheless being an employment relationship. That is because, apart from the relatively mechanical aspects of dealing with calls and, as a result, sales representatives, the true level of the Putlands’ autonomy remained both limited and subject to the ultimate dictation and control by Mr Andrews on behalf of Royans Wagga. The conclusions reached about the degree of authority to control in the relevant period largely, if not entirely, unavoidably apply to the 2007 to 2012 period as well. Despite the tax, invoice and GST‑charging arrangements, it would be very difficult, and bordering on impossible, to conclude that the Putlands ever really ran a separate and independent business. They seemed, in substance and reality, to be employees even when running the entire radio base from home, albeit with some greater degree of flexibility and autonomy in terms of how individual incidents were dealt with.
5. Mr Andrews gave evidence in chief of having discussions in late 2011 and early 2012 with Ms Putland and Mr Putland about concerns relating to the radio base. He said that he spoke to Ms Putland and said:

Linda, the radio base reports are always being sent late. They’re up to a week late sometimes. I have asked so many times. What can we do about it?

He said that Ms Putland shook her head as though frustrated and said:

I have asked him so many times to get them up to date.

Mr Andrews said that the reference to “him” was a reference to Mr Putland.

1. Mr Andrews said that the concerns that he conveyed to Mr and Ms Putland in discussions at that time related to the log reports being late, which made them of no use, as well as complaints from other branches. He said that he conveyed to them that the Royans branches were complaining that they would have won a job had information been passed on to them sooner. The tenor of this evidence and these conversations conveyed, perhaps inadvertently, the extent to which Mr Andrews was endeavouring to exert control in the manner of an employer, rather than asserting contractual rights and expectations as a party to an independent contracting arrangement. However it might also be observed that such a concern would not be unnatural for the principal in an independent contracting arrangement. In the context of the evidence in this case, it tended more to the former than the latter.
2. Mr Andrews was cross-examined about an email he sent to the Royans managers on 3 February 2012, extracted at [118], which was forwarded to the Putlands and Mr Haberecht on the same day. The email set out what Royans Wagga (via Mr Andrews) expected to be done by its sales representatives and by the radio base, including by way of improvements. This was reflective of the real control that Mr Andrews possessed and exercised, on behalf of Royans Wagga, over the radio base and the rest of the Royans Wagga workforce engaged in this aspect of the business. He accepted in cross-examination that this email did not merely contain suggestions but, rather, mandatory requirements to be adopted by the Royans Wagga representatives and by the Putlands. The final paragraph of the email seeks an indication that the other Royans branches would also adopt the improvements.
3. In around June 2012, Mr Andrews had a further discussion with the Putlands. In his evidence in chief, he described the situation in which that discussion arose as being that “*the radio base at that point had degenerated even more so from the services that the [Royans] branches expected*”. After a discussion with several of the branch managers, it was decided that he would have a talk with the Putlands. He went over to their house and had the discussion in the backyard because their house was being renovated. He said to them that he had been speaking to the branch managers and that they had had enough because of the call logs being submitted late, calls not being answered and messages not being passed on. He said that Ms Putland said, “*well, what are we to do*?” and “*how can we fix this?*”. Mr Andrews said, “*well, look, they’ve had enough*”. He said that he put forward the suggestion from the managers that the radio base move back to Royans Wagga, but this time that it operate from the Hut. He indicated that they had past experience that having the radio base at Royans Wagga had worked, that people were awake, could send the reports and answer the phones. Ms Putland said things such as, “*well, what am I to do? I home school the kids. I have* [things, the specifics of which Mr Andrews could not recall] *to do*”. Mr Andrews said that Mr Putland said, “*I will come into the Hut*”.

#### Establishing the Hut: June/July 2012

1. Mr Andrews said that the discussion then turned to the fact that the Putlands could not do the radio base work by themselves. Mr Andrews said he suggested having a person called Rodney Roy also work on the radio base because he was a radio technician expert. Mr Andrews said in his evidence in chief that he said to Ms Putland:

Look, there’s no reason why the weekend should change. You can operate from home just as normal.

1. At this point in his evidence in chief, Mr Andrews said that, at that stage, he was “*more seeing Shane and Linda without having all the answers.*” He said that Mr Putland asked in response:

Well, what times and what shifts will I do?

Mr Andrews responded:

Well, what you want to do. You two can decide what you can reasonably do, and then we can put the rest to a person by the name of Rodney Roy.

Mr Putland said:

Well, can you provide a list of perhaps possible shifts for me so that I can have a look at it?

Mr Andrews responded:

Yes, I will do something up. I will send it to you so that you can choose what you think you can reasonably do.

1. The tenor of this conversation, even as conveyed freely by Mr Andrews in his evidence in chief and unled, was that he was effectively telling the Putlands what the problem was and what the solution would be. It was a clear exercise in control, albeit that Ms Putland was not being forced to work from the Hut on weekends. Cross-examination detailed below made it clear that while expressed as a proposal, it was one with no real alternative for the Putlands other than ceasing to work for Royans Wagga.
2. Mr Andrews was then taken in his evidence in chief to a subsequent email to the Putlands from him which followed on from this conversation and included proposed shifts and rates. His evidence was that he was surprised when Mr Putland nominated for one shift of only six hours per day, from 11.00 am to 5.00 pm for Monday to Friday, being 30 hours per week, because this meant that he had to find two operators. This was a revealing item of evidence, because it disclosed the overall control and responsibility retained by Royans Wagga via Mr Andrews. Had this been an independent contractor arrangement, it would be expected that finding additional staff for shifts in the Hut would be the Putlands’ responsibility.
3. Mr Andrews accepted in cross-examination that while the idea of moving the work back to Royans Wagga’s premises was put to the Putlands in the form of a suggestion or proposal, the effect of what he was saying was that, if it was not accepted, the Putlands would probably lose the Royans Wagga work. This was another manifestation of the control and authority that Mr Andrews held and exercised over the Putlands.
4. Mr Andrews said in his evidence in chief that when the change to work being done from the Hut took place in late July 2012, there was no change in the nature of the duties or services that were provided, nor in the invoicing arrangements. He engaged two operators to work during the times outside the shifts that Mr Putland had nominated to work, being Mr Rodney Roy and Ms Kylie Yerbury. Ms Yerbury started on 25 July 2012. Her contract was in evidence. To the extent that this was relied upon to contrast with the absence of such a contract with Mr Putland, it did not achieve more than showing a subjective intention to treat him differently, despite minor and immaterial differences in substance.
5. Mr Andrews’ evidence in chief was consistent with the Putlands to the effect that part of the reason for moving the radio base work to the Hut was, to use his words, to “*lift the standards of the base and to keep John Cusack* *at bay*”. On that topic, Mr Andrews said:

I certainly spoke to Shane and Linda about collecting information on John Cusack regarding failures on his part. For example, the very things John Cusack often complained about the North Wagga base were similar things that he would do himself, such as he might complain that North Wagga hasn’t answered the phone. It rang out. Well, I wanted to know when John Cusack’s phone rang out, which it did, and they would leave messages and he wouldn’t call them back, so I needed that information so that I could balance the equation.

This was another example of non-leading evidence in chief being revealing as to Mr Andrews’ true level of control over what took place concerning the radio base.

1. At the commencement of the work from the Hut, Royans Wagga continued to receive a single invoice from Mr and Ms Putland. From 25 September 2012, Royans Wagga started receiving two separate invoices, which was not explained to Mr Andrews by either of the Putlands. He said he did not ask for this to take place.
2. Mr Andrews was taken in his evidence in chief to timesheets completed at the Hut. He said this took place because:

… the office girls were confused and needed some sort of system. They had employees in the Hut which they needed to pay, and they needed to know times, so they would have produced this to make it easier for themselves to know who to pay and how much.

He said that the administrative staff did not receive the Putlands’ invoices before payment was made.

1. Mr Andrews confirmed in his evidence in chief that he had told the Putlands to hold back on providing the log reports to the sales representatives in approximately late 2012. This evidence again indicated control on the part of Mr Andrews. This evidence was further supported by Mr Andrews confirming that a week later he had instructed the Putlands to continue to send the reports on time.
2. Mr Andrews gave evidence in chief to the effect that there was a material difference in the way in which Mr Putland and Ms Yerbury performed work in the Hut. This was evidently directed to supporting a conclusion that Mr Putland was an independent contractor, while Ms Yerbury was an employee. Mr Andrews explained that Ms Yerbury had to be awake, had to be present at the premises, had to listen to scanners, would do cleaning and wore a uniform, whereas Mr Putland could come and go as he pleased. Also, Ms Yerbury was not able to divert the phones to her home.
3. It is appropriate to express a view on this evidence at this point, rather than leave it to the consideration section below, so as to be clear as to the evidence being referred to. In my view, these were not relationship-changing points of difference. It was only a very slight indication in the direction of an independent contractor arrangement for Mr Putland and certainly was not enough to draw a real line or point of distinction between Ms Yerbury, who was plainly being presented as an employee, and Mr Putland, who was not. First, Mr Putland performed work from the Hut from July/August 2012 until October 2014 when Ms Yerbury resigned. During that time, Mr Putland also filled in for Ms Yerbury when she was unwell. Mr Andrews conceded in cross-examination that cleaning was not a requirement in Ms Yerbury’s employment contract. It was not clear on the evidence that Mr Putland was, in fact, able to come and go as he pleased. Mr Andrews accepted in cross-examination that Mr Putland behaving in this way was not conducive to him continuing to work for Royans Wagga.
4. It is true that there was more flexibility for Mr Putland insofar as his home was actually set up with the relevant equipment due to Ms Putland’s weekend work. Mr Putland had the option to divert the telephones to a location with scanners, internet, multiple telephone lines, an uninterruptable power supply and a commander telephone system (which Mr Putland deposed was an integrated system of eight telephone handsets installed in various places around the Putlands’ home), which Ms Yerbury did not apparently have the benefit of.
5. Mr Andrews was cross-examined at some length on the working arrangements in the Hut as opposed to working arrangements on weekends. In attempting to resist the suggestion put by counsel for the Putlands during cross-examination that a lump‑sum payment of $800 for weekend work from the middle of 2012 equated to approximately $13 per hour for that work, Mr Andrews himself made reference to a time basis per call – “*Or you could look at it as $100 a phone call*” – and described that as being “*how call centres operate*”. This evidence of the hourly rate that Mr Putland was paid for weekday work in the Hut ($20 per hour) contrasted with the independent contractor call centre arrangements trialled with Well Done and ultimately entered into with Fonebox. It was quite clear that Ms Putland was not being remunerated on the basis of answering an average number of calls on the weekend, but was instead paid an amount of money to cover a particular shift in the roster.
6. The distinction between work in the Hut and services provided by Well Done and Fonebox was highlighted during cross-examination of Mr Andrews, when he sought to draw a distinction between weekend work and weekday work. He was unwilling to accept the proposition that someone who was on duty but not answering telephones was still working by reason of the overall arrangement in which this occurred. He made repeated reference to weekend work being assessed by reference to the number of calls, rather than the amount of time being spent, seeming to suggest that a rate per call was a call centre arrangement. However, that is not the way in which the weekend work was remunerated as performed from the Putlands’ home. Rather, there was a lump-sum payment which readily translated into an hourly rate, albeit an hourly rate lower than the weekday hourly rate paid in the Hut.
7. The overall burden of Mr Andrews’ evidence in cross-examination was to reinforce the impression that the work done by Ms Putland from home was, in truth, only different from work done in the Hut by reason of it being outside ordinary business working hours and perhaps with less volume of work than the weekday business hours. It was not different in character. The attempted distinction that Mr Andrews was seeking to draw became even less tenable during cross-examination. Mr Andrews endeavoured to suggest in cross-examination that watching television in the Hut when the telephones were not ringing was materially different from being asleep at the Putlands’ home when the telephones were not ringing. That distinction seemed to be without real substance. In re-examination, the real point of distinction relied upon was the lack of supervision at the Putlands’ home, yet Mr Andrews disavowed any real degree of supervision in the Hut.
8. In cross-examination, Mr Andrews confirmed that Mr Putland, Ms Yerbury, Mr Joel Roy and Mr Rodney Roy all worked shifts in the Hut, and were all paid by the hour. Mr Putland was initially required to do the work from the Hut, while Ms Putland was able to do the weekend work from home, principally, on Mr Andrews’ account, because the weekends were a quiet period, rather than because of her children or any other responsibilities. Mr Andrews did not accept that it was a significant change for Mr Putland to go from being responsible for the radio base with Ms Putland 24 hours a day, seven days a week, working from home and being paid a lump sum, to working shifts and being paid by the hour in the Hut. I conclude, contrary to Mr Andrews’ evidence in cross-examination, that this was a significant change, but not of itself determinative of the nature of the legal relationship. It was, however, an important step towards more of an employment arrangement.
9. Mr Andrews’ effort to distinguish between employees in the Hut and the Putlands was considerably weakened after a line of questioning in cross-examination about his expectations of employees, as compared to Mr Putland, in relation to the importance of listening to scanners as part of the radio base work. Mr Andrews gave evidence that it was expected that Ms Yerbury listen to the scanners, but he did not really care if Mr Putland did because “*he had a flexibility that wasn’t applied to an employee*”. Mr Andrews later conceded in cross-examination that Mr Putland did in fact listen to the scanners and that Mr Putland filled in for Ms Yerbury when she was ill (which was apparently a regularly frequent occurrence due to ongoing health problems). He accepted that the whole reason why Mr Putland was brought in to work in the Hut was to ensure his attendance and to make sure he was awake, with the probability that he would not continue to receive work from Royans Wagga if that did not happen.
10. The lack of real and material difference between those who worked in the Hut is reinforced when regard is had to another person, Vicky McCully. Ms McCully worked in the Hut, rendered invoices with GST and was subjectively regarded by Mr Andrews as a contractor, yet was otherwise even less able to be distinguished from Ms Yerbury, Mr Joel Roy and Mr Rodney Roy. On the totality of the evidence, I find that there was no relevant, let alone legally significant, distinction between Mr Putland when working in the Hut, and any of the other persons who worked in the Hut.
11. Mr Andrews was questioned about an email sent to various Royans managers and copied to the radio base email account in December 2013 advising that Royans’ Sydney branch would have its own radio base from February 2014. Mr Andrews’ evidence was that the Putlands’ invoices did not change following the establishment of the separate radio base for Royans Sydney. The effect of this evidence was that the Putlands were not remunerated for the volume of calls answered or made (given that the invoices rendered did not change after the work from Sydney during business hours was no longer completed by them), but for their time. Similarly, Mr Andrews gave evidence that the cost structure of the work provided by the Putlands compared unfavourably with the charging arrangements with the first company that was trialled to provide an outsourced call centre service, known as Well Done. However, the perhaps unintended impact of this evidence was to highlight the real differences between a true independent contractor call centre service and the more employee-type service being provided by the Putlands. As noted above, the independent call centre operator first engaged to carry out a trial, Well Done, charged at a rate of $1.90 per minute, providing, as Mr Andrews evidence indicated, “*actual costs as time spent per branch*”.

#### The commercial call centre proposal, the issue of termination, and the Putlands ceasing to work for Royans Wagga

1. Mr Andrews gave evidence in chief of attending a series of meetings in the second half of 2014, in July, September and November 2014, all of which, at least in part, advanced a proposal to move the provision of radio base services to an independent call centre:
2. The first meeting was for Royans managers in Port Douglas on 31 July 2014. The topics discussed included changes to the radio base. Mr Andrews was taken to a document containing presentation slides which had been sent by email by Mr O’Reilly to some of the directors, a part of which is extracted at [79] above. Mr Andrews noted that the covering email was a push from Mr O’Reilly towards new ideas proposed in the Port Douglas meeting which involved changes to the radio base arrangements. The slides concerned a move to Well Done.
3. On 10 September 2014, Mr Andrews attended a meeting in Nowra at the offices of Well Done with some other Royans managers. He also gave evidence about a series of emails relating to Mr O’Reilly’s communications with Well Done. Mr Andrews’ evidence was that the emails included questions and comments to assist Royans in making an informed decision about the changes being contemplated.
4. There was a further managers’ meeting in the Hunter Valley on 14 November 2014, which Mr Andrews attended. The minutes of that meeting referred to the Wagga base operators being given three months’ notice “*shortly*”. The minutes referred to trialling the proposed new system before it was implemented.
5. This evidence did not establish that any firm date for a changeover to a call centre had been determined, such that any *effective* notice of termination that was proposed to be given to the Putlands involved a real risk of a hiatus between the Putlands ceasing the radio base work and the commencement of an independent call centre. This was not a promising foundation upon which to give clear and unequivocal notice of termination. That reality, and the probable need for a degree of flexibility, may have contributed to the manner and content of what Mr Andrews in fact said to the Putlands. This set of circumstances reinforces the acceptance above of the evidence of the Putlands that no such notice of termination was communicated to them. That conclusion was further reinforced by the following evidence of Mr Andrews in cross-examination.
6. Mr Andrews agreed in cross-examination that at the time he said he gave the Putlands notice in December 2014, there was no contract in place with any other provider; the suitability of Well Done was not known and Fonebox was not spoken to until 2015. Mr Andrews also agreed that immediately prior to Royans Wagga signing a contract with Fonebox on 9 April 2015, no Royans branch had committed itself to an alternative call centre service provider.
7. Mr Andrews denied that Royans Wagga would have to rely upon the Putlands until it could find someone else whose trial had proved successful, because Royans still had the option to divert the 1800 number calls instead among the six geographic branches, including directly to Royans sales representatives, or to secretaries at the branch offices. However, he conceded that it was an option that was never exercised and that the better option was a call centre. Any degree of dissatisfaction with the Putlands was not met by taking up the diversion to branches and representatives option. Mr Andrews denied the proposition that it did not make any sense to give the Putlands notice in December 2014. While I am not prepared to reject that denial, it does suggest that Mr Andrews may not have been abundantly clear in what he said to the Putlands so as to convey any notice that he thought he was giving clearly enough, not least because he could not have known when the proposed changeover could or would take place. This supports the finding that whatever may have been Mr Andrews’ intention as to notice, the giving of such notice was not successfully conveyed and therefore was not given. A further reason in support of that conclusion is that the contract with the Putlands did not, in fact, conclude until almost five months after December 2014; however, it was something that the Putlands were not specifically aware of until the telephone calls were diverted to Fonebox, or at least shortly before or after. Those events are therefore also inconsistent with prior notice having been effectively communicated to the Putlands in December 2014.
8. Mr Andrews also gave evidence in chief of a conversation that he had with Ms Putland after the December 2014 meeting that he had at the Putlands’ house. He said that the conversation took place a day or two after the meeting, when he called Ms Putland, in response to an initial call from her immediately following the meeting in which she had been extremely hostile. The most that I can make of that evidence is that Mr Andrews maintained his subjective position that the Putlands were independent contractors, and that there was some discussion about the duration of notice to which the Putlands were entitled. It was possible, and indeed quite logical, for there to have been a discussion about the duration of notice that the Putlands were entitled to in light of the trials they had been told about, without Ms Putland understanding that notice had in fact already been given. This evidence did not persuade me that the giving of notice had been communicated to the Putlands, or either of them. The evidence also confirmed that Mr Andrews undertook a comprehensive search of Royans Wagga’s records and could not locate any documentary material that definitively clarified the true position of the arrangement aside from the North Wagga Base proposal document.
9. Mr Andrews gave evidence in chief about the cross-over between the continuing trial with Well Done, (which was not formally terminated until May 2015) and the discussions with Fonebox (which commenced in January or possibly February 2015). The first email in evidence on this topic is dated 27 March 2015. The radio base telephones were switched over to Fonebox on Friday, 1 May 2015. On that day, Mr Steve O’Reilly sent an email to Mr Andrews and nine other Royans recipients with the subject line “*Fonebox now live !!*”. The content of the email referred to the Fonebox service having started, a call being made by Mr O’Reilly to the radio base 1800 number, Mr O’Reilly hearing a disconnected message and then successfully calling the number which was answered by Fonebox. The email also stated, “*They are in the process of diverting Qld & Newcastle back to Well done (we will stay with them for a couple of weeks until we hopefully determine that Fonebox is the way to go)*”.
10. Mr Andrew said he did not see Mr O’Reilly’s 1 May 2015 email until Saturday, 2 May 2015, because he was not in the office on the day it was sent. Mr O’Reilly rang Mr Andrews on the morning of 2 May 2015 and confirmed that the phones had been transferred across to Fonebox. Mr O’Reilly told him he had spoken to the Putlands and that they were aware of the change and suggested that it would be a good idea for Mr Andrews to give them a call. Mr Andrews gave evidence of a brief conversation with either Ms Putland or Mr Putland to say to them, “*Look, as you know, the phones have now been diverted as from Friday afternoon across to Fonebox*”. Mr Andrews said that they said, “*yes, we’re aware*”, because Mr Cusack had called them first thing on that [Saturday] morning and told them what had happened. Mr Andrews understood that after Mr Cusack called the Putlands, Mr O’Reilly spoke to them and then he had spoken to them.
11. Mr Andrews said in his evidence in chief that Mr Putland came in to Royans Wagga the following Monday morning, 4 May 2015, and said he was going to charge for the entire weekend. Mr Andrews said:

Well, look, I don’t know if that’s quite fair.

1. Mr Putland told him that they thought they “*had the phones*” over the Friday night and were not told about the change. Mr Andrews said:

Well, yes. That’s fair enough. You weren’t told until Saturday morning. You were warned several days before that the phones were going to be cut off and we did speak to you on Saturday morning.

1. Mr Andrews proposed that a fair way would be for the Putlands to charge for half the weekend, which equated to approximately midnight on Saturday night. That was agreed to and resulted in the final invoices issued by the Putlands. The main points to derive from this evidence are that Mr Andrews did not suggest that notice had been given at any time after December 2014 and, by his evidence, confirmed that effective notice was only given to the Putlands on 2 May 2015 following them becoming aware that the telephones had been diverted.
2. On the totality of the evidence, I conclude, on the balance of probabilities, that the Putlands were aware that their services, however legally characterised, were at a substantial risk, bordering on certainty, of being terminated at some point once a successful trial had been completed with an alternative service provider. However, I also conclude, on the balance of probabilities, that they did not know when that was going to take place. Even if, contrary to the findings I have previously made, some kind of notice was given in December 2014 by Mr Andrews, it seems that that notice was imprecise and had no particular dates associated with it. Thus it was not an effective notice in any event. On balance, I conclude that the Putlands were waiting to be told when it was likely that their services would no longer be required and were expecting to be given notice at some stage, but this never transpired. Instead, their services were abruptly terminated with either little or no warning, let alone clear notice of termination. This view of what took place also accommodates the evidence given by Mr Andrews that he had conversations in the period between January 2015 and April 2015, both with Mr Putland and Ms Putland, about obtaining other employment, and that he provided a reference by telephone in support of an application by Ms Putland to work for Wagga Radio Cabs, a taxi firm. This again is consistent with the termination of the Putlands’ service taking place at some point, without formal notice ever having been effectively communicated to them.

#### After the Putlands’ termination

1. In his evidence in chief, Mr Andrews said that on the afternoon of 4 May 2015 or on 5 May 2015, he received a telephone call from Ms Putland who asked if he could provide a separation certificate for Centrelink so that they could get some money. Mr Andrews’ evidence was that he said:

Look, Linda, I’m sorry I can’t do that. Separation certificates are for employees.

Ms Putland said:

Well, look, I can’t get any money. I’ve got to get something. Can you just write down something about terminating the contract, then?

Mr Andrews said:

Okay. I will put something together.

The result of that conversation was the letter that was provided for both Mr Putland and Ms Putland about terminating the contract, extracted at [90] above.

#### Other aspects of the radio base operations during the time the Putlands worked there

1. Mr Andrews gave evidence in chief that one of the radio base operators, Vicki Hayden, changed from being regarded by Mr Andrews as an employee to being regarded as an independent contractor. The legal foundation for that change was not the subject of any evidence, but it tended to demonstrate the importance to Mr Andrews, and thus to Royans Wagga, of a subjective view of the nature of the relationship, rather than a change attended to by any careful process of reasoning. It was not a promising foundation for any defence under the FW Act denying recklessness.
2. Mr Andrews confirmed that the 1800 number used for reporting accidents was advertised, including by way of cards, stickers or calendars, to encourage people to call the number in the event of an accident. Any calls to the 1800 number would be answered by the radio base. Thus to the world at large, the service was not just provided on behalf of Royans Wagga, but by Royans Wagga. It also meant that there was limited scope for any separate goodwill to accrue to the Putlands.
3. Mr Andrews was taken by counsel for Royans Wagga to some telephone bills which confirm that Royans Wagga paid for the 1800 number for the radio base. He was taken to a number of entries which indicated the volume of calls to the radio base. Perhaps contrary to the intention in taking Mr Andrews to these records, they confirm that the Putlands were not paid for the volume of calls or for the time spent on each call, but rather for the overall time on duty. This again contrasts with the cost-effectiveness of an independent call centre, which was doubtless a powerful financial motivation for a change. As such, this evidence did not assist the case for Royans Wagga.
4. In cross-examination, Mr Andrews accepted that it was always the intention that Royans Wagga would bear the costs of the internet and telephone services for the accident reporting service, including the cost of some telephone hardware, a computer, some scanners and some office equipment. Mr Andrews asserted in cross-examination that the Putlands had “*paid for many things themselves*”, but did not articulate what that was beyond a reference to computer screens. He never once told the Putlands that they needed to go out and buy something themselves to do the radio base work, and he was not aware of anyone else at Royans Wagga ever telling them to do so.

# CONSIDERATION

## Employee vs independent contractor

1. The chronology of key events is reflective of the largely undisputed parts of this case. Much of the additional evidence was reflective of greater detail than the chronology of key events. The greater detail in the additional evidence also more readily exposed the points of difference and disagreement between the competing cases, as well as facilitating reaching conclusions based on the personal attributes of the various witnesses, especially the Putlands and Mr Andrews. Not every point of difference required detailed consideration and not every disagreement required resolution. The focus, in considering the totality of the evidence needed to be on key aspects of those differences and disagreements insofar as they had a bearing on the resolution of the competing cases. The key purpose of this analysis is to reach a concluded view on the single most important issue – that of whether the Putlands, at least in the relevant period from September 2012 to May 2015, worked for Royans Wagga as independent contractors or as employees.
2. This ended up being a case in which the resolution of the question of whether Royans Wagga retained the authority to control the Putlands, or either of them, was decisive. Before turning to the issue of control, it is convenient first to list the competing indicia for the relationship between Royans Wagga and the Putlands being one of employer/employee or independent contractor, noting the warnings in the authorities about the hazards and risks attendant upon a mechanical listing of indicia. Such a list is useful for summarising and framing more detailed considered of the key or otherwise decisive factors as they have emerged in the evidence and submissions.
3. The indicators in favour of an independent contractor relationship were as follows, many of which occurred prior to the relevant period:
4. the obtaining of ABNs by the Putlands;
5. the issuing of tax invoices in lump‑sum amounts;
6. the non-deduction of income tax;
7. the availing of income‑splitting;
8. the working from home, mostly by Ms Putland, but also at different times by Mr Putland, including by helping Ms Putland out prior to the relevant period, and filling in for Ms Yerbury when she was ill during the relevant period, plus during the last six months or so from mid- to late October 2014 to the start of May 2015;
9. the lack of any Royans Wagga uniform being worn by the Putlands; and
10. paying others to do work.
11. The terms of the written proposal from September 2007 might also have been influential, but as it has been found that this was never the subject of any concluded contract, it is of limited, if any, weight or relevance. The suggested business structures were never adopted, no work was done for anyone other than Royans Wagga and there was no retaining of employees of the kind contemplated.
12. The independent contractor features listed above were largely reflective of the Putlands’ subjective understanding of the position they were in, according to the wishes of Royans Wagga, rather than supporting an objective assessment of the true nature of the relationship. The Putlands had ABNs, but no real understanding of their legal significance. The ABNs reflected an aspect of the formal and legal requirements to have a business, largely for taxation purposes. But they did not reflect in any meaningful sense the setting up of an independent business, let alone a business that was separate from Royans Wagga.
13. The issuing of tax invoices with ABNs was a step along the way to establishing a separate business, based on the advice of their accountant. There was no evidence to suggest that the Putlands appreciated any legal, as opposed to financial, significance in doing this. Viewed in this way, these steps were reflective of form rather than substance. Similarly, the non-deduction of income tax, and the resultant income‑splitting, was the product of the use of tax invoices, rather than being any independent indicator. The fact of a lump‑sum amount tends towards a contract for services; however, the unilateral nature of that arrangement was evidence of the existence of control by Royans Wagga. If the time from Friday evening until Monday morning is calculated as being, in round terms, 60 hours, a weekend rate of $750 equates to $12.50 per hour. In the cross-examination of Mr Andrews, a weekend was measured as 58.5 hours, producing an hourly rate of $13.68, based on $800 for a weekend. Both hourly rates are quite a departure from the $18 per hour offered for the weekday afternoon shifts Ms Putland also worked.
14. Working from home was, on all of the evidence, not of itself a strong indicator either way. Put another way, it was not, in this case, of itself inherently inconsistent with an employment relationship. Not wearing a uniform was of trivial significance and cannot be given any substantial weight, especially when the majority of the Putlands’ interactions with Royans staff and members of the public were by telephone.
15. The most significant of the independent contractor indicia ended up being the payments made to others to do radio base work. However the significance of this fades once it is appreciated that this was done in a very limited way, for a very limited time, and only outside the relevant period. It was not something that could, of itself, change the nature of the relationship between the Putlands and Royans Wagga.
16. The “*employment contract document*” is, on its face and therefore objectively, consistent with an outsourcing arrangement with an independent contractor, or at least consistent with such an arrangement being in contemplation by Ms Putland, so might have been of some importance. However, a curious feature of this document is that Mr Andrews was not aware of it until it emerged in the course of this litigation. Ms Putland appears to have knowledge of the document, or apparently of it having been prepared by her father. The document was never signed and it is difficult to characterise this as having been a contract at all, given the lack of any meeting of the minds as to its contents or even existence. Despite the initial impression, the document does not advance Royans Wagga’s case as it could not be shown to have ever been more than a bare and unconsummated proposal.
17. The indicators of there being an employment contract relationship between the Putlands and Royans Wagga were as follows:
18. The Putlands only performing radio base or call centre work for Royans Wagga;
19. payment by Royans Wagga for the installation and transfer of ownership of telephone lines at the Putlands’ home;
20. payment by Royans Wagga of the monthly telephone and internet accounts at the Putlands’ home;
21. emails and other documents reflecting involvement by Ms Putland, in particular in the overall running of Royans Wagga, albeit with a focus on the base, including deference to Mr Andrews;
22. the supply of scanners and other equipment, including the commander telephone system and a computer, by Royans Wagga to the Putlands;
23. the lack of any profit and the dominance of hourly rates, although lump-sum rates were present for weekend work;
24. the absence of any form of advertising of a business run by the Putlands;
25. the lack of tangible assets supplied, purchased or maintained by the Putlands for the ostensible use in a business run by the Putlands;
26. the accrual of goodwill to Royans Wagga from the work being performed by the Putlands; and
27. the lack of true autonomy besides the carrying out of mechanical tasks, including home visits by Mr Andrews.
28. Each of the above 10 indicators are significant indicators of an employer-employee relationship. However they might not on their own be decisive. What is much more important in this case than any of those 10 indicators is authority to control.
29. The question of authority to control in significant measure turns on an assessment of the conflicting evidence of the Putlands and, in particular, Mr Andrews. The conflict was somewhat nuanced. The overall burden of Mr Andrews’ evidence, especially if only read and not heard and seen, might tend towards the idea that the Putlands were indeed operating a separate business which he sought to influence, but did not seek to control and did not have authority to control. However, his manner and demeanour, the way he spoke, and the sense of authority he conveyed stood in sharp contrast to the same assessment of each of the Putlands. I was left in no doubt that each of them was subordinate to Mr Andrews’ wishes, even if he did not always get his own way. He had authority to control and, when needed, he exercised it. This was a feature of the relationship between Mr Andrews and each of the Putlands throughout the period that each of them performed work for Royans Wagga. A few examples from the additional evidence illustrate the basis for this conclusion:
30. Ms Putland’s evidence of the circumstances leading to her first working for Royans Wagga in 2005, including her remuneration, were reflective of Mr Andrews’ control over her as an employee from the outset.
31. The process by which Ms Putland came to take on responsibility for the radio base full‑time from home in late 2007 was controlled by Mr Andrews, despite the proposal that was advanced by her and her father, which was never substantially put into effect.
32. The assistance that Ms Putland was able to get from Mr Putland in 2008 was only obtained after Mr Andrews had given his approval. To the extent that Mr Andrews suggested otherwise, I found the evidence of the Putlands more reliable and more persuasive on this point.
33. Increases in remuneration, such as that which took place in early 2010, were sought from and approved by Mr Andrews in the manner of a pay rise, rather than in the manner of a variation of an independent contractor’s terms and conditions of contract.
34. Mr Andrews gave written directions by email of requirements he was imposing on the Putlands that were akin to directives to an employee, rather than the enforcement or negotiation of a term of a contract with an independent contractor. This took place by way of forwarding minutes of a group sales meeting held on 27 August 2009, and by way of, for example, an email sent to branch managers and forwarded to the Putlands on 3 February 2012.
35. Ms Putland prepared documents for the purposes of Royans’ Wagga business, for approval by Mr Andrews, including in particular the towing and salvage contract clarification document, extracted at [120] above, sometime after November 2012.
36. Each of the above events preceded the relevant period of September 2012 to May 2015, but demonstrated the nature of the relationship and its history leading up to that time. It was the context in which Mr Andrews sought, and effectively required, the weekday work to return to Royans Wagga’s premises in the Hut. That process alone would most likely have been more than enough, in all the circumstances, to establish the requisite authority to control, and indeed its exercise, for the relevant period. However, when that history and context is added to the equation, that conclusion is inescapable. The residual indicia of an independent contractor arrangement then pale in significance.
37. That conclusion is reinforced by two further considerations. The first is that Mr Putland’s evidence of what took place in the Hut until October 2014 leaves almost no room for him to be regarded as anything other than an employee in that period. In particular, he worked side-by-side with employees in the Hut, doing the same work as them and even working in Ms Yerbury’s shifts when she was ill. In substance, he was at all times an employee in the Hut.
38. A potentially important collateral question requiring resolution is whether the accident reporting service provided by the Putlands between September 2012 and October 2014 should be regarded as a single service considered in combination, or as separate services bifurcated as between what was done in the Hut on Royans Wagga’s premises and what was done at the Putlands’ home. This divides approximately, but not always precisely due to variations, into the working week (including after-hours) in the Hut, and on weekends from the Putlands’ home.
39. The suggestion of two separate services as between the Hut and the Putlands’ home is not supported by any part of the arrangements disclosed by the evidence. Apart from time of day and location of work, the substance of what was done did not change. The same work was being done in both locations and at all times. The bulk of that work was done during the working week, with the weekend work being in the nature of maintaining coverage at all times. It was a single service. This has a significant effect in reinforcing how the overall arrangement should be viewed and characterised. The work done in the Hut strongly and decisively leans towards an employment relationship. Viewed in combination, while the taxation and ABN aspects indicate, however weakly, an independent contractor relationship, almost everything else, most particularly Royans Wagga’s undoubted authority to control, points to an employment relationship having no more than the appearance, in some limited respects, of an independent contractor relationship.
40. While the authorities make clear that the determination of the nature of the relationship is multifactorial, in appropriate cases control can and will be a dominant consideration. This was such a case. Each of the independent contractor considerations were reduced to matters of form or a reflection of the subjective view of Royans Wagga, via Mr Andrews, or the Putlands. The problem is that this then relied upon the soundness of those subjective views, rather than the underlying reality of what was taking place.
41. Mr Andrews’ evidence in chief, spelt out in some detail above, makes it clear that he, on behalf of Royans Wagga, retained a high degree of discretionary control and authority at all times, which he freely exercised when it suited him, albeit not always achieving his desired results. The situation worsened further for Royans Wagga once regard is had to the cross-examination of Mr Andrews.
42. Overall, it has to be said that Mr Andrews did not fare well in cross-examination. The stance he attempted to maintain was considerably weakened by cross-examination. Not all of that cross-examination has been the subject of detailed consideration. However, an overall impression obtained about Mr Andrews, both in his evidence in chief and in cross-examination, was that he is a firm and disciplined man. He has a forceful personality and would have had little difficulty in imposing his will on the Putlands, who were not just in a weaker position, but had neither his force of personality, nor his economic power to impose his will. Supported by the documentary evidence, I was left in no doubt whatsoever that Mr Andrews’ authority to control and, in fact, his actual control over the work done by the Putlands was extensive and as far‑reaching as he wanted it to be. It was his decision entirely as to how much latitude the Putlands were given over how they carried out their work.
43. That is not to say that Mr Andrews’ control and its exercise was wholly successful. The decision to return the weekday work to the Hut in late July 2012 was a reflection of Mr Andrews’ inability to have the work by the Putlands, and by Mr Putland in particular, performed to a standard and in a way that he considered acceptable. Equally, his acceptance of the radio base work being taken back to the Putlands’ home in October 2014 until early May 2015 was an arrangement that he undoubtedly could and would have changed if that suited him and Royans Wagga. I note that by October 2014, discussions about moving the radio base work to an independent call centre had commenced and advanced, including a site visit to Well Done in Nowra in early September 2014. I therefore infer that it suited Mr Andrews and Royans Wagga not to return the work to the Hut pending that change.
44. Finally, the contractual arrangements ultimately arrived at with Fonebox were even more starkly different to the arrangements with the Putlands, and clearly reflected an independent contractor relationship between Fonebox and the Royans companies. For example, in the course of Mr Andrews’ evidence in chief, it was apparent that it took months of negotiation of documentation about the new arrangement with Fonebox as the ultimate independent contractor before the services were provided, and the contract ultimately signed in April 2015 bore Fonebox branding, including the Fonebox logo and website. The arrangement was for a payment of $2,500 per month, charged at the rate of 1,000 minutes per month.
45. The weight of the indicia established by the evidence, dominated by the finding of Royans Wagga’s authority to control, favours finding an employment relationship rather than an independent contractor relationship, notwithstanding certain lesser features that are in common or more telling of the latter. The reality is that the impact of technology, and in particular communications technology, has greatly facilitated working from home where the substance of work is no different from that which was done in the workplace in the past. However, quite apart from the arrangements in the Hut which strongly tell of an employment relationship, the key features, even for the weekend and after hours work from home, are the undoubted control that Royans Wagga, through Mr Andrews, had the authority to exercise and did exercise from time to time, and the fact that the work was only done for Royans Wagga. Any sense in which the applicants were entrepreneurs and running their own business was illusory and, in any event, a matter of form rather than substance. They were not truly performing work as entrepreneurs owning and operating a separate business. They were not truly working in and for their own business and as representatives of that business but, rather, were performing work as representatives of Royans Wagga.
46. The conclusion I have reached, in the end by a comfortable margin, is that the nature of the legal relationship between Royans Wagga and each of the Putlands in performing the accident reporting service work in the relevant period must objectively be viewed as one of employer and employee, rather than principal and independent contractor.
47. Had I been in any serious doubt as to the nature of the legal relationship between the Putlands and Royans Wagga, there would have been a need to consider in some detail the *Independent Contractors Act* alternative claim. It suffices for present purposes to say that this would have been a difficult claim for the Putlands to establish. In all the circumstances, there is nothing useful to be achieved in determining whether that claim would have succeeded.

## Alleged breaches of the FW Act contingent on finding an employment relationship

1. The breaches of the FW Act alleged against Royans Wagga consequent upon finding an employment relationship were (in the order they will be addressed):
2. contravening a term of a modern award, prohibited by s 45 of the FW Act;
3. making a representation (or representations) that the Putlands were independent contractors in contravention of s 357 of the FW Act; and
4. failing to provide pay slips in contravention of s 356 of the FW Act.

## Breach of s 45 of the FW Act: contravening a term of a modern award

1. Having found that the Putlands were employees of Royans Wagga, at least for the relevant period of September 2012 to 2 May 2015, I now turn to consider whether Royans Wagga has breached a term of a modern award in contravention of s 45 of the FW Act. If so, the Putlands seek compensation to the extent of the contravention, pursuant to s 545(2)(b) of the FW Act. The relevant contraventions relied upon concern underpayment, and, implicitly, failure to pay in lieu of notice of termination.
2. The Putlands claim that they were underpaid during the relevant period in breach of the remuneration set out in an asserted award for an asserted job classification. Determination of this issue requires consideration of the applicable award, the appropriate job classification within the applicable award and the nature of the role (i.e. full-time, part-time or casual) for each of the Putlands.
3. The second amended statement of claim pleads that the award applicable to the Putlands between September 2012 and May 2015 was the Clerks Award for the job classification “*casual level three call centre principal customer contact specialist*”. Royans Wagga, having failed in defending its primary position that the Putlands were not employees and therefore not subject to an award, advanced a secondary position that the appropriate award is the Vehicle Award for the job classification “*Service receptionist*”. Royans Wagga disputed the characterisation of the Putlands as casual employees.

### The applicable award and classification

1. Determining the applicable award requires construing the coverage clause within each of the asserted awards and determining which instrument is most appropriate based on the work performed by the Putlands. In that respect, it is convenient to consider both the appropriate award and classification in tandem, as the work undertaken by the Putlands informs both considerations.

#### Coverage clauses

1. The relevant parts of the coverage clause in the Clerks Award (relied upon by the Putlands), as in force at the relevant time, are as follows (emphasis in original):
2. **Definitions and interpretation**

...

* 1. In this award, unless the contrary intention appears:

…

**clerical work** includes recording, typing, calculating, invoicing, billing, charging, checking, receiving and answering calls, cash handling, operating a telephone switchboard and attending a reception desk

…

…

1. **Coverage**

…

* 1. This award covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature, and to those employees. However, the award does not cover:

**(a)** an employer bound by a modern award that contains clerical classifications; or

**(b)** an employee excluded from award coverage by the Act.

…

* 1. Without limiting the generality of the foregoing this award does not cover employers covered by the following industry awards with respect to employees covered by the awards:
* [list of awards **not** including the Vehicle Award]

…

* 1. Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work.

1. The relevant parts of the coverage clause in the Vehicle Award (relied upon by Royans Wagga), as in force at the relevant time, are as follows (emphasis in original unless otherwise stated):
2. **Coverage**

…

* 1. This award covers employers throughout Australia of employees engaged in vehicle manufacturing and/or vehicle industry repair, services and retail, as defined in this clause, to the exclusion of any other modern award and where the employer’s establishment, plant or undertaking is principally connected or concerned with:

**(a)** the selling, distributing, dismantling/wrecking/restoring, recycling, preparing for sale, storage, repairing, maintaining, towing, servicing and/or parking of motor vehicles of all kinds, including caravans, trailers or the like and equipment or parts or components or accessories thereof including the establishments concerned for such vehicles and the like;

…

* 1. For the purposes of coverage of this award:

**(a)** employees engaged in **vehicle industry repair, services and retail** means employees covered by the classifications at clause 33 and for whom Section 1 – Vehicle Industry RS&R Employees applies; and

…

…

* 1. **Exclusions**

…

…

**(b)** Where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work **performed by the employee** and to the environment in which the employee normally performs the work. **[emphasis added]**

…

* 1. The award does not cover an employee excluded from award coverage by the Act.

NOTE: Where there is no classification for a particular employee in this award it is possible that the employer and that employee are covered by an award with occupational coverage.

#### Classifications

1. Schedule B of each of the Clerks Award (relied upon by the Putlands) and the Vehicle Award (relied upon by Royans Wagga) sets out different job classifications, based on key skills and competencies, which correspond to a particular remuneration level.
2. The relevant parts of the Clerks Award in relation to job classification are as follows (emphasis per original unless otherwise stated):

**Part 4—Minimum Wages, Classifications and Related Matters**

1. **Classifications**

…

* 1. All employees covered by this award must be classified according to the structure set out in Schedule B—Classifications and paid the minimum wage in clause 16—Minimum weekly wages. Employers must advise their employees in writing of their classification and of any changes to their classification.
  2. The classification by the employer must be according to the skill level of levels required to be exercised by the employee in order to carry out the principal functions of the employment as determined by the employer.

…

**Schedule B—Classifications**

…

The classification criteria in this schedule provides guidelines to determine the appropriate classification level of persons employed pursuant to this award. In determining the appropriate level, consideration must be given to both the characteristics and typical duties/skills. **The characteristics are the primary guide to classification as they indicate the level of basic knowledge, comprehension of issues, problems and procedures required and the level of supervision or accountability of the position.** The totality of the characteristics must be read as a whole to obtain a clear understanding of the essential features of any particular level and the competency required. The typical duties/skills are a non-exhaustive list of duties/skills that may be comprehended within the particular level. … [emphasis added]

**The key issue to be looked at in properly classifying an employee is the level of competency and skill that the employee is required to exercise in the work they perform, not the duties they perform per se.**  … [emphasis added]

…

**B.3 Level 3**

**B.3.1 Characteristics**

Employees at this level have achieved a standard to be able to perform specialised or non-routine tasks or features of the work. Employees require only general guidance or direction and there is scope for the exercise of limited initiative, discretion and judgment in carrying out their assigned duties.

Such employees may be required to give assistance and/or guidance (including guidance in relation to quality of work and which may require some allocation of duties) to employees in Levels 1 and 2 and would be able to train such employees by means of personal instruction and demonstration.

**B.3.2 Typical duties/skills**

Indicative typical duties and skills at this level may include:

…

**(ii)** Provide specialised advice and information on the organisation’s products and services; respond to client/public/supplier problems within own functional area utilising a high degree of interpersonal skills.

**(iii)** \* Apply one or more computer software packages developed for a micro personal computer or a central computer resource to either:

* create new files and records;
* maintain computer based records management systems;
* identify and extract information from internal and external sources; or
* use of advanced word processing/keyboard functions.

…

**(vi)** Call centre customer contact office[r] grade 2 is employed to:

* perform a broader range of skilled operations than grade 1;
* exercise some discretion and judgment in the selection of equipment, services or contingency measures;
* work within known time constraints;
* provide multiple specialised services to customers (including complex sales, service advice for a range of products or services, and difficult complaint and fault inquiries);
* deployment of service staff using multiple technologies; and
* exercise a limited amount of leadership over less experienced employees.

An employee who holds a Certificate III (Customer Contact) or equivalent is to be classified at this level when employed to perform the functions defined.

\* Note: These typical duties/skills may be either at Level 3 or Level 4 dependent upon the characteristics of that particular level.

**B.4 Call centre principal customer contact specialist**

Employees at this level are employed to:

* perform a broad range of skilled applications;
* provide leadership as a coach, mentor or senior staff member, and provide guidance in the application and planning of skills;
* work with a high degree of autonomy with the authority to take decisions in relation to specific customer contact matters; and
* take responsibility for the outcomes of customer contact and resolve complex situations.

1. The relevant parts of the Vehicle Award in relation to job classification are as follows:

**Section 1—Vehicle Industry RS&R Employees**

1. **Classification and minimum weekly wages**

…

* 1. All adult employees (other than adult apprentices) covered by this section must be classified according to the structure set out in clause 33.4 according to the skill levels and duties required to be exercised by the employee in order to carry out the principal function of the employment as determined by the employer. The skill level definitions, according to which employees are to be classified, are set out in Schedule B—Vehicle Industry RS&R—Skill Level Definitions
  2. Employers must advise each employee in writing of their classification and of any subsequent changes in their classification.
  3. Employees must perform all work within their skill and competence consistent with the classification structure and the skill level definitions including work which is incidental or peripheral to their main tasks or functions, provided that such duties are not designed to promote de-skilling.

…

**Schedule B—Vehicle Industry RS&R—Skill Level Definitions**

…

**B.3 Vehicle industry RS&R—employee—Level 3 R3**

…

An employee at this level has completed eight modules of a nationally accredited RS&R Certificate or equivalent training and uses skills above that of an employee at Level R2.

A Level R3 employee would be expected to have the job skills relevant to the tasks performed and would work with only general supervision of daily duties and to the level of their training:

* …
* possesses good oral and/or written communication skills;
* is responsible for quality of own work subject to routine supervision;
* plans own work in consultation with supervisor;
* requires only general job instruction;
* possesses customer service skills;
* …
* has fault finding skills;
* …
* can assist with on-the-job instruction in conjunction with general supervision;
* uses some basic negotiation skills in service areas;
* …
* receiving, despatching, distributing, sorting, checking, packing (other than repetitive packing in a standard container or containers in which such goods are customarily sold), documenting and recording of goods, materials and components.

**Classifications contained within Level 3 R3**

* …
* Service receptionist – not being a tradesperson
* …

#### Submissions on award and classification

1. Counsel for the Putlands cited ***Kucks*** *v CSR Limited* (1996) 66 IR 182, decided by Madgwick J, a former judge of this Court sitting as a judge of the former Industrial Relations Court of Australia, on the appropriate way to read awards. In *Kucks* it was said persuasively at184:

It is trite that narrow or pedantic approaches to the interpretation of an award are misplaced. The search is for the meaning intended by the framer(s) of the document, bearing in mind that such framer(s) were likely of a practical bent of mind: they may well have been more concerned with expressing an intention in ways likely to have been understood in the context of the relevant industry and industrial relations environment than with legal niceties or jargon. Thus, for example, it is justifiable to read the award to give effect to its evident purposes, having regard to such context, despite mere inconsistencies or infelicities of expression which might tend to some other reading. And meanings which avoid inconvenience or injustice may reasonably be strained for. For reasons such as these, expressions which have been held in the case of other instruments to have been used to mean particular things may sensibly and properly be held to mean something else in the document at hand.

But the task remains one of interpreting a document produced by another or others. A court is not free to give effect to some anteriorly derived notion of what would be fair or just, regardless of what has been written into the award. Deciding what an existing award means is a process quite different from deciding, as an arbitral body does, what might fairly be put into an award. So, for example, ordinary or well-understood words are in general to be accorded their ordinary or usual meaning.

1. It was submitted by counsel for the Putlands that the Clerks Award was more appropriate, largely because the nature of the work was more akin to a call centre, rather than to a receptionist as the only potentially applicable classification in the Vehicle Award. This submission also directs attention to the coverage provisions of the respective awards, which focus on the work of the employee.
2. It was submitted on behalf of Royans Wagga that the Vehicle Award applied to the Putlands because coverage in modern awards was determined based on the industry of the employer, and Royans Wagga was an employer “*throughout Australia of employees engaged in vehicle manufacturing and/or vehicle industry repair, services and retail …”*, as described in clause 4.1 of the Vehicle Award. In response, counsel for the Putlands correctly pointed out that the coverage clause in the Vehicle Award should be read as applying to employers throughout Australia of “*employees engaged in vehicle manufacturing and/or vehicle industry repair, services and retail …*” and thereby the relevant consideration is the work undertaken by the *employees* and not the *employers.* I accept that submission on behalf of the Putlands. It is supported by logic, but also by the express focus on the work done by the putative employee. The reading of the coverage clause urged by the Putlands is reinforced by clause 4.2(a) of the Vehicle Award, which provides a definition of an employee “*engaged in vehicle industry repair, services and retail*” expressly for the purpose of the coverage of the award. The Putlands were never so engaged. Rather, it is plain that they were engaged in a particular kind of call centre work, albeit going well beyond merely answering telephones.
3. In support of the Putlands’ claim that they were employed as level three call centre principal customer contact specialists, counsel for the Putlands submitted the following in closing written submissions (drafted in relation to Mr Putland but said to apply equally to Ms Putland; footnotes omitted), which fairly and accurately summarised this aspect of the evidence:

Mr Andrews’ [sic] accepted that the call centre work could be complex and difficult on occasion. He accepted that a degree of improvisation and inventiveness was sometimes called for. He agreed the work required judgment and discretion, and a detailed knowledge of how Royans’ operations work and what its sales representatives do. Knowledge of large geographical areas was also helpful to the work. Call centre staff operated with a higher degree of autonomy. The company wanted a person with a certain range of skills and abilities working in the role (“ … skills in as many areas as possible” [a quote from Mr Andrews in cross-examination]). The company desired a person who fitted the description of “all-rounder” performing the call centre work. Initiative was a key element of the role. Mr Putland showed initiative by, for example, preparing a letter to redress an apparent failure by Royans to pay spotters which was resulting in fewer calls to Royans. When Ms Yerbury was sick, Mr Putland made sure that her shift was covered. When Ms Yerbury left altogether in late 2014, he and [Ms Putland] showed initiative by re-commencing their performance of the call centre work 24 hours a day 7 days a week (despite Mr Andrews being on holidays at the time).

Mr Putland trained other staff. He was consulted by management in relation to the work performance and the termination of the employment of another call centre employee (Mr Andrews trusted and valued Mr Putland’s views and was prepared to rely on them).

1. Counsel for the Putlands pointed out in closing written and oral submissions that the trial initially undertaken by Well Done through its “*Escalation and Callout Service*” was said to be performed by “*trained senior operators only*”. In the same vein, the contract with Fonebox, for a service described as a “*Complex Live Operator Service – 24/7/365*”, confirmed that the work undertaken by the Putlands was effectively the same as the work performed by an independent, professional call centre. That evidence supports the notion that the Putlands fell within the classification of “*call centre principal customer contact specialist*” within the Clerks Award.
2. Royans Wagga’s position was that the work performed by the Putlands could not be considered within the classification of “*call centre principal customer contact specialist*”. In substance, this contention was based on a characterisation of the work as “*simple and routine*”, being focussed on receiving calls, recording information and passing it on when appropriate, and only rarely seeking the assistance of a member of the public. This was said to entail broad flexibility rather than a limited initiative and discretion. The work performed by the Putlands was said *not* to involve, as per the criteria of a “*call centre principal customer contact specialist*” reproduced above, many of the listed features of performing “*a broad range of skilled applications*”, or providing “*leadership as a coach, mentor or senior staff member*”and “*guidance in the application and planning of skills*”. While it was accepted that the Putlands were provided with a “*high degree of autonomy*”, it was submitted that they were *not* required to “*take decisions in relation to specific customer contact matters*”, nor “*take responsibility for the outcomes of customer contact and resolve complex situations*”.

#### Consideration on award and classification

1. It is quite clear that the Vehicle Award and the job classifications therein are intended to have a direct connection with vehicle manufacturing, repair, services and sales. The environment in which the Putlands performed their work is best characterised as an office environment requiring the use of office equipment, including telephones and computers, and also scanners which are not office equipment, rather than machinery and parts. While the Hut was located at the Royans Wagga premises, the fact that the radio base work was performed just as effectively from the Putlands’ home indicates that the location of the Hut was for reasons related more to control and supervision than any direct connection with the truck repair work. The tasks undertaken by the Putlands were administrative rather than any form of manual labour. Save for sales representatives such as Brett Haberecht attending the Hut, the interactions the Putlands had were predominantly over the telephone with sales representatives, other Royans employees, spotters, and other members of the public.
2. The service receptionist classification appears to involve some kind of nexus to the service area in which the relevant vehicle manufacture, repair, services and sales are performed, even if the nexus does not necessarily entail immediate physical proximity. This nexus cannot be said to properly exist in the work performed by the Putlands. They are at least one step removed from any work done in actual repair and directly related activities.
3. In contrast, the work performed by the Putlands clearly fell within the intended coverage and classifications within the Clerks Award, spanning a wider range of industries, but able to encompass work that may ultimately lead to vehicle repair work of the kind conducted by Royans Wagga (and other companies in the Royans group of companies). There were no other alternative awards said to be more appropriate. I therefore find that the Clerks Award was the applicable award for the Putlands during the relevant period. The employment contracts of the Putlands were therefore contracts required to be in compliance with the terms of that award, including as to matters such as termination. Having found that the Clerks Award applies, the more difficult question is that of the appropriate classification.
4. There are two problems with Royans Wagga’s submissions on classification. First, they do not pay sufficient heed to the evidence, especially of Mr Putland, as to what the radio base work entailed. What is required in this case is to consider the potentially applicable classifications and decide which best fits the work that was performed. In this case, those classifications are the “*call centre customer contact officer grade 2*”, and the “*call centre principal customer contact specialist*”. The work performed by the Putlands was plainly above a grade 1: Royans Wagga did not apparently contend otherwise once classification was being considered, rather than what was the applicable award. An award classification should not be read so strictly to require each and every criterion to apply in order that the classification apply. Referring to the bold emphasised text in the passage reproduced above from the Clerks Award dealing with classification, it will suffice if enough of the features apply to represent fairly the “*characteristic and typical duties/skills*”, with the characteristics being the “*primary guide*” as they “*indicate the level of basic knowledge, comprehension of issues, problems and procedures required and the level of supervision or accountability of the position*”. The “*key issue*” is the level of “*competency and skill*” required to be exercised in the work performed, not the duties performed per se. A perfect fit is not required.
5. In this case, the Putlands fit certain aspects of both potential classifications, noting that some are common, or substantially common, to both, such as the somewhat opaque reference to “*a broad/broader range of* *skilled operations*”. In this case, that term seems to encompass monitoring scanners and the internet, while also taking and making calls. Each incoming call could result in numerous outgoing calls to obtain further information and provide that to the sales representatives to be able to determine an appropriate response. The Putlands were certainly senior staff members by the relevant period, and did provide guidance to other radio base operators such as Ms Yerbury and Ms McCully.
6. It may be that some criteria will be exceeded, while others are not relevant. For example, the Putlands did not just have a “*high degree of autonomy*” when it came to dealing with individual calls and other problems that arose; they were required to make decisions without reference to anyone else on a day‑to‑day basis. In a practical way, they had complete autonomy as to the response to a particular accident or incident. They were not simply receiving calls and providing boilerplate solutions or outcomes, even if there was a measure of repetition. It was evidently an area where there was sometimes fierce competition for the accident repair work, and responses needed to be tailored to the circumstances as they arose, under some considerable time pressure. The sales representatives complained when leads were not passed on quickly enough. The Putlands had no immediate supervisor or manager, nor anyone else to take advice from on the run and under pressure when that was present. They necessarily had authority to “*take decisions in relation to specific customer contact matters*”. They had to take responsibility and address the apparent disagreements when accidents were reported in the “*grey*” areas between different Royans branch areas, with known problems in the form of cheating or poaching work from other branches being an issue from time to time.
7. Doing the best that can be done on the available evidence, the Putlands were probably above the specialist position some of the time, at that level some of the time and below it some of the time with respect to the level of competency and skill they were required to exercise in the work they performed. It was unpredictable as to when the higher level skills would be needed, but they were a feature of what could and often would be required and to that extent were indispensable. On balance, the “*call centre principal customer contact specialist*”classificationis the closest to what the Putlands were doing and is therefore the appropriate classification.

### Nature of the role: casual, part-time and full-time employment

1. During closing oral submissions, it was submitted by counsel for the Putlands that Ms Putland was more likely a part-time employee and Mr Putland was more likely a casual employee. This was a shift in the position outlined in the amended originating application and second amended statement of claim that both applicants were casual employees.

#### Principles on casual, part-time and full-time employment

1. Counsel for the Putlands directed the Court to the following description of the characteristics of casual employment in ***Hamzy*** *v Tricon International Restaurants* [2001] FCA 1589; 115 FCR 78 at 89 [38] per Wilcox, Marshall and Katz JJ (emphasis added):

In our opinion there is no material difference between the description “employees engaged on a casual basis for a short period”, in s 170CC(l)(c) of the *Workplace Relations Act*, and the description “a casual employee engaged for a short period”, in reg 30B(l)(d). Both descriptions embrace an employee who works only on demand by the employer (or perhaps only by agreement between employer and employee) over a “short period” (whatever that may be). **The essence of casualness is the absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work.** But that is not inconsistent with the possibility of the employee’s work pattern turning out to be regular and systematic.

#### Submissions on casual, part-time and full-time employment

1. Counsel for the Putlands provided the following summary of Mr Putland’s working habits during the relevant period (footnotes omitted):

Mr Putland was engaged in the middle of 2012 to work 11 am to 5 pm Monday to Friday, and he appeared to work those shifts until about the middle of October 2012.

From about the middle of October 2012 until early December 2012, Mr Putland worked a range of different shifts and hours, consistent with casual employment.

From about early December 2012, Mr Putland generally worked 5 am to 9 pm Monday to Thursday and 5 am to 6 pm Friday. This excludes nightshifts worked for Ms Yerbury.

From about the middle of March 2013 until late 2014, Mr Putland generally worked 6 am to 9 pm Monday to Thursday and 6 am to 6 pm Friday. This excludes nightshifts worked for Ms Yerbury.

1. During closing oral submissions, counsel for the Putlands submitted that while there were several changes to Mr Putland’s working hours, at other times there was consistency and it is therefore not an easy question to resolve as to whether or not Mr Putland’s arrangement more closely resembled casual work or some form of permanent work.
2. In relation to Ms Putland, counsel for the Putlands submitted that Ms Putland’s working hours throughout the relevant period typically involved covering the weekend from 6.00 pm on Friday until 5.00 am on the following Monday. It was said that this tended to indicate that Ms Putland was employed on a part-time basis.
3. Closing written submissions for Royans Wagga asserted that if the Clerks Award applied to the Putlands and if they were employed as level three call centre principal customer contact specialists, it was not open on the evidence to make findings that Mr Putland or Ms Putland have an entitlement to overtime, penalties, and weekend and public holiday penalty rates. This was said to be because of the inability to calculate the hours each of them worked and whether the work was performed from their home or from the Hut. It was submitted that these factors were obstacles in the first instance in relation to finding an entitlement to any such benefits, and also in calculating the quantum of any such benefits found to be owed. Royans Wagga’s closing written submissions also stated that it was unclear on what basis a casual employee (the role type claimed in relation to at least Mr Putland) would have entitlements, over and above a casual loading, to overtime rates of pay and shift penalties. It was submitted on behalf of Royans Wagga that in the context of the difficulties outlined above, no findings of contravention of a modern award pursuant to s 45 of the FW Act should be found and, correspondingly, the orders for compensation sought should not be made.
4. With respect, those submissions confuse principle with precision. It may be that the calculations to be made will entail a measure of inference or estimation based on the records that are available, such as the Putlands’ invoices, and that some aspects of what is sought will be too uncertain to produce a quantifiable amount to be awarded. But that is a common feature of damages claims. A Court cannot shirk from responsibility to do the best it can when it comes to the assessment of damages: see *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 83.5 per Mason CJ and Dawson J. A similar principle applies to this case by analogy.

#### Consideration of the nature of the Putlands’ employment

1. It is apparent from the evidence that Ms Putland’s work during the relevant period between September 2012 and October 2014 involved regular, predictable and mostly unchanging hours insofar as she was responsible for working the entire weekend (being from Friday evening until Monday morning). During that period, Ms Putland’s hours were more than full-time, approaching or falling just short of 60 hours between a Friday night and a Monday morning. Between October 2014 and May 2015, Ms Putland performed additional hours. Mr Putlands’ hours were more predictable when he was working in the Hut between September 2012 and October 2014, albeit that the shift arrangements changed several times, and he also filled in for Ms Yerbury.
2. Applying common law principles, I would have difficulty characterising either of the Putlands as casual employees. However, there is a more fundamental point of principle in relation to modern awards. It is that such awards generally, and the Clerks Award in particular, make casual employment dependent on designation per cl 12.1, which provides that “*A casual employee is an employee engaged as such*”. A number of decisions of the Fair Work Commission and a decision of this Court have grappled with this issue.
3. In ***Telum*** *Civil (Qld) Pty Limited v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434; 230 IR 30,the Full Bench of the Fair Work Commission considered the meaning of “*casual employee*” in the FW Act. It was concluded that the term was not referable to the general law meaning of that term. Rather, it was found that specification of casual employment in federal awards has diverged from the ill-defined common law position in favour of the basis of engagement being determinative: see 36 [21]-[25], 38-40 [38]-[43], 40-1 [49]-[51], 42 [58], especially 38-9 [38].
4. The approach taken in *Telum* was adopted by White J in *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365, in which his Honour observed:

137 The FWO submitted that both Mr James and Mr Kouka should be characterised as casual employees and that they had not been paid the casual loading. The submissions of the FWO proceeded on the basis that the status of the men as casuals or otherwise was to be determined by the general law. In this respect, the FWO referred to *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420 and to *Hamzy v Tricon International Restaurants* [2001] FCA 1589; [2001] 115 FCR 78. In *Blue Line Cruises*, Moore J at 425 described casual employment in the following terms:

A characteristic of engagement on a casual basis is … that the employer can elect to offer employment on a particular day or days and when offered, the employee can elect to work. Another characteristic is that there is no certainty about the period over which employment of this type will be offered. It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.

To similar effect, the Full Court in *Hamzy* said at [38]:

… The essence of casualness is the absence of a firm advance commitment as to the duration of the employee’s employment or the days (or hours) the employee will work. But that is not inconsistent with the possibility of the employee’s work pattern turning out to be regular and systematic.

138 However, in my opinion, the approach for which the FWO contended is not the correct approach. Regard must be had instead to the definition of “casual employment” in cl 14.1, namely, that a “casual employee is one engaged and paid as such”. That definition is to be understood in the context of the Award as a whole and, in particular, in the context of its provisions concerning full-time and part-time employment.

…

141 The word “engaged” in cl 14.1 of the Award is capable of more than one meaning. On one view, it can refer to the way in which the parties themselves identified their arrangement at its commencement. On another view, it can be a reference to the objective characterisation of the engagement, as a matter of fact and law, having regard to all the circumstances. Support for the former construction is seen in the decision of the Full Bench of the Fair Work Commission in *Telum Civil (Qld) Pty Ltd v Construction, Forestry, Mining and Energy Union* [2013] FWCFB 2434. The Full Bench said at [38]:

[38] All of the modern awards contain a definition of casual employment. Those definitions, notwithstanding some variation in wording, have the same core criteria:

(i) That the employee was “engaged” as a casual - *that is, the label of “casual” is applied at the time of time of engagement*; and

(ii) That the employee is paid as a casual, and specifically, the employee is paid a casual loading (set at 25% in all of the modern awards, subject to transitional arrangements), which loading is paid as compensation for a range of entitlements that are provided to permanent employees but not to casual employees.

(Emphasis added)

…

144 It is sufficient in my opinion to state that, in the present case, the former construction draws support from two considerations and should be adopted. First, the term “specifically engaged” in cl 12 indicates that the focus is on the agreement of the parties at the commencement of the employment as to the character of the employment. Secondly, the requirement in cl 14.3 for the observance of formality at the time of engagement of a casual employee suggests that the word “engaged” is directed to the agreement made between the parties rather than to the manner and circumstances in which the employee does in fact carry out his or her work.

1. That approach has since been endorsed by Full Bench of the Fair Work Commission in its *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [72]-[85] (5 July 2017). In that way, *Hamzy* has been distinguished by confining it to the different legislation under consideration in that case, preceding the FW Act.
2. The same approach should apply here. In order to be employed as a casual under the Clerks Award, the employee must be “*engaged as such*”. In the circumstances of this case, that could not, and therefore did not occur for either of the Putlands, because they were never subjectively regarded by Royans Wagga to be employees at all, let alone casual employees. That leaves the choice between full-time and part-time employment.
3. The definition of full-time employment in cl 10 of the Clerks Award is the number of hours regarded as the full-time hours at the particular workplace, being 38 hours or less per week. While again the term “*engaged*” is used, the context is different from that pertaining to casual employees. Permanent employment, whether full-time or part-time, is the default in the Clerks Award based on the reasoning above. When a person is found to be an employee, they are engaged as such, and there is no parallel requirement that this be subjectively recorded for the person to be an employee. Were that not the case, the Clerks Award, and any other award expressed in similar terms, would have the effect of dispensing with the concept of employment whenever the subjective form of an independent contractor arrangement is deployed, which is going well beyond the work that any such award is capable of performing.
4. There was no evidence of what was *regarded* as full-time hours at Royans Wagga. Accordingly the default of 38 hours or less applies. In the relevant period, Ms Putland worked well in excess of 38 hours per week, and so was full-time. Mr Putland worked 30 hours per week in the period from sometime in July 2012 until the middle of October 2012. Thereafter he worked 38 hours per week or more. Any part-time period in the relevant period was confined to something less than two months from sometime in September to the middle of October. He was therefore overwhelmingly full-time and should be classified as such.

## Breach of s 357 of the FW Act: misrepresenting employment as independent contracting

1. Section 357 of the FW Act, extracted at [32] above, relevantly has three limbs:
2. The existence of an employment relationship, which has already been resolved in favour of the Putlands.
3. Whether Royans Wagga, the employer, had represented to each of the Putlands that they were employed as, or performed work as, independent contractors.
4. If the first two limbs within s 357(1) are made out, whether Royans Wagga had proved the defence in s 357(2) that when each representation was made, it did not know and was not reckless as to whether the contract was one of employment rather for services.
5. The Putlands submitted that Royans Wagga, via its managing director Mr Andrews, made representations to the Putlands on two occasions that they were engaged as independent contractors in breach of s 357 of the FW Act:
6. by way of the letter written by Mr Andrews dated 9 January 2013, which stated that Mr Putland worked for Royans Wagga “*on a subcontractor basis*”; and
7. in a telephone conversation with Ms Putland, following the conversation at the Putlands’ house in December 2014, upon which Royans Wagga claimed notice of termination was given, extracted above at [83].
8. As to the first of these asserted breaches, counsel for the Putlands submitted that the representation was clearly made (in the letter). It was further submitted that Mr Andrews during cross-examination:
9. gave evidence that as far back as August 2012, he was aware of the distinction between an employee and an independent contractor, and that any labels used were not determinative; and
10. when questioned about his state of mind when he wrote the letter, said he could not recall thinking about whether Mr Putland was an employee or a contractor.

Upon that basis, it was submitted that Royans Wagga cannot make out the defence because it had not shown that it did not know and was not reckless.

1. As to the second of those asserted breaches, counsel for the Putlands relied upon Mr Andrews’ own evidence in these proceedings that, in December 2014, he said to Ms Putland:

You can’t be serious. You are contractors. You work from home. You give an ABN invoice. You’re [sic] charged GST. I can see right through what you’re trying to do here.

1. It was submitted that there was no evidence that Mr Andrews (and thus necessarily, no evidence that anyone else at Royans Wagga) took any steps to satisfy himself of the correctness of his asserted belief that the Putlands were independent contractors. The only evidence led as to his state of mind was as to anger. Upon that basis, it was again submitted that Royans Wagga cannot make out the defence because it had not shown that it did not know and was not reckless.
2. Royans Wagga did not directly engage with this aspect of the case advanced on behalf of the Putlands. Instead it was submitted that their case relied upon it being established that there was a new contract of employment proposed in August or September 2012, because it was said to be not in contest that there was an independent contractor arrangement from 2005 to July 2012. That is not a concession that was either overtly made or available by implication. While the Putlands ran a case based on the more limited period from September 2012, presumably because that was considered their best case, that did not amount to any concession in relation to the earlier period. In closing submissions, counsel for the Putlands referred to any employment relationship existing from September 2012, if it had not existed earlier. However none of this is to the point. The prohibition necessarily fixes on a given point in time, as does the case advanced by the Putlands. At the time of the letter and at the time of the conversation, the Putlands were both employees, but had represented to them that each was an independent contractor. That must be the focus of consideration.
3. Royans Wagga is caught by the strict liability nature of the civil penalty provision and the limited scope of the statutory defence. For the reasons advanced on behalf of the Putlands, I am satisfied that both s 357 contraventions have been made out and that the defence has not been established for either.
4. I will hear the parties on penalty. I note, without expressing any concluded view, that relevant considerations may include whether the evidence already available, or perhaps sought to be adduced, establishes that Mr Andrews intended to obtain the benefits of an independent contractor arrangement and subjectively believed that this is what he had achieved on behalf of Royans Wagga, or had a less benign state of mind. The breadth of the contraventions and their duration will also be relevant.

## Breach of s 536 of the FW Act: failure to provide pay slips

1. Section 536 of the FW Act, extracted at [32] above, requires an employer to provide an employee with a pay slip in the proper form within one working day of payment in relation to the performance of work. Section 536 is a civil remedy provision under Part 4-1 of the FW Act. The second amended statement of claim pleads that Royans Wagga was in breach of s 536 for failing to provide the Putlands with pay slips “*at any time in respect of their employment*”, i.e. during the pleaded employment period between September 2012 and May 2015.
2. The parties were in agreement that resolution of this issue followed the outcome of the employee/independent contractor issue. The parties also agreed that the Putlands were not provided with pay slips between September 2012 and May 2015 (or, in fact, before September 2012, though nothing turns on this given the scope of the claim brought). Evidence was given by Ms Putland, Mr Putland and Mr Andrews that confirmed that pay slips were not provided to the Putlands. For example, during a line of questioning in cross-examination on the letter written by Mr Andrews which stated that Mr Putland was employed on a “*subcontractor basis*” for the purpose of assisting Mr Putland to obtain vehicle finance, Mr Andrews said, “*[Mr Putland] obviously couldn’t produce wage dockets to the financier…*”. Closing written and oral submissions on behalf of Royans Wagga conceded that if an employment relationship was found during the relevant period, then Royans Wagga accepts that it did not issue pay slips in accordance with s 536 of the FW Act.
3. On the basis of the evidence and the concession made by Royans Wagga, I accept that the Putlands were not provided with pay slips by Royans Wagga between September 2012 and 2 May 2015, in breach of s 536 of the FW Act. The more difficult question is the scope of the breaches of s 536 of the FW Act and the penalty (if any) which is appropriate. The evidence demonstrated that Royans Wagga’s practice was to pay employees on a weekly basis, and the invoices submitted by the Putlands were paid on the same day as employees were paid. The evidence does not establish the number of breaches of s 536 for each of Mr Putland and Ms Putland. During closing oral submissions, counsel for Royans Wagga submitted that the Putlands worked interchangeably when conducting work from their home, and therefore it would be difficult to establish the hours worked by each of Mr Putland and Ms Putland. In my view, while perhaps the division of hours may be difficult to establish, the number of pay slips which should have been issued to each of Mr Putland and Ms Putland should be relatively easy to establish. For example, assuming that each of Mr Putland and Ms Putland worked at least one shift each per week from September 2012 to 2 May 2015, the number of pay slips required to be issued for each of them by Royans Wagga should be equivalent to the number of payment periods between September 2012 and 2 May 2015.
4. Given the absence of evidence on this point put forward by the parties, I grant the parties the opportunity to put on supplementary written submissions and supporting calculations in relation to the number of breaches of s 536 of the FW Act for each of Mr Putland and Ms Putland, in addition to submissions on the quantum of penalty, if any, which is appropriate for those breaches.

## Failure to give reasonable notice of termination

1. The second amended statement of claim pleads that Royans Wagga breached the employment contracts with Mr Putland and Ms Putland by terminating each contract without notice. Royans Wagga denied any breach and submitted that reasonable notice of termination had been given to each of the Putlands during the conversation between Mr Andrews and the Putlands at the Putlands’ house in December 2014, referred to above at [83].
2. On the topic of notice being given, none of the Putlands or Mr Andrews struck me as being untruthful. Each of those witnesses was doing his or her best to depose truthfully and accurately to what had taken place. However, the recollections and perceptions of what took place were very different. That highlights the problem in giving oral notice of something as important as the end of either an employment or a contractual relationship. The onus was on Royans Wagga to prove that notice was given, not on the Putlands to prove that it was not. However, even if there was no such onus, the answer is still the same as I am satisfied, on the balance of probabilities, that neither of the Putlands had communicated to them what they understood to be notice of termination.
3. I am somewhat fortified in that conclusion because the alternative service provider arrangements for the radio base were not finalised at the time of the conversation at the Putlands’ house in December 2014, making the giving of any clear notice at that time difficult, at least as to a date, unless Royans Wagga was going to risk being without a radio base, or be forced to rely upon ad hoc arrangements, such as diverting calls to individual Royans branches. I am further fortified by the evidence given by the Putlands and Mr Andrews that the Putlands only became aware of the phones being finally diverted to Fonebox on the morning of 2 May 2015, suggesting formal notice was not properly given to the Putlands until that date.
4. Even if Mr Andrews did intend to give notice on behalf of Royans Wagga, and in fact uttered words which to his mind communicated that, it is entirely possible that he simply was not clear enough to communicate that, especially if he was trying to avoid confrontation. I am unable to form a different view because of his account of the telephone conversation that he says later took place with Ms Putland. That conversation does not go to notice, but rather to conflicting views of the nature of legal relations. Further, Mr Andrews’ evidence was that the conversation was with Ms Putland, so that conversation could not provide any support for Royans Wagga’s contention that notice had been given to Mr Putland.
5. I have concluded that no notice of termination was in fact given to the Putlands. In those circumstances, it falls for consideration what obligation to give notice was required by s 117 of the FW Act, and whether any different period should be implied in the Putlands’ contracts of employment. This is a further question to be resolved at the separate hearing to determine relief.

# RELIEF

1. The relief sought by the Putlands in their amended originating application, omitting the abandoned adverse action claim and alternative independent contractor claim, was as follows:
2. A declaration that the First and Second Applicants were employees of the Respondent from September 2012 to 5 May 2015.
3. A declaration that the employment of the First and Second Applicants by the Respondent was covered by the *Clerks Private Sector Award 2010* (**Award**).
4. A declaration that the Respondent has contravened the Award and s. 45 of the *Fair Work Act 2009* (Cth) by:
   1. Failing to pay the First Applicant and Second Applicants at the applicable hourly rate for a Casual Level Three Call Centre Customer Contact Specialist;
   2. Failing to pay the First Applicant at the applicable hourly rate for overtime, penalties, weekends and public holidays;
   3. Failing to pay the Second Applicant at the applicable hourly rate for overtime, penalties and public holidays [noting that relief is not expressly claimed for Mr Putland in respect of weekend work, if any, including from October 2014 to early May 2015];
   4. Failing to make any superannuation contributions on behalf of the First and Second Applicant;

…

1. A declaration that the Respondent has contravened s. 357 of the *Fair Work Act 2009* (Cth) by misrepresenting to the First and Second Applicant that the contracts of employment under which they performed work for the Respondent was a contract of services, where the First and Second Applicant performed work as an independent contractor.
2. A declaration that the Respondent has contravened s. 536 of the *Fair Work Act 2009* (Cth) by failing to provide pay slips to the First and Second Applicant.
3. An order that the Respondent pay compensation to the First and Second Applicant for breaches of the Fair Work Act and the Award pursuant to s. 545(2)(b) of the *Fair Work Act 2009* (Cth).
4. An order that the Respondent pay pecuniary penalties pursuant to s. 546(1) of the *Fair Work Act 2009* (Cth), and that those penalties be paid to the First and Second Applicant pursuant to s. 546(3) of the *Fair Work Act 2009* (Cth).
5. An order that the Respondent pay to the Applicants damages for breach of contract.

…

1. An order for payment by the Respondent to the Applicants of the amounts in order 9 above.
2. Such further or other order or orders as the Court deems fit, or as the case may require.
3. Interest up to judgment.
4. The above reasons mean that I have determined that the Putlands are entitled to most of the relief sought in their amended originating application, omitting the abandoned adverse action claim and the alternative relief sought under the *Independent Contractors Act* (because, at the first threshold, that Act does not apply because of the determination that the Putlands were employees of Royans Wagga). Accordingly, the Putlands are entitled to declarations:

(1) that they were employees of Royans Wagga:

(a) in respect of Ms Putland, from the date or dates in September 2012 to which invoice number 0421 issued by Ms Putland dated 25 September 2012 relates, to 2 May 2015 (being the date upon which the Putlands’ services were terminated by the diversion of the radio base telephones to Fonebox); and

(b) in respect of Mr Putland, from the date or dates in September 2012 to which invoice number 001 issued by Mr Putland dated 25 September 2012 relates, to 2 May 2015;

(2) that their employment in that period was covered by the Clerks Award for the classification “*level three call centre principal customer contact specialist*” on a full-time, permanent basis;

(3) that Royans Wagga contravened the Clerks Award:

(a) to the extent that they were paid below the applicable hourly rate (including as to any variation in that period) for a permanent, full-time level three call centre principal customer contact specialist;

(b) to the extent that they were not paid overtime, penalties, weekends and public holidays as required during that period;

(c) to the extent that superannuation contributions were not made as required,

the scope and quantum of such contraventions being dependent on further submissions and calculations, whether agreed or competing, noting that the resulting declaration be accompanied by an order that Royans Wagga pay to the Putlands the sums thereby ascertained;

(4) that Royans Wagga has contravened s 357 of the FW Act by misrepresenting to the Putlands that the contracts of employment under which they performed work were contracts of services under which they performed work as independent contractors on the following occasions:

(a) in the conversation Mr Andrews had with Ms Putland after the December 2014 meeting wherein he stated that she was a contractor; and

(b) in the letter dated 9 January 2013 and furnished to Mr Putland referring to him as a “*subcontractor*”; and

(5) that Royans Wagga has contravened s 536 of the FW Act by failing to provide payslips to them throughout the period of employment found in these reasons.

1. I have also determined that Royans Wagga is liable to pay pecuniary penalties pursuant to s 546(1) of the FW Act for the contraventions of ss 45, 357 and 536. What remains to be determined, following further submissions and any further evidence, is what the quantum of those penalties should be, and whether those penalties should be paid to the Putlands or to the Commonwealth.
2. The Putlands are also entitled to an order for payment in lieu of notice of termination of their contracts of employment. The period of notice that was required to be given, and the rate at which compensation should be ordered to be paid for that period, are further questions to be resolved at the separate hearing.
3. I see no reason why interest should not be ordered to be calculated and paid to the date when the final orders are to be made.
4. The closing oral submissions for both parties indicated that the appropriate course would be for the Court to hear the parties on costs. Accordingly, at this stage I propose to address the question of costs as part of the determination of outstanding issues and penalties.
5. The matter will be listed for a case management hearing for the purposes of making procedural orders for the hearing to determine the outstanding issues as to final relief, as outlined above. It may be that the procedural orders can be agreed between the parties and orders made in Chambers for that purpose.

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| I certify that the preceding three hundred and forty-three (343) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Bromwich. |

Associate:

Dated: 9 August 2017