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TRANSCRIPT OF PROCEEDINGS

O/N H-1358227

FEDERAL COURT OF AUSTRALIA

QUEENSLAND REGISTRY

BROMBERG J
RANGIAH J
WHITE J

No. NSD 566 of 2020

AMITA GUPTA

and

PORTIER PACIFIC PTY LTD and ANOTHER

BRISBANE

9.22 AM, FRIDAY, 27 NOVEMBER 2020

MR M. GIBIAN SC appears with MR P. BONCARDO for the applicant
MR I. NEIL SC appears with MR Y. SHARIFF SC appears for the 1st respondent

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

BROMBERG J: Good morning. May we take appearances, please.

MR M. GIBIAN SC: Thank you, your Honour. I appear with Mr Boncardo for the applicant.

BROMBERG J: Thank you, Mr Gibian.

MR I. NEIL SC: And if the court pleases, I appear with my learned friend, Mr Shariff, for the first respondent.

BROMBERG J: Thank you, Mr Neil. Now, if the court is - - -

RANGIAH J: Now, it's Justice Rangiah here. This is Justice Rangiah. I understand that you can't see me. I think there's a problem with my camera, but I can hear the participants in the court. So if the parties are happy to proceed in that way, I'm content to proceed without being visible to the parties.

BROMBERG J: All right. Is there any issue with that for anyone?

MR GIBIAN: Not for our part, your Honour..

BROMBERG J: All right. Well, we will proceed accordingly. I was about to say that you can take it that the members of the court have read each of your submissions and the decision below. I know the matter has been listed for a day. It perhaps looks to us like more of a half-day case, but without wishing to unduly restrict you, could you bear that in mind. It seems like there's no dispute as to any factual matter, and you've both given us a very comprehensive outline of all of the relevant cases and principles. All right. Mr Gibian, you need to read the affidavit in support, I think. It's the affidavit of Ms Lorraine Viviano. Is that right?

MR GIBIAN: Viviano. Yes, your Honour.

BROMBERG J: Viviano.

MR GIBIAN: I read that affidavit of 18 May.

BROMBERG J: All right. Yes. Thank you. All right. Mr Gibian.

MR GIBIAN: There is extracted from the material annexed to Ms Viviano's affidavit in part C of the appeal book – the materials that are referred to in the submissions – and I was going to refer to them in that location if that's convenient to the members of the court. As your Honours says, I think the subject matter of the debate is well-articulated in the submissions. Essentially what we say the question is

is whether or not the Commissioner – Commissioner Hampton – and the full bench were correct in determining that the Commission had no jurisdiction to entertain Ms Gupta's unfair dismissal application by reason of her not being an employee for the purposes of the Fair Work Act. What I propose to do by way of elaboration upon the written submissions was in four parts.

Firstly, make three introductory observations in relation to the relevant principles in the identification of the employment relationship. Secondly, just take the court to some of the evidence, particularly the services agreement, the contractual documentation. Thirdly, address the sum of the relevant factors in the multifactorial analysis, particularly concentrating upon the independent business aspect, the obligation to perform work, and the degree of control. Finally, I was going to address briefly the issue as to the task of the court on judicial review, whether it is simply a question as to whether or not the full bench and the Commissioner were correct in their conclusion or whether, as ..... submits, there is the need to identify some error in approach, as opposed to simply error in conclusion, if that's convenient to the court.

Firstly then, if I can address – I'm obviously not going to take the court through the law as to the identification of employment relationship, but there were three initial observations that I wish to make. The first is that it's trite to say, of course, that it's a multifactorial approach that's to be adopted and that no single consideration will be determinative of the outcome. Can I just note what the chief justice said in that respect in the recent judgment of the Full Court in CFMEU v Personnel Contracting, which is – it's tab 4 in our list of authorities. I think it's also in my learned friend's list of authorities. It's (2020) FCAFC122. In the judgment of the chief justice, his Honour discusses the approach. Can I just note what his Honour says, firstly, from paragraph 13 where his Honour notes that:

> *It is important to recognise that the processes is one of characterisation of the facts by reference to the whole arrangement to reach a conclusion as to the nature of the relationship.*

His Honour then goes on in the same paragraph to refer to organising concepts, particularly the observations in Hollis v Vabu applying Colonial Mutual and Marshall, as to the distinction between an independent contractor operating their own business and a person who serves in the employer's business. And then can I also note his Honour then extracts a passage at paragraph 18 from Mummery J in Hall v Lorimer, and at paragraphs 20 and 21 notes that:

> *The expression of the task by Mummery J is valuable because it illuminates in language ..... for the relevance of an intuitive appreciation and assessment of the whole, rather than the process of mechanically disaggregating and deconstructing different parts of the relationship by tests drawn from other cases.*

And that:

This intuitive appreciation of the whole can also in an important degree be seen in Hollis v Vabu.

And then at 21 noting that:

The process of characterisation is not the process of constructional interpretation of a written contract.

And that:

The decision for conclusions to the character of a relationship is affected by the terms, meaning the content of the contract and, in particular, by clauses that give rise to rights and obligations rather than simply seek to place a contractual label on the relationship.

And then it is essential to recall, however, that it is not the contract that is characterised by the relationship; the relationship is founded on but not defined by the contractual terms, hence the importance of standing back and examining the detail as a whole.

Perhaps all of that is relatively uncontroversial, but we do think that, with respect to the ..... events that the conclusion did appear to isolate certain particular consideration as to the submissions of Uber in – as being critical or decisive, in particular, the focus upon whether there was an obligation upon Ms Gupta to log on to the Uber Eats app and perform work at any particular times. That, in our respectful submission, does depart from the correct approach of looking at the overall arrangement.

The second initial observation that I wish to make is that we do – is that it is a significant consideration or organising concepts in the present test, to examine whether or not Ms Gupta could be said to be operating in a business of her own or working in the business of Uber Eats – if I can refer to the respondent's collective – the respondent collectively in that way. And that is plainly a central consideration in assessing the nature of the relationship, being one of employee or independent contractor.

I don't need to read from it, but the Chief Justice referred, in the passages to which I've referred to the Hollis v Vabu and the indication that the distinction between servant and independent contractor is rooted fundamental in the difference between a person who serves his employer in his employer's business and a person who carries on a trade or business of his own. That was a matter taken up in more detail in the judgment of your Honour Justice Bromberg and Justice North in Fair Work Ombudsman v Quest South Perth, which is tab 7 in our bundle of authorities.

Could I just note and I can do so by way of overview in that judgment, which is 228 FCR 346, commencing at paragraph 176 on page 389 of the report, their Honours –

firstly to the uncontroversial multifactorial assessment. And then from 177 to the passage in Hollis:

> *Accepting that the distinction is rooted fundamental in the difference between a person who serves the employer's business and a person who carries on a private business of his own.*

The judgment goes on in the matter but I don't need to read in detail, from paragraph 179, to discuss what might be the features of – or the common features of – or the common hallmarks of a business as a separate business. And then at 183 or 184:

> *It was observed that in relation to unskilled workers the prima facie position is clear, as the majority said at 48 in Hollis, is intuitively unsound to conclude that unskilled workers are running their own enterprise when providing their labour.*

The question of the significance of whether a person is running their own business was discussed in both of the recent Full Court judgments in the Personnel Contracting matter and in the Jamsek matter, to some degree. Can I just observe what was said by Justice Lee in the Personnel Contracting judgment- again, tab 4 within the bundle – with whom the other members of the court agreed there. His Honour dealt with the significance of carrying on business on one's own account from paragraph 89 of the Full Court judgment. I've got the Industrial Reports version. It's 197 Industrial Reports 269 at page 297.

At paragraph 90, his Honour noted that the economic – a focus on the economic reality of the relationship between the parties is discernible from ..... judgment in Hollis v Vabu and then in reference to on-call interpreters and Quest South Perth. At paragraph 95, on page 299, it's indicated the primary judge declined to follow Quest. And then, at paragraph 96, his Honour indicated that he generally accepted that the focus of the multi-factorial approach in terms of whether the employee is conducting a business as an entrepreneur might, in some cases, have the potential to detract attention from the central question. And, indeed, as it has been said, an affirmative answer to the question of whether one is working one's business does not necessarily entail that one is not working in another's business or one cannot be an employee, a reference to Jamsek and to ACE Insurance and to the Full Bench decision in this matter. His Honour goes on halfway down that paragraph:

> *…but that is not to say that the reasoning of North and Bromberg JJ in Fair Work Ombudsman v Quest is not of real assistance. Whether the worker is carrying on a business is likely to be a useful way of approaching a broader inquiry in many cases. An indicia outlined by their Honours helpfully informs such analysis.*

The same may be said of inquiring into whether the worker has the capacity to generate goodwill, a matter which was referred to particularly by Perram J in Jamsek

from paragraphs 9 to 11. In that respect, we've said in the written submissions that we don't suggest there's some alternate test, but the authorities do make clear that the question of whether a person could be said to be operating some distinct business able to generate goodwill is a significant consideration. And, importantly, that it informs the relevance or significance of certain other criteria or of other of the factors which are commonly taken into account in the multi-factorial analysis. For example, the ownership or acquisition of significant equipment for the use in the performance of work, in some cases, is a significant consideration.

If the acquisition of equipment involves significant expense, then it may be important because, in substantial part, it might be indicative that the person is operating their own business and making an investment in the hope of generating profit or return. On the other hand, the provision of equipment which is either already available to the employee – or the use of equipment which is already available to the worker, or not of particular – particularly significant expense, is not likely to be an important factor given that it does not suggest that the employee is establishing an independent business. We would say that the same is important in understanding one of the matters which is relied on centrally by Uber here, namely the obligation to perform work at particular times.

It may be, in some cases, that the absence of an obligation to perform work at particular times or whenever called upon by the employer, or purported employer, may be of significance, particularly if it were to indicate that the worker is operating a separate business from that of the employer's business. It may not be as significant a matter if, as we would say is the case here, is not indicative of Ms Gupta operating some separate business, but merely a factor of the manner in which the employer chooses to operate or organise its business. And it's not a matter, in that context, upon which great, and certainly decisive weight, ought to have been attached.

The third initial observation I wish to make in relation to the proper approach was that the common law test involving, as it does, an impressionistic and multi-factorial analysis has always proved itself to be flexible and adaptable to changing social and economic circumstances. I don't, perhaps, need to read it, but your Honours will be aware in Stevens v Brodribb, particularly at pages 28 and 29, that being the judgment at 160 CLR 16. At pages 28 and 29, Mason J observed that the traditional formulation in relation to – that is, the control test, had application – or, sorry, that it has been said that the test which places emphasis on control is more suitable to social conditions of earlier times in which a person engaged by another to perform work could and did exercise closer and more direct supervision than is possible today.

And it's said in the modern post-industrial society, technological developments have meant that a person so engaged often exercises a degree of skill, expertise and expertise inconsistent with the retention of effective control by the person who engages them. And that the common law has been sufficiently flexible to adapt to changing social conditions by shifting the emphasis in the control test from the actual exercise of control to the right to exercise it so far as there is scope for it. Similarly here, some of the features at least which are said to be significant in the manner in

which work is organised by Uber Eats are the product or the availability to it of the mobile phone application technology which permits it to know the precise location of delivery workers who are logged on to the app; to send delivery requests to the delivery worker who is identified as most ideally located to perform the work; be informed automatically when the – or instantaneously when the delivery has been picked up and effected to the customer.

To the extent that that permits Uber Eats to organise its workforce in a way which is somewhat more flexible than is traditional of many employment relationships is, it appears to us, substantially a factor of the technology available. And the common law has always been and is sufficiently flexible to adapt to identify the manner in which – the true manner in which the work is performed. With those additional observations, can I then direct the court's attention to some of the documents which explain the way in which the work is performed and the underlying contractual documentation. Can I first ask the members of the court to turn up the amended witness statement of Mr Mulholland prepared for Uber; it's under tab 7, I think. If your Honours have tabs in part C commencing at page 221, in part C of the appeal book.

Can I just refer to the – in relation to which there's not great disagreement to the mechanics of how the business systems operate. Could I firstly note on pages 222 and 223 from paragraph 12, Mr Mulholland notes that Uber Eats has restaurant partners, each of which have a contractual relationship with Uber entities and eaters, from paragraph 13, who, in order to order food through the Eats app. And it must have an account with the Eats app and there's a description of what's involved in creating an account, including providing payment details and the like to Uber. Then, from paragraph 15, the other participant in the business – what's referred to as the "delivery partners", such as Ms Gupta, who are approved by Uber to perform work by following the steps that are there described by Mr Mulholland.

From paragraph 22 on page 225, there's a general description of the way in which delivery requests are provided. As one would expect, the first step is that the eater places an order through the Eats app. At paragraph 23:

> *If the restaurant partner accepts the order, there is generated a time for when the food will be ready to collect.*

And then at 24:

> *The request is sent to delivery partners who are logged on to the partner app.*

Can I just note what is said in the final sentence of paragraph 24, namely, that:

> *The initial notification includes a map of the general location of the restaurant and an estimate of how many minutes away the pick-up location is, but not the identity of the restaurant.*

It's then said at 25 that:

> *The delivery request can be accepted or ignored or declined.*

At (a):

> *It is only if the request is accepted that the restaurant partner's name and address and pick-up instructions are then provided.*

That is, the delivery worker is only provided with the identity of the restaurant after they've accepted the request. At (b) it's noted that the request would lapse after approximately 15 to 30 seconds. I think there was some debate about whether it was that long, or some shorter period of time, but in any event it lapses after a short period of time, or it's noted that ..... has declined the request. 26, again, a matter that I will need to refer to. Mr Mulholland asserts that there is a capacity to cancel a request without consequences until the food is collected. And then at 28 and 29 at the bottom of that page:

> *The delivery worker who has accepted the request attends the restaurant to collect the order and then once the delivery partner arrives at the restaurant partner's location and has collected all the order, they can start the app.*

And over the page at paragraph 30:

> *The partner app then displays the eater address.*

So the delivery worker only finds out the delivery location after they've attended the restaurant and picked up the meal for delivery, and then is required to make the delivery and notify the completion of the delivery through the app process. The contractual documentation that was entered into involved the execution of a services agreement by Ms Gupta. Uber's evidence indicated that two such documents were executed, albeit the first one only operated for a more limited period of time. The first of those documents commences at page 249 in part C under tab 10. The second of them precedes it and commences at page 237. The proceedings before the Commission were approached on the basis there wasn't any particularly relevant difference between the two, although there was at least one that I will come back to.

Can I go to the later agreement that then applied for the bulk of the period that Ms Gupta performed work for Uber, commencing at page 237. What I wish to emphasise by reference to some parts of the services agreement, which is a lengthy and if I might say wordy document, is that it is replete with declaratory statements in relation to either facts or legal characterisation, which are in many respects either inconsistent with, or at least don't sit well with, operative obligations which are, in fact, conferred by the services agreement. Starting at page 237 within part C, can I note in the second paragraph on that page there's an attempt to characterise the nature of a relationship as:

Portier Pacific –

the particular corporate entity –

being involved in procuring and facilitating the provision of what are described as lead generation services, being on demand, intermediary and related services rendered by a digital technology application that enabled independent providers of delivery services to seek, receive and fulfil on demand requests for delivery services described as Uber Services, an independent provider of delivery services.

BROMBERG J: Mr Gibian, can I interrupt to ask this question of whether the highlighting which we see in this is in the original, or has it been added in as a result of the litigious process, or in some other way?

MR GIBIAN: The version that I'm working off in part C does not have highlighting. I understand that my learned friend sent through a version of this document and two others in part C last night with their highlighting added, as I understand it, in various colours. I'm not sure if it's apparent to me what that highlighting was intended to convey, and I assume my learned friend will endeavour to explain that in his submissions. The version - - -

BROMBERG J: All right. So the highlighting wasn't in the version that was provided to Ms Gupta.

MR GIBIAN: No. And is added by my learned friends or their solicitors, as I understand it, in the version sent last night.

BROMBERG J: Thank you.

MR GIBIAN: There is then in bold above the heading Definitions, there's again a declaratory assertion asking or requiring the delivery worker to acknowledge and agree that Uber, who is a technology services provider, that neither Uber, Portier Pacific nor their affiliates, provide delivery services, in a manner which we don't think matches any sensible understanding of reality. Similarly, within the definitions of - - -

BROMBERG J: Where's that?

MR GIBIAN: I'm sorry. There's - - -

BROMBERG J: Where's that?

MR GIBIAN: Bolded text in the middle of page 237 above Definitions – above the fourth one Definitions.

BROMBERG J: I see. Yes. Thank you.

MR GIBIAN: And that declaratory statement is sought to be further perpetrated through the agreement, but I note in that respect that the definition at 1.7 towards the bottom of page 237 refers to "delivery services" as:

> *Giving your provision of delivery services to and on behalf of users by the Uber Services in the territory using the applicable transportation method.*

And "user" is then defined over the page on page 1 at clause 1.17 to mean "the end user". I won't read the definition. I think it's intended to be a reference to either the eater, that is, the customer who orders the food, or the restaurant from where the food is ordered.

WHITE J: I notice this agreement isn't signed by anyone. There's no issue about that, I take it, that it's accepted it is contained in the relevant terms.

MR GIBIAN: I think that's right, your Honour. My learned junior is just referring me to page 246 where your Honour will see right at the bottom of page 246 in part C there's text that indicates:

> *By clicking "yes" I accept.*

Or signing below:

> *You expressly acknowledge that you have read, understood and taken steps –*

etcetera. I'm not sure it was clearly dealt with in the evidence, but I think the inference is that this was executed by way of assent through a mobile – through an internet or website link.

WHITE J: Thank you.

MR GIBIAN: If I could go back then to page 238, clause 2 then deals with what's described as "the use of Uber services". And at 2.1 "the provision of delivery services", which indicates that:

> *When the provider app is active user requests for delivery services may appear to you via the provider app if you are available and in the vicinity of the user.*

And that:

> *The request may specify a deadline.*

Can I just note – again, this text is a bit hard to navigate, but at slightly more than halfway down that page – that clause, I'm sorry, 2.1– about 10 lines from the bottom, there's a passage which indicates:

You shall not contact any users or delivery recipients or use any user's personal information for any reason other than for the purposes of fulfilling delivery services.

That is, whilst the agreement purports to indicate that the delivery partner is performing delivery services to – providing delivery services to or on behalf of the users, they are prohibited from actually contacting either the restaurant or the customer – the eater – other than through – for the purposes of fulfilling the delivery services. Can I note then at 2.2, right at the bottom of page 238, there's a further attempt to assert the nature of the relationship. And it's said there that :

You acknowledge and agree that your provision of delivery services to users creates a direct business relationship between you and the user to which Uber, Portier Pacific and their affiliates are not party.

As I will come to – and as the majority in the Full Bench of the commission identified – that's not a proposition that could be accepted as a factual one in circumstances in which the delivery worker has no contact with and does not even know the identity of the restaurant or the customer prior to accepting the delivery request or have any – or have or have the capacity to have any interaction which would be indicative of the creation of any such business relationship. And as I've said, it's prohibited otherwise from contacting the user – or the restaurant or the customer. Over the page, can I note what is said at 2.3 in relation to "your relationship with Uber Group." There's firstly a reference to license and use of the app. In the fourth line of that clause, can I note that there's an assertion that:

neither Uber nor Portier Pacific shall be deemed to direct or control you generally or in the performance under this agreement, specifically including in connection with your provision of delivery services, your acts of omission or your operational maintenance of your transportation method.

And that accept:

As expressly set out herein you retain the sole right to determine when, where and how long you utilise the provider app or Uber services.

So there's an attempt to assert an absence of directional control. Can I note that that then has to be read subject to then what follows, which seems to be in reasonably direct contradiction of that assertion, including that – and again, I apologise; it's a bit difficult to navigate – but about point 4 on the page, maybe 15 lines from the bottom, it's said that:

Portier Pacific retains the right at any time and at sole discretion to restrict you from using Uber services in the event of a violation of this agreement or any relevant Uber policy. Your disparagement of Uber, Portier Pacific or any of their affiliates or your act of omission which causes harm to Uber's, Portier Pacific's or their affiliates' brand, reputation, business as determined by

Portier Pacific in its sole discretion. Portier Pacific also retains the right to restrict you from using Uber services for any reason at the sole and reasonable discretion of Portier Pacific.

Similar assertions are then made that:

Uber retains the right at its sole discretion to deactivate or otherwise restrict you from accessing the provider ID or provider app in the event of violation of the agreement of any relevant policy, including what are referred to as the community guidelines or Uber privacy policy … or deactivate or otherwise restrict your account for any other reason at the sole and reasonable discretion of Uber.

So there's an assertion of an absence of directional control but then a reservation to Uber of a – or by a requirement and a capacity to restrict access to the – to Uber's system or to deactivate or restrict access to the work if there's a breach of any policy or any – instituted from time to time by Uber or any conduct at the sole discretion of Uber that it considered to be – warrant that step being taken. There's reference at 2.4 to the ratings system, which I will return to, and it's elaborated upon in the community guidelines. Can I note at page – in the overview at page 240 from clauses 3.1 to 3.3, obligations are imposed upon the delivery worker in relation to the performance of the work, including at 3.1:

Exercise due skill, care and diligence, maintain high standards of professionalism, service and courtesy.

At 3.2, to:

Meet the transportation method requirements as dictated by Uber from time to time.

And at 3.3 to:

Provide documentation, licenses, permits, work entitlements –

etcetera:

…as required from time to time.

At right at the conclusion of 3.3, an indication that any failure to meet all of those requirements is to be considered a material breach of the agreement. The financial terms are then dealt with from 4.1. I'm sorry, your Honour? The financial terms are then dealt with from 4.1 which deals with delivery fee calculation and "your payment" which purports to indicate that the delivery worker can charge a delivery fee for each instance of completed delivery services provided to a user, an amount known as the delivery fee, which – the components of which are then set out but are,

in short, determined by Uber. There is then from about the sixth line – there's an indication that you – or a requirement that:

> *You acknowledge that the delivery fee is the only payment you will receive in consideration of the provisions, on your provision of delivery services to the user. And neither delivery fee nor the delivery fee calculation includes any gratuity.*

So there's no – that's the only payment that can be received. Right at the bottom of page 240 there's, in the second-last line – there's an indication that – in a manner that the majority of the Full Bench regarded as somewhat incongruous, but you also have the right to charge a delivery fee that is less than the pre-arranged delivery fee – the negotiated fee. Even there, the next sentence indicates that it's Portier Pacific that must consider such requests by you in good faith. So it's still subject to supervision and the like. And then at the top of page 241, still within clause 4.1:

> *Portier Pacific agrees to remittal cause to be remitted to you on a weekly basis, the delivery fee, any tolls, any incentive payments and, depending on the reason, certain taxes or ancillary fees.*

Can I just note at 4.2 and 4.3, there's capacity for Portier Pacific to either change the delivery fees generally at their own discretion or to adjust a particular delivery fee in 4.3, again, at its discretion. And at the bottom of page 241 under clause 7.4 deals with – sorry – 4.7 deals with receipts and indicates that as part of the Uber services, Porter Pacific provides you with a system for delivering receipts to users for delivery services rendered:

> *Upon your completion of delivery service to a user, Portier Pacific prepares and issues a receipt to the user by email on your behalf.*

So it's asserted to be on behalf of the delivery worker, but the process of generating all the documentation in relation to the payments is undertaken by the Uber entities. Finally, in that respect, can I note at page 245 within part C, clause 12 deals with termination, and 12.2 permits either termination on notice or, in the second line, (b):

> *…immediately without notice for imposed material breach of the agreement, or immediately without notice given insolvency and –*

Etcetera. Clause 13 is an express provision, endeavouring to describe the nature of the, with 13.1 asserts that:

> *Portier Pacific is acting as the limited payment collection agent solely for the purposes of collecting payment from users on your behalf, except as otherwise expressly provided herein.*

And that:

This agreement is not an employment agreement and does not create an employment, independent contractor, or worker relationship, including from a labour law, tax law, social security law perspective, joint venture, partnership or agency relationship.

So, there's an intent to deny not only the employment relationship, but even any independent contractor relationship. And they describe what the Uber entities are doing as getting as an agent to collect payment. The final provision I wish to draw brief attention to is 14.4 on the following page, 246, which deals with assignment and prohibits assignment or transferring of the rights or obligations under the agreement. Now, what we've – what we've said in that – in relation to the – having noted those provisions, we do think, in short – and perhaps it's no longer an issue – that the services agreement purports to describe a relationship which doesn't – which is not consistent with the factual way in which the work was performed, namely that there was a business relationship between the delivery worker and the customer, or the restaurant, in circumstances in which the customer or restaurant makes the arrangement with Uber Eats for the delivery, pays Uber Eats for the delivery, the courier has no practical means to and is expressly prohibited from contacting or making an indirect arrangement with the customer or the restaurant.

But amount of the delivery fee is determined by Uber, and any adjustment to it must be negotiated with Uber and the worker is prohibited from seeking any additional amount, and the conduct and qualification requirements in relation to the performance of work are dictated by the services agreement which exists between the Uber entities, in this case Portier Pacific, and the delivery worker. In that respect, the – the contract here is not identical, but bears some similarities to that which was considered in the English Court of Appeal in Aslam, in the – concerning Uber passenger drivers. It's tab 13 on our list, I think.

RANGIAH J: Mr Gibian, are you able to hear me? It's Justice - - -

MR GIBIAN: Yes, I can, your Honour.

RANGIAH J: Just one thing I wanted to ask you is that in paragraph 16 of your written submissions, you say that if Ms Gupta's delivery rating falls below a minimum level, then the use of the app can be suspended. Which clause was that?

MR GIBIAN: Yes. That is, in effect – that was an express provision of the earlier services agreement which addresses that question at page 253 at – of the – of part B, clause 5 – 2.52. In the later services agreement, the obligation to comply with what's referred to as the community guidelines is dealt with, as I took the court to it, 2.3 – clause 2.3 on page 239, and the reference to ratings is at 2.4. The community guidelines make provision 4, the matter that your Honour has raised with me – they are at page – or they commence at page 281. And the relevant part is at page 291, 292 of part C, where your Honour will see under the heading "bullet" in the middle of page 291, it's indicated that – the conclusion, every delivery, restaurant and customers have the opportunity to rate their experience, either thumbs up or thumbs

down, with their delivery. And the delivery partners can also raise feedback on their delivery pickup – and drop off, I should say – experience – pickup and drop off experience.

RANGIAH J: Just – what I – the reason I was asking was I wasn't sure whether the delivery ratings were referring there to the ratings given by customers, or – is there any clause that requires a minimum number of deliveries to be made, or otherwise the rating drops?

MR GIBIAN: No, there's no provision that requires a minimum number of deliveries to be undertaken. There is – the ratings provision that I was drawing attention to, and your Honour will see, the bottom half of 291 and the top of 292 indicates that if your rating is below the minimum level in the city, then you may lose access to Uber Eats. There's also sanctions in relation to the cancellation rate, which your Honour is going to return at 292. And over the page at 293, there's reference to acceptance rates and the expectation that the delivery workers involved on – would be able and willing to accept deliveries. But they're not in the manner your Honour directly raised in the – an overt requirement to accept a minimum number of orders.

RANGIAH J: What – as I understand it, if three offers of work are declined in a row, then access to the app is ended. Is that for a period of time, and then - - -

MR GIBIAN: The evidence indicated that the rider – that the courier could then log back in, but that they were thrown out if three deliveries in a row were not accepted.

RANGIAH J: So, is the – the way that it works is that if somebody wants to do work they log in, but there's no obligation to log in.

MR GIBIAN: Yes.

RANGIAH J: All right. And then if they decline three deliveries in a row, then Uber Eats logs them out, and – or they can log out themselves, is that right?

MR GIBIAN: Yes. I accept that, your Honour.

RANGIAH J: Yes, thank you.

MR GIBIAN: I was just going to refer briefly to Uber BV v Aslam, the English Court of Appeal decision, which was tab 13 part B in our list, quickly. Although the contractual provisions are not the same, obviously enough, the – the manner in which the court approached the type of declarations made by the contractual documents is of some assistance. From paragraph 90 – or, before paragraph 90, there's a heading – in the judgment, there's a heading - - -

WHITE J: Sorry, Mr Gibian. Can I just – I'm just behind you. Where do I find this authority in the lists?

MR GIBIAN: It's tab 13, part B of our list. I think it was also sent through last night by my learned friends.

BROMBERG J: I'm not sure what lists – I've only got – I've got two lists, an A list and a B list or authorities. I'm not sure whether it's yours or the respondents. What's the name of the case again?

MR GIBIAN: Uber BV v Aslam, it's 2018 EWCA Civ 274.

BROMBERG J: I've – in the B list it's number 30.

MR GIBIAN: Yes, I'm sorry, I was working off a different – off the separate list that we sent through, I apologise. That's my fault.

BROMBERG J: Right. All right.

WHITE J: Yes, I have it. Thanks, Mr Gibian.

MR GIBIAN: I just wish to note what was said from paragraph 30 – sorry, paragraph 90, where there's the heading "in the artificiality of the contractual documents". At paragraph 90, it was asserted:

> *There is high degree of fiction in the wording of the standard form agreement between UBV and each of the drivers.*

And can I just note the passage at (c) within paragraph 9, agreement is expressed:

> *…with the submission by Mr Linden of Queen's Counsel for some of the claimants, that: "the documents required the drivers to agree to numerous facts and legal propositions about the position of others, such as the relationship between customers and Uber and/or the driver, rather than being confined, as one would expect, to mutual obligations of the parties to the agreement -".*

BROMBERG J: Where is that?

MR GIBIAN: Sorry, it's in the – paragraph 90 (c).

BROMBERG J: Yes. Yes, I've got it, thank you.

MR GIBIAN: Yes. And:

> *"…This unusual feature was the hallmark of an attempt to describe the set up as Uber wished to portray it and then bind the driver to that description, whereas the function of a contract is actually to set obligations and then only the obligations of the party to the contract. Moreover, the drivers could not be*

bound by facts or legal propositions of which they were unaware and/or which were false."

There's then discussion of the findings of the employment tribunal in relation to the contractual – or whether those propositions were true or not, and their inconsistency, at paragraph 94, with certain public statements made by Uber. And then from paragraph 95, agreement is expressed with the employment tribunal's findings that the drivers were working for Uber. And that:

We agree with the employment tribunal's finding at paragraph 92 that "It is not real to regard Uber as working 'for' the drivers and that the only sensible interpretation of the relationship is the other way round. Uber runs a transportation business. The drivers provide skilled labour through which the organisation delivers its services and earns its profits."

And - - -

BROMBERG J: Was this decision available to the full bench, or did it come later?

MR GIBIAN: It was available for the full bench.

BROMBERG J: Okay.

MR GIBIAN: I should identify, if the members of the court aren't aware, it has been subject of appeal to the UK Supreme Court, judgment for which is reserved, as I understand it. It was – it concerned a – the application of a statutory definition of worker rather than the common law definition as – as such. What's referred to, as I understand it, in England as a ..... worker under their – the applicable legislation. I refer to it as a useful indication of the way which one would treat certain of the declaratory statements made in the services agreement here which seek to bind the delivery worker to certain propositions in relation to – which are intended to be declaratory of the nature of relationships of which the delivery courier has no capacity to control or know, and which are not consistent with the practical operation of the deliveries.

WHITE J: When – when did the UK Supreme Court hear the submissions on the appeal?

MR GIBIAN: About a month ago, I think.

BROMBERG J: And this isn't – this is not dealing with Uber Eats, is that right? It's - - -

MR GIBIAN: No.

BROMBERG J: - - - dealing with drivers for Uber generally, is it?

MR GIBIAN: Passenger – passenger.

BROMBERG J: Passenger services.

MR GIBIAN: Taxi .....

BROMBERG J: Yes.

MR GIBIAN: Yes.

BROMBERG J: Yes.

MR GIBIAN: The full bench referred to this judgment in its decision, I can find the – paragraph 41, I'm told.

BROMBERG J: Thank you.

WHITE J: I think Commissioner Hampton did too, didn't he?

MR GIBIAN: Yes, that's correct, your Honour. I will just note – I don't read them, of course, there are then a series of propositions or considerations in paragraph 96, which were said to support the conclusion that the drivers were working for Uber. Not all of them are identical in the present – in the present arrangements, but many of them, we would say, are. And that the fundamental proposition accepted in that case in relation to a passenger were, by "drivers" is, as the majority in the Full Bench accepted, consistent with the arrangements here, namely that Ms Gupta was performing work, delivery work, for Uber Eats in circumstances in which the customer has ordered the food and paid for it through the Uber Eats app and pays Uber Eats.

The restaurant has the contractual arrangement with Uber Eats, or an Uber Eats entity, and Uber Eats facilitates the delivery of the order by transmitting a request to delivery – or it goes to its delivery partners who are contracted to it to undertake that work. And the – I'm not sure it's pressed, the contrary proposition is now pressed or is said to be necessary at least to be determined on this application, but to the extent that the services agreement purports to portray a different situation, it departs from reality, with respect. If I can turn then to a number of the – just to address as briefly as I can the number of the factors.

Firstly, in terms of whether Ms Gupta was operating her own business, essentially for the reasons that were expressed by the majority in the Full Bench from paragraph 36 to paragraph 48, particularly from paragraph 44 to 48, in our submission, it couldn't be sensibly suggested that Ms Gupta was operating in any way her own independent delivery business or performing work for restaurants or customers independently of Uber Eats. She was undertaking delivery work for fees determined by Uber rather than – as a means of remuneration rather than the pursuit of profit or investment.

She did not advertise, have a brand or seek to attract goodwill so as to suggest a business undertaking.

And the work undertaken itself was, relatively, at least, of an unskilled nature, not such as to practically give rise to the capacity to generate independent business. She did not have interaction with and can have formed any independent relationship with any restaurant or customer, and was specifically prohibited from communicating with any restaurant or customer independently of the performance of services through the Uber Eats app. And, as I've said, the obligations in relation to the performance of work, both in the services agreement and the community guidelines, were obligations owed to the Uber entities and Uber controlled the amount and the method of payment. That is, as we've said, a significant consideration in itself in assessing whether Ms Gupta was performing work as an independent contractor or as an employee.

And, as I endeavoured to say in introduction, has relevance to the significance that would be attached to other of the factors which are taken into account in the multi-factorial analysis. The second factor to which I wish to direct attention was the obligation to perform work. As the members of the court will have seen, the majority in the Full Bench attached what they – well, or identified what they described as three critical factors which they considered pointed – just, sorry, perhaps if I withdraw that and go back a step. The majority in the Full Bench accepted that Ms Gupta was performing work for Uber, but characterised that relationship as one of independent contractor.

At paragraph 69 of its decision – of the decision, the majority identified – perhaps I should say the plurality identified what it described as three critical factors which it said were pointed decisively away from a finding of employment. The first of those was said to be the absence of control over when and how long Ms Gupta performed her work. With respect, in our submission, that the approach of the majority wrongly identified that matter as determinative or – and gave undue weight to that consideration in assessing the nature of the relationship. Firstly – although, perhaps, it wasn't expressly, at least, an aspect to the reasoning in the majority in the Full Bench. The submissions that are put by Uber suggest that an obligation to perform work at particular times is an essential aspect of an employment relationship founded upon the proposition that a wages work bargain is commonly understood to be the usual feature of an employment relationship.

With respect, we think that that misunderstands the relevance of the wages work bargain and that the authorities relied upon don't support that proposition. Could I just note two of those, the first being BWIU v Odco. Sorry, if I could just have a moment. I'm sorry, your Honours, I just want to find the correct tab number.

WHITE J: If it's any help, it's number 9 in part B in the version I'm looking at.

MR GIBIAN: Yes, your Honour. Thank you, your Honour. In that respect, can I just – the part that is relied upon in support of that proposition of my learned friend's

submissions is that that appears within the judgment of the court at pages 113 and 114 of the report, being [1991] 29 FCR 104. Can I just note in that respect that the issue being addressed at that part of the court's judgment, as the heading a third of the way down page 113 indicates, is whether or not there was in existence a contract between the worker and builder at all. And as ..... will know, this judgment concerned a tripartite labour hire-type arrangement involving the worker, a labour hire agency known as Troubleshooters and various construction companies.

What was being addressed – it was clearly a contract between the worker and the labour hire agency. What was being addressed at this aspect of the judgment was not the nature of a particular contractual relationship, but whether or not there was any contract at all between the building company to whom – or the construction company for whom the worker was ultimately performing work pursuant to the labour hire arrangement and the worker. And the paragraph that commences at the bottom of page 113, their Honours note evidence in relation to the arrangements between the worker and the builder once the worker attended the particular site, but suggest at the bottom of the page that:

> *It is clear from the evidence that it was always intended that the builder should remain liable to Troubleshooters for all work performed by the worker whenever it might be done and that Troubleshooters be liable to pay the worker for such work.*

As the counsel for the appellants conceded, the builder was not always aware of that rate as distinct from the total amount per hour he was liable to pay Troubleshooters. And it was then said that:

> *The element of consideration which is essential to a contract of employment is the promise by the presumptive employer to pay for service as and when the service is rendered.*

Reference then made to Automatic Fire Sprinklers v Watson. Stopping at that point, what was being identified there was whether or not there could be any contract at all that could answer the description of being a contract of employment with the builder, in circumstances in which there was no obligation by the builder to pay the worker at all for services as and when it was rendered. And can I secondly note in that respect that what is asserted to be the essential to a contract of employment is a promise to pay for service as and when it is rendered, not a requirement that service be provided as and when it is demanded. There's then a passage from Automatic Fire Sprinklers v Watson extracted in the middle part of that page. I don't need to read it, but in the second paragraph it's firstly noted that it's possible for there to be different arrangements, that is, payment may be periodically rendered irrespective of the performance, or independently of the performance of service.

But in the second half of that paragraph, that the common understanding of a contract of employment of wages or salary periodically payable is that it is service that is earned through remuneration, and even wrongful discharge from service means wages and salaries cannot be earned however ready and willing the employee may be

to serve. That ..... concerning liability, that is, what the liability of an employer was who had wrongfully prevented an employee from continuing to provide such service, whether that liability was for wages or merely damages for breach of contract. Those cases do not support or even address the proposition as to whether or not there is essential in identifying an employment relationship, an upon the employer to – employee, I should say – to perform work at particular times, rather than that the reciprocal obligation is to pay for service when the service is rendered. The second - - -

BROMBERG J: The Full Court seems to have said something about that at – I'm sorry, the full bench seems to have said something about that at 48. They did say that there was…

> *…the minimum reciprocal obligation of work and payment.*

MR GIBIAN: Yes. They accepted that proposition. Then at 69 the first of those – the first bit of considerations is raised with an absence of control over when and how long the work is performed. As I say, perhaps the majority and the full bench don't go as far as my learned friend's submissions in the extent of suggesting that there must be a requirement or an obligation upon the employee, or the worker, to perform work in order for there to be a contract of employment. Rather, the members of the full bench regarded the absence of that factor as being a critical, potentially decisive, of that matter. Uber's submissions perhaps put it somewhat higher than the decision, majority at least, in the full bench.

The second case to which I draw attention was Forstaff, which is tab 10 in part A, relied upon by my learned friends. That was again a case in relation to a triparted labour hire type arrangement, and whether liability for payroll tax arose in that circumstance. The issue being – or the arrangement being that workers were on the books, as it were, of a particular labour hire agency that is available to potentially accept assignments, but could accept or reject particular assignments from time to time. The question the – his Honour ultimately found – McDougall J ultimately found there was not a standing contract of employment, as it were, simply because one of the workers was on the books and potentially could be called upon, but that there was a contract of employment created once a particular assignment was accepted to perform work pursuant to the labour hire arrangement. The passage relied upon by my learned friends is really that at paragraph 90 and 91 at the bottom of page 20 of the report, where his Honour indicated that:

> *It therefore seems, if I may say so with respect, that the irreducible minimum of mutual obligation necessary to create a contract of service to which Lord Irvine referred should be expressed, not as an obligation of one to provide and the other to perform work, but as an obligation on one side to perform work or provide service, and on the other side to pay. That would be entirely consistent with the approach of the Full Court as it was said in Odco.*

His Honour went on in 91:

In any event, having regard to what was said in both Automatic Fire Sprinklers, Odco and Curro, I think that, for there to be a relationship of employer and employee, it is essential that the putative employer be obliged to pay the putative employee in accordance with the terms of the contract for services reasonably demanded under it, and the putative employee be obliged to perform such services. That is as much so where the service consists of standing and waiting as where it is active.

In that respect, we don't read particularly the second last sentence of paragraph 91 as suggesting that it is necessary that a putative employee be obliged to perform services as and when, or whenever, demanded by the employer. We rather think it suggests that there is an obligation ought be read as suggesting that there must be an obligation on the putative employee to perform such services to be entitled to payment under the contract, that being the reciprocal obligation. We think that that is clear once one looks at it. If I could ask the court to turn over to page 24 and paragraph 113 of the judgment, where his Honour noted that:

The workers could, without penalty, accept or reject assignments.

That, it was clear, was not an impediment to – at least once an assignment was accepted – there being in existence a contract of employment.

WHITE J: Sorry, Mr Gibian. What paragraph were you referring to again there?

MR GIBIAN: 113.

WHITE J: Thank you.

MR GIBIAN: And his Honour then goes on in a manner, which I wasn't going to read, onwards to 117 to find that there was in existence a contract of employment, at least once a particular assignment was accepted. Now, there were really two aspects here that were relied upon against the proposition of employment. The first was that there was no requirement for Ms Gupta to log on to the app and to perform delivery work at particular times. The second was that it was said that there was then no obligation to accept particular orders, or particular delivery requests, when logged on. Can I deal with those two matters in turn. As to the first matter, we don't think that it is right to say that an absence of an obligation to perform work at particular times is in itself either inconsistent with the existence of an employment relationship, or a decisive factor against it. It is also, of course, a feature of casual – at least true casual – employment.

Can I ask the court to refer to, firstly, JA & BM Bowden. It's tab 13 in part A of the bundle. That was a case again about payroll tax liability concerning workers undertaking fruit picking work during the fruit picking season. Can I note within the judgment of Ipp J, and the other members of the court agreed, the nature of that work was described from paragraph 18 onwards, or the nature of the arrangement that were dealt with from paragraph 18 to paragraph 25. I don't want to read it, but, in

summary, there were a cohort of workers that performed work during the picking season from December and May, or at various times of the year depending upon the type of fruit involved, and would attend particular farms and work in a manner which was relatively ad hoc. That is, there wasn't a requirement to work particular hours and they were paid on a piece per product. The mutuality of obligation issue was then dealt with from paragraph 87 of the judgment.

Where it was noted that Mr Sullivan relied heavily on the fact that the hours of work were entirely within the workers' discretion. They had the right to come and go as they pleased. They had the right to stop work whenever they wished. The appellant has no obligation to provide work and the workers gave no undertaking to work. Mr Sullivan submitted that these matters were fundamentally incompatible with the employment – with that employment relationship. His Honour then noted at 88 the mutuality obligation to work is a usual ingredient employee-employer relationship but at 89, the mutuality obligation was held not to be conclusive in a number of matters, including Roy Morgan Research Centre v Commissioner of State Revenue.

BROMBERG J: The mutuality of obligations approach, I think, comes from England, if I'm right. And I think it might have been a quest where North J and I made the point that in England, there's no recognition of casual employment, in the way that the law in Australia recognises casual employment. That might be a reason to be a little way about statements suggesting that a mutuality of obligation needs to exist, as a precondition to contact.

MR GIBIAN: Yes. Certainly, McDougall J in Forstaff, from paragraph 79 draws on English authority to that effect. Albeit also seeking to draw on Odco and Automatic Fire Sprinklers in a manner which as – I endeavoured to indicate, is not necessarily consistent with what is being addressed in either Automatic Fire Sprinklers or in Odco, which were seen as somewhat distinct or separately distinct issues. We would embrace what we said at paragraph 90 in Bowden, that is that like virtually all factors relevant to the existence of an employment relationship, absence of mutuality of obligation cannot be looked at in isolation. It has to be seen in context and context will colour any inferences to be drawn from the fact that a worker is entitled to work whenever he or she wishes. And we do think, certainly, Uber's submissions with respect to them and the majority of the Full Bench are keen to have departed from that approach in the sense that they seem to have attract – attached precisely more critical waste to the obligation or the absence of an obligation by Ms Gupta to log on to the app and perform work at particular times. We can't say that that is an irrelevant consideration, but it is a consideration which must be looked at in the context of the whole of the relationship, as it was with the fruit-picking workers in Bowden. That is, it's a – I'm sorry, your Honour?

BROMBERG J: It tends to be the nature of piecework arrangements - - -

MR GIBIAN: Yes - - -

BROMBERG J: - - - are that atemporal requirement as to when the work is to be performed is absent. I mean, for example, piece workers in the clothing industry, who delivered garments to sew together. They do that as and when they like to.

MR GIBIAN: Yes.

BROMBERG J: They can start work at the beginning of the day or at the end of the day or in the middle of the night. That's the nature of many piecework arrangements, I would have thought. That when the work is to be performed is really left up to the employee. It doesn't have to be, but it can be.

MR GIBIAN: Yes. And if you look at the circumstance of the fruit pickers, if there's a farmer who needs a particular orchard to be picked any time in the next two or three weeks, when the fruit is appropriately ripe and there are 20 or so people who are available to do it, the farmer may be sufficiently confident from the incentive provided by the piecework that between them they'll get it done, without requiring the worker to commence work at a – the workers to commence work at a particular time in the morning and finish at a particular time in the afternoon.

And that doesn't – that cannot in itself, in that context, be a factor which is decisive or we would say, even particularly significant, in assessing whether or not the relationship is one of employment. Here we would say it is substantially the same. If by the use of the mobile app technology and the mapping systems that are available now, Uber has a cohort of workers who are available for work for it and it will be sufficiently confident that the piece rates-type payments that it provides will provide sufficient incentive for workers to accept delivery requests to make deliveries for it, that is not a factor which is decisive or indeed, even particularly significant in determining the nature of that relationship.

As I said at the outset, the absence of an obligation to work at particular times may in some cases be indicative that – indicative of a finding that the worker is operating some separate business. But if it is not and is merely a factor of the exigencies of the particular business, then we don't think it's a matter which is of significant – which is of great significance. We say – we accept it's relevant but it is not of great significance or certainly give it the decisive weight that it would be given by Uber or by the majority in the full bench.

BROMBERG J: Did the Full Court consider whether this was properly characterised as piecework?

MR GIBIAN: I don't believe so, your Honour. No.

BROMBERG J: I mean, if not, it's piecework.

MR GIBIAN: It's certainly paid on a per-delivery basis. Yes. Of course, it wasn't an underpayment claim as such. It was an unfair dismissal claim, of course, in the first instance, so questions of the nature of the payment aren't perhaps critical.

BROMBERG J: No. But I think that the question of – this is a question of characterisation I suppose but – and it seems to me a relevant one. Are these workers – if I can use that as a neutral description – to be regarded as pieceworkers?

MR GIBIAN: We would say they are in the same way that the bicycle couriers in Hollis v Vabu were paid a piecework rate, by-delivery rate, in a matter that means that the High Court regarded as a usual and obvious way for such work to be paid. I might say the full bench also is perhaps not addressing that issue but did accept that the fact that the payments were on a per-delivery basis was not a consideration that was of great significance against a finding of employment, and that it was a usual manner of remunerating employees undertaking work of this type.

Just completing, down at 93, the – well, at 92 there's reference to another type of piecework-type-rate work which was the opinion survey work that was done in Roy Morgan Research at home and, to some extent at least, at times that were within the discretion of the worker. And at 93, his Honour concluded that the capacity – the independence of the workers as to the time and amount of work was not sufficient to conclude that they were engaged as independent contractors.

We've also made reference to your Honour Justice Bromberg's judgment in On Call Interpreters which at paragraphs 267 and 268 referred to the fact that the absence of an obligation to accept particular assignments or not cancel assignments was not necessarily – or didn't preclude a finding of employment and that ongoing – that whilst ongoing employment has an obligation to work during hours for which the employee was engaged, a casual employee ..... casual has no such obligation. And the lack of an obligation to work is a feature of an independent contractor. Whilst no – a lack of an obligation to work is a feature of an independent contractor, it is also a feature of casual employment. For those reasons, we don't – we – with respect, we don't think that the absence of an obligation to log on and perform work at particular times is, in itself, a factor which is decisive against a finding of employment, particularly in the context in which the majority of the full bench, at least, correctly accepted that Ms Gupta was not operating her own business but working for Uber Eats, undertaking work in its business.

Secondly – the second aspect that – upon which significance was attached was what is asserted to be an absence of an obligation to accept delivery requests, even once logged on to the app, and the capacity to cancel orders, even after they have been accepted, at least prior to picking up the order from the restaurant. In that respect, that is an assertion made at clause 2.3 in – of the services agreement. However, the actual instructions provided to delivery workers don't support, with respect, an inference that there was no obligation to accept work – no practical obligation to accept work at all or to accept delivery requests at all. Can I just note within part C of the appeal book. Firstly, under tab 7, attached to Mr Gupta's witness statement in the proceedings at first instance, there were a number of screenshots of – from the Uber app. Can I note at page 158, in part C, the screenshot on the left-hand side, there's a question:

What happens if I decline a delivery request?

And it's said:

If you decline a delivery request, the request will be reassigned to another nearby delivery partner.

It then says:

We recommend that you only go online when you are ready to accept delivery requests. The app functions most optimally and efficiently for both the delivery partners and their customers when delivery partners actually intend to be online. Also please note that certainly delivery partner promotions require a minimum delivery acceptance rate.

So that is there were incentives to maintain a minimum acceptance rate. And be sure to read the details etcetera. At page one - - -

BROMBERG J: What page was that? I missed the page.

MR GIBIAN: Sorry.

BROMBERG J: What – what - - -

MR GIBIAN: 1-5-8.

BROMBERG J: 158.

MR GIBIAN: 158.

BROMBERG J: Thank you.

MR GIBIAN: In part C. Numbers at the bottom of the page.

BROMBERG J: Yes. Thank you.

MR GIBIAN: The other relevant contextual element is noted at – in terms of acceptance is at 179, where this reference is made to the – well, on the left-hand screenshot of that page, the question's asked:

How long do I have to accept a delivery request?

In most cases the app will wait 15 to 30 seconds after it sends out a delivery request before it sends the delivery or request to someone else ..... accept a delivery request when you see it comes in. That is the practicality was that the delivery worker has a very short period of time in which to accept the request and there is obviously an urgency in so doing. Could I then just note what is said – or the sanctions which are

foreshadowed in the community guidelines in that respect. I referred an answer to your Honour Justice Rangiah's question earlier to the community guidelines. Can I just note in passing that commencing at page 281, there are obligations set out in the community guidelines applicable to restaurants and customers – eaters – which demonstrate that Uber superintends – supervises the conduct of all parties to this arrangement. And again, further emphasising this is its food delivery business.

BROMBERG J: And where's that; 289?

MR GIBIAN: Sorry, two-eight – it starts at page 281. I don't need - - -

BROMBERG J: .....

MR GIBIAN: - - - to go to it in detail but your Honours will see from 281 under the heading "Legal", one has to read the text perhaps, but the first part appears to address restaurants. I'm sorry. The first part seems to address – addresses eaters, then obligations on restaurants commence at the bottom of – towards the bottom of page 284. And then reference to the obligations of delivery partners are dealt with from the – towards the bottom of page 289 of the guidelines which, as I have indicated, are expressly referred to as being required to be complied with in clause 2.3 of the services agreement and providing the basis for either suspension or termination of an account. Can I note, in that respect the first matter dealt with at the bottom of page 289 is ensuring a respectful and safe environment. And at the top of page 290 it's asserted that the way you behave while using Uber Eats can have a big impact on the experience of all the users of the app; courtesy matters. And that's why you're expected to use good judgment and behave decently towards people using Uber Eats. There's then a reference to a series of matters that could give rise to losing access to Uber Eats on the part of delivery partners. Over on page 291 there's a heading at point 1 on the page "What leads to you losing access to your account", where it's said that:

> *If we are made aware of behaviour in violation of these community guidelines, we will contact ..... into them. Depending on the nature of the concern we may put a hold on your account during the inquiry.*

That is, there may be suspension while investigations are conducted of the behaviour of the rider – of the delivery worker. And then:

> *If the issues raised are serious or a repeat offence or you refuse to cooperate, you may lose access to Uber Eats.*

I referred earlier to the rating system which is referred to under the heading "Quality" in the middle of page 291. There's description at the bottom of page 291 and the top of page 292 as to the manner in which ratings are calculated. And then, at point 3 on that page, a heading "What leads to you losing access to your account":

If your rating starts to approach the minimum rating in your city, we will reach out to let you know. If your deliverer rating consistently falls below your city's minimum you may lose access to Uber Eats.

As to cancellation, on page 292, under the heading "Cancellation Rate", it's indicated that:

Cancellation occurs when you accept a delivery request and then cancel the trip. When you cancel, it negatively affects the experience for both restaurants and consumers, and creates a poor customer experience.

It's also said that:

We understand there may be times at which something comes up and you have to cancel an expected delivery request. Minimising cancellations is critical to the reliability of the system.

The cancellation rate is then explained. And at the bottom of page 292 it's indicated that – you will –

If your cancellation rate is much higher than the average for your city, we will alert you, after which you may be logged out of the app. If your cancellation rate continues to exceed the maximum limit, you may lose access to your account.

So whilst there was a capacity to cancel requests once accepted, at least, up until the time the food was delivered, if your cancelation rate was higher than the limits stipulated by Uber, then you would be either logged off – logged out of the app or could lose access to your account. So it was hardly an unconstrained capacity to accept and then reject work. The issue of acceptance rates is then dealt with at 293, as I indicated to Justice Rangiah earlier.

Whilst we accept that there was no express sanction contemplated for low acceptance rates as such, it was plainly communicated that it was expected that, when logged on, the delivery workers would be available, and would accept delivery requests. And there's no denying that hangs consistently with its:

Consistently accepting delivery requests helps maximise your earnings and keeps the system running smoothly.

Again:

We know that sometimes things come up that prevent you from accepting every request, and you may want to take a break. But accepting requests when you're online in the app causes delays –

sorry –

…not accepting requests while your online in the app causes delays and makes the app less reliable. While declining deliveries does not automatically –

it is said –

lead to permanent deactivation of your account, if you don't want to accept a delivery request, you can just go offline. There's no minimum requirement that you log on to the app or accept deliveries when you have but, logging on is an indication that you are available for receiving deliveries. If you consistently decline delivery requests, we will assume you do not want to accept more deliveries at that time and your account may be automatically logged off until you log back in.

RANGIAH J: What is meant by the reference to not automatically?

MR GIBIAN: We can only read into this – into this document what appears on its face. In my submission, it makes a claim that Uber is reserving, to itself, the capacity, which it had under the services agreement, to terminate at any time – or, to terminate or deactivate and account at any time for any reason if considered to be reasonable; that a failure to accept at a level that was considered satisfactory. So while it might not – would not automatically lead to permanent deactivation, it may do so. It was a possible sanction available.

Although we accept that, unlike cancellation, there wasn't a – a clear indication of what the minimum level involves or a clear indication that there was a minimum threshold that was required to be met. Finally, in that respect, can I note what is said under the heading Delivery Delays, that is, that there was expectations that deliveries – or, a requirement that delivery would be made in a timely manner:

Our restaurant partners and consumers choose Uber Eats –

that is, they chose to engage Uber Eats –

for its high quality, reliably and speed. So partners who are consistently slow to complete trips with a significant number of deliveries materially deviating from the estimated delivery time for arriving at the premises, for picking up, or arriving at delivery location for drop off, may lose access to their accounts.

And that's what happened in Ms Gupta's case; an assessment was made that she was – that her deliveries were not meeting the timeliness standard in a manner which was satisfactory to Uber, and her account was, initially, put on hold and subsequently deactivated. In that respect, addressing the obligation to perform work: whilst we accept that there was no obligation to log on at particular times, we don't accept that one draws from the requirements enunciated by Uber that there was an unconstrained capacity on the part of the delivery worker to not accept any delivery requests or to cancel any delivery requests once they were logged onto the app.

But there was a clear expectation that they would be available to receive deliveries when logged onto the app, and that cancellations were seen as particularly problematic behaviour, and that if cancellation exceeded the threshold set by Uber, that would lead the suspension or deactivation of the worker's account. In that context, we don't think that the flexibility that did exist in relation to the time for the performance of work was a decisive or critical factor against a finding of employment, both because of the factors I've mentioned, but also that that flexibility has to be seen in the context of what permitted it, namely, that there was technological arrangements made possible by the mobile app technology to identify deliver workers who were in an appropriate location and logged on, and transmit orders or delivery requests through the facility of the app.

And that factor itself, particularly if it didn't in itself suggest the performance of work in some independent business by Ms Gupta, was not a matter which ought to have been regarded as decisive or critical. Can I just mention, briefly, the elements of control. I don't need to go to any of the authorities, in that respect. But I just note that, as your Honour's will be well aware, control remains a consideration in assessing the nature of the relationship, albeit one that is not determinative or even essential, and that what is important is not the actual exercise of the provisional control, but it's the lawful capacity to do so, to the extent, or, so far as there is scope for it.

In that respect, Uber exercised what we would regard as a significant degree of control and supervision over the manner in which work was performed. We've – I've referred to the periods of the – the provisions of the service agreement, particularly one point – 3.1 to 3.3, setting out minimum standards of skill, care, diligence and behaviour, coupled with the sanction of – of termination or deactivation. In relation to the route taken for the delivery, there is something made of an assertion that the delivery worker is free to perform or to take routes to execute the delivery as they wish.

Firstly, that is something to the constraints upon delivery delays, that is, the requirement of timeliness. The other observation we would make in relation to that matter is that the manner of the – the manner in which the delivery requests are conveyed to the worker gives the worker very little control over the ordering of their work. That arises from the description of the services to which I took to the court to, in Mr Mulholland's statement – with the statement. Namely, that when the delivery request is notified to the delivery worker through the app, they are not told – they are told the general location only of the restaurant, not its identity. They only get told the identity of the restaurant once they accept the request.

And they are only told the, or are informed of the location of the delivery – the customer – when they pick up the meal from the restaurant, and are in, in a practical sense, at least, irrevocably committed to undertaking the work. They cannot, is that context, have a meaningful control over the manner in which – where they want to go in the performance of the work, or linking particular jobs to one another, because that information is reserved to Uber – Uber reserves to itself, and releases only in

that piecemeal way, to the delivery worker. The elements of control are also made clear in the Community Guidelines provisions to which I've just made reference, including sanctions or injunctions in relation to courtesy and behaviour, combined with a suspension, investigation, and disciplinary sanction system.

The ratings system, designed, as the community standards make clear at page 291, to deliver accountability, again, combined with the sanction of losing access to your accounting if your ratings fall below an acceptable level, and the sanctions applicable in relation to cancellations, delays or failure to meet other delivery requirements imposed. Finally, in this respect, can I just refer briefly to some of the other factors referred to in – either in the commission's decisions and my learned friend's submissions. Firstly, as to competition or engagement of work for other operators, the Full Bench at paragraph 69 – or the second matter referred to by the Full Bench – the majority of the Full Bench at paragraph 69 was an assertion that:

> *Ms Gupta was able, even when logged on and performing work pursuant to a delivery request, to accept work through other competitor food delivery apps and perform other types of passenger or delivery work.*

In that respect, firstly we accept that the services agreement at 2.3 says that the – at clause 2.3 says that the delivery partner is able to perform other occupations. As to – the evidence, however, was that Ms Gupta did not do so. And we don't think that there was evidence which really went to the practicability of performing work for other operators at the same time. And indeed, the findings made by Commissioner Hampton would support the view that that wasn't a practicable arrangement. Commissioner Hampton at paragraph 92 of his decision at first instance, which is at page 47 in part A – well, from paragraph 91 he – the commissioner dealt with the entitlement to work for others. At paragraph 92, he indicated that:

> *The need to respond to delivery requests, accept if she so chose, within a short period of time must also be taken into account. This would practically have meant that it would have been difficult to be logged on and accept requests from multiple apps at the same time, but does not mean that Ms Gupta could not work for other food delivery or transport operations using exactly the same equipment, being her vehicle or mobile phone.*

To the extent that there was a capacity to do other work at other times, we don't think that – that is also common feature of both casual employment and part-time employment and is not a decisive factor. The suggestion that work could be done for other operators at the same time was a matter which wasn't greatly explored in the evidence, in these proceedings at least, given that Ms Gupta did not in fact do so.

BROMBERG J: You mean at the same time as being connected to the Uber app?

MR GIBIAN: Yes. I think the suggestion in paragraph 69 – or the second part of paragraph 69 in the majority's decision in the Full Bench was that Ms Gupta could perform work – well, could accept – could be logged on to the Uber Eats app and

accept delivery requests from other operators at the same time. Now, she didn't do so. She was not signed up to any other operator, as I understand it. But there was a suggestion that that was a course that might have been open. We don't think that that was a matter - - -

WHITE J: Did Mulholland give any evidence that others did that?

MR GIBIAN: I don't believe so, your Honour, no. I don't know that it's prohibited by the services agreement, but all the services agreement says, that there's not a prohibition upon working – undertaking other operation – other occupations, I should say. The next matter – the third matter referred to by the majority in the Full Bench at paragraph 69 was that Ms Gupta was not presented as an emanation of Uber Eats' business in that she was not required to wear a uniform, the car didn't bear a logo or the like. With respect, in our submission, that is perhaps too narrow a way to look at the question of whether a worker presents as an emanation of a particular business. Certainly, the wearing of a uniform is a relevant consideration

MR GIBIAN: In our submission, that is, perhaps, too narrow a way to look at the question of whether a worker presents as an emanation of a particular business. Certainly, the wearing of a uniform is a relevant consideration that was a matter taken into account in Hollis v Vabu, with respect to the Crisis Courier workers in that case. However, we think the practical operation of the Uber Eats system means that Ms Gupta was, in a practical sense, presented an emanation of Uber Eats, in that the customer places the order through the Uber Eats app, which is then delivered by a courier engaged by Uber Eats, and that the courier is, necessarily, in that context, associated with, and a representative of, Uber Eats, and is, in the ordinary courts, the only representative or associate of Uber Eats with whom the customer would have any interaction.

That was a matter, again, which was recognised by Commissioner Hampton, in his first instance decision, at paragraph 108, at page 49 in part A, where the Commissioner noted that:

> *marketing and delivery of the Uber Eats services to the world contemplate the delivery being provided by Uber Eats because the user has made an order using the Uber Eats app and when the service is provided, it is the delivery partner that is advised to the user by the relevant app as conducting the services and they attend the final destination, sometimes with a paper bag carrying the Uber Eats logo provided by the restaurant.*

Whilst it's said that this is not inconsistent with independent contractor relationships, it does further inform the real world public presentation of Ms Gupta. And we think that that is – one shouldn't limit the consideration of whether the worker is an emanation of a particular business, merely to the wearing of a uniform or the use of particular logos. The method of business operation here, necessarily, we would say, presents the worker or the delivery courier as an emanation of Uber Eats.

I think the other considerations are adequately dealt with in the written submissions. We don't think the express description of the relationship in the services agreement can be given any weight, in the context of what is obviously a one-sided document which presents, we would say, as a substantially degree of fictitious description of the way in which the operation operates. The taxation arrangements are an aspect of the attempt, by Uber Eats, to portray the relationship in a particular way. The provision of equipment, as I think all the members of the Commission accepted, the use of a personal car and a mobile phone was not a sit factor in this matter.

Unless there's anything further on the considerations, can I just briefly turn to the fourth - - -

RANGIAH J: Mr Gibian, I just have one question. In paragraph 70 of the Full Bench's decision, it referred to a lack of a number of the usual and essential hallmarks of an employment relationship. What was meant by essential hallmarks?

MR GIBIAN: Well, we think that's a reference to the matter that I referred to in 69, and with respect to the members of the Full Bench, we think that that is a further indication of a departure from the multifactorial approach of looking at the entirety of the relationships, and standing back and looking at the particular picture once completed, as Mummery J suggested, but rather identifying certain individual factors as being essential, rather than taking the approach of standing back .....

RANGIAH J: So you don't accept that the three factors in paragraph 69 were essential?

MR GIBIAN: No, we do not. We submit that the proper approach – we don't suggest that ..... are irrelevant, but they are part of the whole of the circumstances that require consideration, and the proper approach is to consider and weigh all of the factors, but at the end of it, to step back, and form a view as to what the overall conclusion would be, not that any particular factor is disqualifying in itself.

The final matter to which I was briefly going to refer, was the submissions that Uber has advanced as to the nature of the task of this court on judicial review of a decision of the Commission. In the circumstances of this matter, the question of whether or not Ms Gupta was an employee, was a question of going to the jurisdiction of the Commission, that is a person is able to make an application seeking an unfair dismissal remedy, under section 394 of the act, if the person relevantly has been dismissed. The concept of dismissal is defined, in section 386, as being:

> *A person whose employment has been terminated by his or her employer. If the person is an employee, they are entitled to make such an application, and it is properly before the Commission. If the person is not an employee, then the person is unable to make such an application, and the Commission has no jurisdiction to entertain it. If the Commission wrongly determines that an applicant is not an employee, that is an error going to its jurisdiction. It will, in that circumstance have erroneously declined to exercise its jurisdiction, and*

subject to any discretionary considerations, which are not raised here, its decision declining jurisdiction ought be quashed, and orders issued, required to determine the relevant unfair dismissal application.

RANGIAH J: So is it your submission that Ms Gupta, being an employee, was a jurisdictional fact?

MR GIBIAN: Yes.

RANGIAH J: If you look at section 390 subsection (1) of the act, paragraph 1(a) refers to:

If the FWC is satisfied that the person was protected from unfair dismissal –

isn't the jurisdictional fact the Commission's satisfaction that the person relevantly is an employee?

MR GIBIAN: In our submission, your Honour, it starts at section 394, which is the provision which permits a person to make an application to the Fair Work Commission or an order under division 4, granting a remedy. As your Honour will see, subsection (1) of section 394, provides that:

A person who has been dismissed, may apply to the Fair Work Commission for an order under division 4, granting a remedy.

As I indicated, the person is dismissed if the definition in section 386 is satisfied, namely that:

The person is dismissed if the person's employment with his or her employer has been terminated on the employer's initiative.

Unless the person is in employment, has and employment, and their employment has been terminated by their employer, the person is unable to make such an application, and the Commission has no jurisdiction to determine it. If it has a proper application before it, the Commission is then required to satisfy itself, to be satisfied, in order to make an order that, as your Honour says, in section 390, that the person is protected from unfair dismissal. But the jurisdiction to even entertain the application, in our submission, is contingent upon the person ..... being an employee, rather than an independent contractor. And the intention of the legislation is not to confer upon the Commission that ..... power to determine whether a person does or does not fall within that jurisdiction.

RANGIAH J: But isn't the - - -

WHITE J: Does section ..... bear on this?

MR GIBIAN: I am sorry, your Honour.

WHITE J: I was asking whether section 396 bears on this question. This is in division 5, which has the heading "Procedural Matters". 394, to which you referred, provides for the making of the application. And then 396 requires the Fair Work Commission to decide four things: (b) is whether the person was protected from unfair dismissal.

MR GIBIAN: Yes. Sorry – must initially decide whether the person was protected from unfair dismissal, including whether the person was an employee, before it can proceed to the merits of the matter.

WHITE J: Well, the determination of whether a person was protected from unfair dismissal would involve, necessarily, a determination of whether the person was an employee, won't it?

MR GIBIAN: It would; yes.

BROMBERG J: But your point is, for there to be a valid application, there has to be an employee.

MR GIBIAN: Yes. And that the Commission cannot, if it erroneously so decides, reinstate an independent contractor. If it erroneously decides the person is an independent contractor, when, in fact – it erroneously decides the person is an employee, when, in fact, they are independent contractor. Nor can it erroneously decline to consider an application upon finding that the person is an independent contractor, if, in fact, they are an employee.

WHITE J: I was wondering whether this might actually support your argument. I wasn't raising it with you as a point against you.

MR GIBIAN: Yes. No, I accept, your Honour. I embrace that it does .....

WHITE J: Because when one asks oneself – when one goes back to 390, which is what powers that the Fair Work Commission may exercise – where we see this 390 sub(1)(a) that the Fair Work Commission is satisfied that the person was protected – that's really, I thought, possibly linking back to the Commission having to discharge the requirement imposed on it by 396(1)(b), of determining whether the person is, in fact, protected from unfair dismissal – in fact, and in law, protected from unfair dismissal.

MR GIBIAN: Yes.

WHITE J: And so it's not really making the jurisdictional fact the Fair Work Commission's state of mind about whether the person was, but determining, as a matter of fact, and law, whether the person was protected from unfair dismissal. And that inherently involves a determination of whether or not the person was an employee.

MR GIBIAN: Yes. We agree with that, your Honour, but we have also said, as Bromberg J has pointed out, that there's not even a valid application before the Commission, unless the person is, in fact, an employee.

BROMBERG J: It rings some bells for me. I think the question of whether a valid application, and whether there was a jurisdictional fact, which the Commission had wrongly found, was raised in a matter called Lawler. It wasn't an unfair dismissal case, but it was an application about – the question was – it was a question about registration of an employee association. And the issue was whether the employee association had made a valid application. And the jurisdictional fact, there, was whether the association was an employee association. And I think the Full Court deal with whether the association was an employee association, as a jurisdictional fact.

MR GIBIAN: I am aware of that matter ..... Secondary Principals Association. I think I had looked at it in this context, but I will do so.

BROMBERG J: Yes. It may throw some light on this question. I'm not sure, but - - -

MR GIBIAN: The submission against us is – first ..... commences with a proposition that the question of whether a person is an independent contractor or not – or employee, involves an evaluative assessment in an amount of degree. The short response we make to that is that whilst that is the case, it nonetheless has one correct answer. A person is either an employee or they are not an employee. It's not a matter of discretion. That's made clear in Jamsek at paragraph 5, and at 171 to 173, for example.

So far as the jurisdiction of the Commission in unfair dismissal matters is concerned, we refer to Damevski which dealt with this point under the preceding legislation, admittedly. It's tab 8 in part A of the authorities. It was a case in which the Commission had determined that Mr Damevski was not an employee, at least of the relevant entity, and was unable to make an unfair dismissal application as a result, and the Full Court found that the Commission had erroneously so decided. Marshall J dealt with this issue from paragraph 103 on – it's reported at 133, Federal Court Reports at 438 at page 458. Under the heading Relief, at paragraph 103, his Honour indicated that:

> *The Commission was incorrect in determining that Mr Damevski was not an employee and this was a fundamental jurisdictional issue. In this circumstance it is appropriate for this Court to give prerogative relief.*

And reference was then made to Pawel v The Australian Industrial Relations Commission. His Honour then addressed a number of other authorities, including Sammartino v Foggo and Mann v Ross. And then at paragraph 112, on the following page 459, his Honour said that:

However, the Full Court in Pawel did not intend to confine the availability of prerogative relief to circumstances where the Full Bench had taken the wrong approach to an application for leave to appeal. Such relief, as Sammertino and Mann show, is also available where the Commission incorrectly determines a jurisdictional fact. Whether or not Mr Damevski was an employee of Endoxos was a jurisdictional fact, which provided the gateway for his access to the unfair dismissal regime administered by the Commission. It was pivotal to its exercise of its jurisdiction.

And then at 113:

The Commission does not have the power to determine conclusively a matter upon which its jurisdiction depends.

BROMBERG J: What were the provisions in place which - - -

MR GIBIAN: They were the 170CE provisions.

BROMBERG J: Which of them indicate whether the person is an employee is a jurisdictional fact?

MR GIBIAN: If I can just have a moment, your Honour. I thought they were set out in the – I don't think we've separately provided - - -

WHITE J: I think if you go to paragraph 127 - - -

MR GIBIAN: Yes. I'm sorry. Yes, at paragraph 127. The basis of the application was, then, 170CE(1):

An employee, whose employment has been terminated by the employer, may apply to the Commission for relief in respect of the termination of the employment.

BROMBERG J: So it's the application provisions.

MR GIBIAN: Yes. And it's now broken up in a slightly different way, that is, there's a separate definition of dismissal or dismissed, I should say, but it's to the same effect, we would say, and in the ..... As your Honours know, the provisions are slightly different in that time in the sense that they collectively dealt with unfair after unjust/unreasonable termination ..... terminations ..... reasons.

BROMBERG J: Yes.

MR GIBIAN: Their conclusion in that respect was at 115 where his Honour in the matter, ... the other members of the court agreed, indicated that:

> *If the Commission wrongly declines to exercise jurisdiction on the basis that it finds a person does not qualify to access that jurisdiction, whereas the facts before it demonstrate that the person does in fact qualify, the Commission has made an error which goes to the very exercise of its jurisdiction.*

And we say the same is the case here. I might deal with ACT Medical Officers in reply, and that's the case, if I assume my learned friend is going to go – but that's the case relied upon against us. We say that is distinguishable from – perhaps I will just go it briefly, your Honour. That's at – sorry – tab 3 in part A, the ACT Visiting Medical Officers Association v AIRC [2006] 153 IR at 228. The question issue there, which may have been revisited in the Lawler matter that your Honour Justice Bromberg mentioned to me, was an application for registration by an association of visiting medical officers in which an issue arose as to whether they were employees or not.

It appears to have been decided in the commission of a Full Bench on the basis that the consideration – not the capacity to make the application, but that a consideration that was required to be satisfied by the Commission – of which the Commission was required to be satisfied was that the association had at least 50 members who were employees. That's referred to in paragraph 2 as a requirement in section 189 of the Workplace Relations Act, as it then was. The court dealt with the – under the heading Error of Law, from paragraph 15 to – the nature of the finding. At paragraph 18 it's said that:

> *Irrespective of these difficulties it must be accepted that characterisation of a person as an employee or an independent contractor expresses a legal conclusion which may or may not be affected by error of law. Where such an error leads to an erroneous refusal to exercise jurisdiction, constitutional or prerogative relief is appropriate –*

reference to Damevski and to Pawel – which is entirely consistent with what we say. We say that the erroneous conclusion here resulted in an erroneous refusal of jurisdiction. My learned friends rely on the passage at paragraph 28 of that judgment in which it was said that:

> *It is well recognised that informed minds may differ as to the proper conclusion to be drawn from the exercise of balancing the relevant factors.*

And then in the last sentence of that paragraph:

> *Provided the correct criteria have been applied, the fact that another decision maker might have attached different weight to the various factors is not a basis for ascribing jurisdictional error.*

Even the earlier embrace of - - -

WHITE J: Isn't the problem with the ACT VMO decision this – I'm not saying it's a problem with the decision itself – but the problem might be that it's erroneous to read more into it than it's appropriate. Simply because the Full Bench said that – and this is in para 14 – that an error of law by the AIRC in reaching the conclusion would lead to it:

...erroneously failing to exercise its jurisdiction –

doesn't mean to say that there cannot be other forms of error, and the very circumstances of that case provide an example. If, for example, the AIRC had made an error of fact as to the number of doctors who were members of the association and found that they didn't have the minimum number needed, which looks on its face to be an accounting exercise – a question of fact – that could give rise to a jurisdictional error. So it just seems to me that it might be an error to be trying to read into that decision more than it properly warrants, and it's this same problem of taking words in cases – taking words in decided cases and treating them as though they're words of statute.

MR GIBIAN: We agree with that, your Honour. But the basic proposition we advance is that the finding here was one which went to the jurisdiction to entertain the application. If the Commission erroneously declined to exercise its jurisdiction based upon a finding that was wrong, then that is sufficient to warrant the relief we seek being granted in this court. We've also said, to the extent necessary, that there was an error in approach in the majority in the Full Bench, at least, in identifying particular considerations as essential in the multifactorial assessment, but we say that that is not necessary and that this court would simply – will simply decide whether or not Ms Gupta was in fact an employee able to make an application or, as the Full Bench had found, not an independent contractor excluded from that jurisdiction. Unless there's anything further, those are our submissions.

BROMBERG J: Yes. Thank you, Mr Gibian. Mr Neil, I note the time, and I note that we've already almost taken half a day. Will it be convenient for you to commence now and continue till 1 o'clock, if that's convenient to others? If it's not - - -

WHITE J: It's convenient to me. That's Justice White speaking.

BROMBERG J: Yes.

MR NEIL: And me.

BROMBERG J: All right. Well, why don't we that. I'm sure that in the 20 minutes you will find something useful to say.

MR NEIL: Your Honour is too kind. May we take that time to begin upon the question that our learned friends last addressed. It's the issue that we addressed in our written outline under the heading the Applicant has not Identified any Error of

Law. And, of course, central to our argument in that part of the case is the VMO case. May we come to that.

The applicant's submissions in this area start with the proposition that if the Commission wrongly declined to exercise jurisdiction on the basis that it found that a person did not qualify to access that jurisdiction because she's not an employee but the facts before it demonstrate that the person does in fact quality, then the Commission has made a jurisdictional error. One can see that submission in, for example, the third sentence at paragraph 4 of the applicant's outline.

The applicant there cites for that proposition paragraphs 103 and 115 in Damevski and paragraph 14 in Pawel. Now, for the purpose of the argument may we presently accept the correctness of that proposition – we want to come back to that at the end, if we may – but accepting, for the moment, the parties' submissions divide at the next step. The applicant says that if this court comes to the view that she was an employee, then that alone is sufficient to require intervention by way of certiorari.

And one can see that, for example, in the fourth sentence at paragraph 4 of the applicant's outline and, more explicitly, in paragraphs 8 and 22 of the reply. Damevski is the only authority cited for that proposition, and we look in that regard at footnote 22 of the – in paragraph 11 of the applicant's reply. Our submission is that Damevski stands for no such thing, and we will develop that - - -

WHITE J: ..... applicant goes to Damevski; it's in the industrial context, it's well-known. But this is just illustrative of a broader proposition that probably started at Craig v State of South Australia – the notion of jurisdictional error – and developed in Kirk, developed further in Hossain. So this sort of focus on one industrial decision and setting it up as the target which needs to be ..... , I just wonder whether it's truly going to be all that helpful to us.

MR NEIL: Well, we understand - - -

WHITE J: ..... jurisdictional error in Australia have just moved on quite a bit, even since the 2006 decision in ACT Visiting Medical Officers.

In our submission, not so far as to mean the Visiting Medical Officers case is no longer correct, and we would say the same, and its treatment of Damevski, we submit, would be considered in the same light. All that the VMO case is really addressing is, how does one identify an error for the purpose of demonstrating jurisdictional error? And the question in the VMO case, as in this case, is a narrow one.

In circumstances where, if one takes as a starting position, accepts as a starting position, that the question of whether the applicant was employed by the respondent is a jurisdictional fact. And that just, that attaches a label to it. The label isn't what is determinative. What's determinative is what one does with that fact. It is, in our submission, it is undoubtedly correct as matter not just of particulars, but a general

principle that what is said in the VMO case is correct if in order to – and we have in mind, in that regard, the passage in paragraph 14 and 18 of which our learned friends reminded your Honours.

There must be, in order for intervention, prerogative intervention to be warranted, there must be an error. In a case of this kind, there will always be cases that can clearly be identified as being a question of employment on one hand - - -

WHITE J: Now, one can accept there needs to be an error. But that error might be one of fact, or of law, or of mixed fact or laws, if it results in the relevant authority or tribunal misunderstanding its jurisdiction. Well, where do you get this proposition that errors of fact can't be relied upon to show jurisdictional error?

MR NEIL: It's not a – that's not the proposition we make. The proposition we make is if you, once, in this particular area, once the statutory decision-maker, the Commission, correctly identifies the legal test – I withdraw that. Correctly finds the facts, the primary facts, correctly identifies and articulates the legal test, applies the legal test in the correct way, looks at, by looking at all of the relevant indicia and evaluating them as a whole in order to ascertain the totality of the relationship. Once you have reached that point then, the mere fact, the mere fact that a different decision-maker, this court, the VMO Full Court would have attached different weight to particular indicia does not indicate an error which is capable of being a jurisdictional error. That's what the VMO case stands for. And in our submission, that's still good law. That seems to put - - -

WHITE J: Well, that can't be right in relation to a - - -

MR NEIL: - - - between decisions of the court - - -

WHITE J: That can't be. Errors that are made in the exercise of the jurisdiction on the one hand, when there's undoubtedly jurisdiction, there can be errors of law, which might not be jurisdictional. But when we're talking, what we're talking about here is a jurisdictional fact which goes to the very jurisdiction of the Commission.

MR NEIL: That's so. Well, we accept that, for present purposes. Whether it's a jurisdictional fact is a different – in the sense that the authorities that your Honour Justice White referred to use that concept, may be a different question.

RANGIAH J: Well, as I understand it, the argument that the applicant is making is that, in this case, the Full Bench made a jurisdictional error. The nature of that jurisdictional error was an error of jurisdictional fact. The jurisdictional fact which was alleged that was not present was that the Full Bench decided that Ms Gupta was not an employee. Often, when you have questions of jurisdictional fact, they must be resolved on the basis of the merits of that fact. I think, that's established as far back as Fox v Hack. And is there anything wrong with that approach, subject to the question of whether this is, in fact, a jurisdictional fact that is in issue?

MR NEIL: Yes, is the answer. There's, if one goes back to the VMO case and looks at paragraph 15 – and, perhaps, we should say this. There's no doubt, contrary to the submissions that have been made by the applicant, there's no doubt that the VMO Full Court approached the question of whether the doctors, the members of the association, were employees as a jurisdictional fact of an objective character. You get that from paragraph 2. What was in issue in the VMO case was whether the requirements of the old section 188 subsection (1) paragraph (b) had been satisfied. This was an objective fact case, not a satisfaction case. Then - - -

BROMBERG J: Sorry, what was the jurisdictional fact, then? Whether there was sufficient number of employees? Or whether the members - - -

MR NEIL: No.

BROMBERG J: - - - were employees?

MR NEIL: No. And your Honour will see the answer to this question in paragraph 2 of the VMO case. In the fourth line - - -

BROMBERG J: So 50 members who are employees?

MR NEIL: No. No. No. No. One should read up. There are two provisions referred to in that paragraph. On the fourth line, your Honours will see a reference to section 188(1)(b).

BROMBERG J: Yes.

MR NEIL: And that contains a requirement that in order:

> *to apply for registration as an employee association under the Act…some or all of the members*

Of the association must be employees.

BROMBERG J: Yes.

MR NEIL: And it was that provision upon which the respondent relied in objecting to the registration of the association. So that's an objective fact test. Section 189 was the provision that related to the accounting exercise. But that wasn't - - -

BROMBERG J: I see.

MR NEIL: - - - the basis of the objection.

BROMBERG J: It sounds very similar to Lawler, I must say. But, and it' s a long time since I've read Lawler. But it sounds a very similar factual situation to Lawler. Which is more recent full court decision, as I recall.

MR NEIL: Yes. Which, and although I'm not sufficiently familiar with Lawler to confidently assist on the first proposition, I can say that Lawler did not overrule the VMO case or seek to depart from it. What I can't remember is whether it was referred to.

BROMBERG J: Yes.

MR NEIL: And perhaps, I could look at that over the lunch adjournment.

BROMBERG J: Yes.

MR NEIL: So put squarely, the question was in the VMO case, had the applicant for registration satisfied the jurisdictional requirement that it demonstrate objectively that some or all of its members were employees? Then, the way in which the case was run on behalf of the applicant is described in paragraph 15. Or perhaps, we should say paragraphs 12 and 15. I think I've lost that now, 12 and 15. And what's there said, in our submission, about the unsuccessful applicant's argument can just as much be said about the applicant's argument tin this case. And then, one goes down to paragraph 28 in which it's set out what, in our submission, is the reason why this application, just like the application in the VMO case, must fail.

And Damevski is, in our submission, on all squares with the VMO case. Wilcox J presided in the VMO case. His Honour did so in the earlier case of Damevski. Damevski is cited. Damevski and Pawel are both cited in the VMO case without any suggestion that what is there being said is inconsistent with either of the earlier decisions. And may we demonstrate why that is rightly so?

BROMBERG J: Well, are you suggesting that - - -

MR NEIL: And which the applicant put - - -

BROMBERG J: Sorry. Are you suggesting, Mr Neil, that an error as to a jurisdictional fact is error within jurisdiction?

MR NEIL: What I'm suggesting is that if the only circumstance in which it is, sorry, let me put it this way. Well, what we are submitting is that a different evaluation of some of the relevant indicia is not an error. And because it's not an error - - -

BROMBERG J: Not a jurisdictional error?

MR NEIL: - - - it's just not an - - -

BROMBERG J: Not a mere error? Or a jurisdictional error?

MR NEIL: It's not an error. And because it's not an error, it's not a jurisdictional error.

BROMBERG J: Well - - -

MR NEIL: And for that proposition, we rely on paragraph 28 of the VMO case.

WHITE J: How does that line up with what was said in Jamsek? About there only being one correct - - -

MR NEIL: Well, two answers to that if it please, your Honour. Jamsek doesn't concern, wasn't an application for prerogative relief, it was an appeal. And - - -

WHITE J: It doesn't alter the underlying proposition, though, does it, that there's only one correct answer, whether it's on a judicial review application or on an appeal?

MR NEIL: The answer to that is that there's one correct answer because the court or tribunal that has the statutory authority to give the answer has decided what it will be. All of the – the authorities in this area, as your Honour will know, are replete with the observation that, in many cases, there is no correct legal answer, single correct legal answer. Because minds may differ. That's why his Honour Lee J said as recently as Personnel Contracting, "Different courts can arrive at different, in this area, arrive at different decisions on the same facts." So again, I - - -

BROMBERG J: And usually they're told by the High Court that they're wrong.

MR NEIL: Your Honour will forgive me if I do not respond to that observation.

WHITE J: But we're told now that there's only one correct answer to such an evaluative exercise as whether something is unconfinable.

MR NEIL: Well, all that their Honours were there saying, if we may suggest, is that it's a binary proposition. A person either is, or is not, an employee. There's no other possible answer. And that's all their Honours were saying.

WHITE J: And if you hold a person is not an employee and therefore say, "I do not have jurisdiction", it sounds like you've made jurisdictional error, just as it would be if you said, "I hold that the person is an employee an employee", and do so erroneously, "and therefore do have jurisdiction."

MR NEIL: With respect, your Honour has hit upon a point. But we would put the emphasis in, rather a different place. In order to get to that conclusion, there must be error. Get to a conclusion that there has been a jurisdictional error, there must be error. And simply to advance - - -

BROMBERG J: That will exist if you've got the wrong, if you've come to the wrong conclusion - - -

MR NEIL: Well, there we've - - -

BROMBERG J: - - - because there is only one correct answer. Now, I will - - -

MR NEIL: Yes. Yes.

BROMBERG J: I will be quiet, Mr Neil.

MR NEIL: No, no, your Honour.

BROMBERG J: I hope you've got better arguments than this one though.

MR NEIL: We will come to the substance of the matter in a moment, but, in our submission, VMO is squarely on point and that's the end of the matter here. It would be different if the applicant had pointed to some error in the identification of the legal test or the way in which it was applied. The only error that the applicant has sought to point to in that regard is by fastening on – it takes as its source the word "essential" in paragraph 70 of the plurality's reasons in the Full bench. To suggest that, in some impermissible way, the Full Bench elevated some of the – three of the relevant indicia above all of the others to the practical exclusion of every other indicia, that's not a fair reading of what the Full Bench did. One looks at its reasoning in this regard from paragraphs sixty – it starts in paragraph 69 and that comes at the end of a careful exposition of the evaluative exercise that the plurality had undertaken in relation to all of the other indicia that was said on all sides to be relevant.

BROMBERG J: All right. Well, we might need to hear you further on that at 2.15, Mr Neil.

MR NEIL: If the court please.

BROMBERG J: Would my Associate please adjourn the court to 2.15 pm.

ADJOURNED **[12.02 pm]**

RESUMED **[1.25 pm]**

BROMBERG J: Yes, Mr Neil. We didn't deliberately try and get rid of you, but I understand there was some technical issues getting you back in. But now you are here we're all ears.

MR NEIL: If the court pleases. Now, what we propose to do is to move – leave the point that we've been addressing immediately before lunch and move to the submissions that we wish to make: if this court considers that it can and should decide for itself whether the applicant was employed by the respondent. Now, essentially our position is that the Full Bench's decision that the applicant was not

employed by the respondent is correct, essentially for the reasons given by the Full Bench and, with respect, this court should come to the same conclusion. We say essentially when we refer to the Full Bench's reasons because we submit that if this court is deciding the question for itself there are five respects in which the weight given to particular indicia by the Full Bench should be adjusted or tweaked and we've dealt with those in paragraphs 21 to 26 of our written outline.

We also submit that this court, with respect, should depart from the Full Bench's reasoning in another respect and that is in relation to the plurality's conclusion that it was the respondent, Uber, who paid the applicant. Now, the scheme of the submissions that we wish to make in this part of the case is this: subject to anything that your Honours have of us we had proposed to begin by reminding the court of the evidence and findings about so many features of the relationship, or at least some of them, and then say something by way of developing the submissions that we've put in writing. May we invite your Honours to take up the services agreement and if it's convenient to do so would your Honours be good enough to look at the marked-up version of the services agreement that we hope we provided yesterday.

That's the highlighted version that your Honour Justice White referred to in the course of the morning. What your Honours there have is a copy of an extract from part C of the application book beginning at page 237 and what we've done is to mark with different colours particular portions of this document to which we wish to direct your Honours' attention and we hope to do that – that by doing that we can move very quickly through the document and identify with precision the portions that we wish to refer to. Now, the services agreement deals with the subject of what each of the parties do on page 237 in the portions that are highlighted orange, blue and red.

It deals with the subject of the applicant's control over the way in which work is performed first on page 238 in the portions that are highlighted in purple – in green and purple and then on page 239 in the portions that are highlighted in orange and in light pink.

BROMBERG J: Have you got some sort of legend for us somewhere in the document or - - -

MR NEIL: I can easily – I can provide that if that would be helpful.

BROMBERG J: I think it would be helpful to me.

MR NEIL: If your Honour please. It occurred to me after I had carried out this exercise, which challenged some of my formatting skills, that I should probably have kept the same colours for the same subjects, but a legend that I can - - -

BROMBERG J: Yes.

MR NEIL: A legend that I can prepare and furnish later on which will set out the – what I'm now about to say will, I hope, do something of the same task.

BROMBERG J: Thank you.

WHITE J: Just to repeat, so on page 239 orange and pink signify what again?

MR NEIL: They deal with – they are portions of the agreement that deal with the subject of the applicant's control over the work – the way work was to be performed.

WHITE J: Thank you.

MR NEIL: The subject of requirements and standards is dealt with on page 240 in clause 3.1 in the section highlighted in orange.

WHITE J: Or yellow. I would have said it was yellow because you've got orange in 4.1. I'm colour blind obviously.

BROMBERG J: It must come with age because I'm equally colour blind I think.

MR NEIL: If that was so, your Honour, I would be similarly disabled and perhaps I'm – and perhaps that's an explanation for the - - -

RANGIAH J: Mr Neil, I don't quite understand what you're doing. Are there particular aspects of these paragraphs that you want us to take note of or are you just outlining which ones you rely on?

MR NEIL: More the latter if it please. I don't want to take up time this afternoon inviting your Honours to read them now. I'm just pointing – what we're doing is pointing to what, in our submission, are the salient features of the service agreement dealing with particular topics.

RANGIAH J: Yes.

MR NEIL: Now, the fact that the – the circumstance that the applicant did not provide her services exclusively to the respondent and was not required to do so, being the consideration that the plurality of the Full Bench dealt with in paragraph 69, subparagraph 2 of its decision, is dealt with on page 239 in two places that – in clause 2.3 at about point 1 the green and the light pink section are two aspects of that issue.

BROMBERG J: Sorry, 249 did you say?

MR NEIL: 239.

BROMBERG J: 39?

MR NEIL: 239 in clause 2.3 in the section highlighted green and light pink.

BROMBERG J: Now, is that dealing with the period in which the worker has engaged the relevant app or is it more general?

MR NEIL: It's more general. It applies at all times. There was never any impediment to the applicant doing any other work for anyone else, including when she was not logged on to the respondent's partner app, when she was logged on to the respondent's partner app and even after she had accepted and was executing a delivery. There was no contractual or practical impediment to her doing so.

BROMBERG J: But it depends on – it might depend on how you read. I mean, what you've highlighted in green might really be doing no more than referring to the position when the person is not engaging with Uber.

MR NEIL: Yes, but – but the – if – possibly, although, in our submission, one would not do so. But if one reads it together with the next sentence, the light pink sentence, it's plain that it's referring to a period when she is logged on, or, at least, including a period when she is logged on.

BROMBERG J: Well, I'm not sure why you say that.

MR NEIL: It - - -

BROMBERG J: But anyway. What part of it do you rely on? I mean - - -

MR NEIL: It – well, it looks – if one looks at the section in light pink, we would emphasise the words "complete right," and then, in (i), your Honours will see that it's talking about the use of other software application services. That must mean, other than the software application services of Uber. And then, it goes on to make the – to talk about that being in addition to Uber's app.

BROMBERG J: I – no, I understand that, but it doesn't say when. It's not saying, you can do that whilst you're also using an – an Uber app.

MR NEIL: In – in our submission – one wouldn't read the words "complete right" in any narrow way.

BROMBERG J: Okay.

MR NEIL: And – and, what one has to think – to look at this, of course, as the authorities so often tell us, against the practical realities. And there was no practical impediment to her working for herself or for anyone else at any time, including when she was logged on to "our app". All – all one has to do is toggle from one – one could easily have, for example, as your Honours would know, more than one application open on a computer at any one time. There was some – and all one needs to do is to toggle between them. There was some evidence about this given my Mr Mulholland on page 228 of part C, in paragraph 52. And – and he says, in the penultimate sentence, that:

Delivery partners may also be logged into and/or provide delivery services by another smart phone application such as Deliveroo or Menulog –

being other apps that he – being Mr Mulholland – has earlier identified as competitors of Uber –

while they are logged into and receiving trip requests via the partner app.

Turning to a different point, also on page 239. If your Honour look at the portion that is headed – that is highlighted in blue, that deals with the emanation question, which was the subject of the Plurality's findings in paragraph 69 subparagraph (3). And here, as your Honours will see, there was a positive prohibition against conduct by which the applicant might represent herself as being an emanation of the respondent.

BROMBERG J: Who would the public have perceived the worker as an emanation of, if not Uber?

MR NEIL: It – it could be anybody. There – there's nothing that represents her to be an emanation of Uber, apart from the fact that she would turn up with food in her hand as a consequence of – at the end of a process that had begun with the customer ordering the food.

BROMBERG J: But if - - -

MR NEIL: In the same way - - -

BROMBERG J: But if I wanted to complain about the delivery, because of the behaviour of the person that delivered, wouldn't, given the nature of the process, that I placed an order an Uber app and the rest of it, wouldn't I be looking to Uber to complain.

MR NEIL: No more so than in relation to the restaurant. What – what one needs to understand, of course, is that this was a quadrilateral relationship. It involved four parties. There was what – what we will call Uber, or Uber Eats. There was the restaurant. There was the delivery partner. And then there was the eater, as they were called; the customer. And - - -

BROMBERG J: So what are you saying? You would ring up the restaurant?

MR NEIL: One could just as well do that, because the order was placed with the restaurant. And the other point that we would make is that the applicant, as the person who delivered the meal, was no more represented by the app as an emanation of Uber than was the restaurant. There's nothing - - -

WHITE J: Sorry, Mr Neil, can I just ask this, no doubt displaying my ignorance. But if – when the consumer orders from the restaurant, does the consumer know

whether the meal will be delivered by Uber Eats, Deliveroo, or some other delivery agency?

MR NEIL: Explicitly, no.

BROMBERG J: I thought you don't – I didn't think you ordered from the restaurant. I thought you ordered from Uber's app.

MR NEIL: You order from the restaurant using Uber's app. The order is placed with the restaurant.

WHITE J: Right.

BROMBERG J: Yes, but go to the Uber – Uber app.

MR NEIL: Yes.

BROMBERG J: You can to an Uber app and the Uber app displays the restaurants in your vicinity.

MR NEIL: Yes.

BROMBERG J: And then – and at that point, you place an order with a restaurant. Is that the way it works?

MR NEIL: That's – that's so. The order – the order is placed by the customer directly with the restaurant, using, as the mechanism of placement, the Uber app. Or at least the version of the app the customer has available to him or her.

WHITE J: The customer could reasonably think that it would be Uber Eats who are doing the delivery, then?

MR NEIL: Possibly. But no – but there would be no more reason to do that – to think that there was an association between Uber Eats and the deliverer than to think that there was an association between Uber Eats and the restaurant.

WHITE J: To whom does the customer give the rating?

MR NEIL: The customer can rate the restaurant or the delivery partner.

WHITE J: No, that's – to whom – to whom do they give that rating?

MR NEIL: I don't - - -

WHITE J: To whom?

MR NEIL: They use the app to do so.

WHITE J: The Uber app?

MR NEIL: They use the Uber app to do so. The Uber app is the way the customer interacts with the restaurant.

WHITE J: But the customer knows that it's Uber Eats, then, who are the agency involved in the delivery, don't they?

MR NEIL: That would be a reasonable assumption, but to say that they know to the degree that one would need to know something to cause the delivery partner to be an emanation of Uber Eats – we would submit that's not the case.

WHITE J: It sounds like an old-fashioned case of ostensible authority, where the principals put the person in a position where they appear to be acting with the principal's authority. Now, ignore the word authority in this context because it gives rise to its own debate, I know. But the underlying concept is the same. Here, the delivery person is put in the position where they appear to be the representative of Uber Eats.

MR NEIL: We would take issue with that, with respect, your Honour, because when we one looks at the position of – at the light in which the customer would look at the restaurant and say, if – if your Honours suggest that analysis applies to the delivery partner, it must equally apply to the restaurant, and that cannot be so.

BROMBERG J: Well, I accept that you would assume that the restaurant cooked the food. Why would you assume, given the process that you've just been taken through – which starts with Uber and ends with an Uber app, so far as the customer is concerned – why would you assume that the driver is emanation of the restaurant?

MR NEIL: There would be no more reason to assume that the driver – there would be just as much reason to assume that the driver sis an emanation of the restaurant as to assume that the person who prepares the food is.

BROMBERG J: Well - - -

MR NEIL: There's simply nothing about the arrangement that would distinguish the – that would enable anyone using it to fasten upon Uber as the - - -

BROMBERG J: Well, except - - -

MR NEIL: - - - principal of the delivery partner, and not of the restaurant.

BROMBERG J: Except for this, Mr Neil. Everybody knows what function Uber plays. The restaurant's function is to prepare the food. Uber's function is to deliver the food; isn't that right?

MR NEIL: Uber's function is to act as an intermediary between the restaurant and the customer at – and, which includes, to effect - - -

BROMBERG J: For the purposes of delivering it.

MR NEIL: And equally, of ordering it. Equally of ordering it. There's no more – in analogue days, of course, one would ring a – if one could persuade a restaurant to - - -

BROMBERG J: Deliver.

MR NEIL: - - - deliver, one would telephone the restaurant, place the order and the restaurant would – and either you, the customer, would walk to the restaurant and collect the food, or the restaurant would arrange for someone to bring it to you. Now, this – this is no different. It's just - - -

BROMBERG J: Well - - -

MR NEIL: - - - done more seamlessly through the use of software that enables the restaurant and the customer to be brought together. It is, in short, in our submission, it is too long a bow to draw to suggest that the fact that the customer and the restaurant and the delivery partner all participate in this quadrilateral relationship leads to an implicit representation on the part of Uber that the delivery partner is its representative. That's the submission. And no more so than would constitute an implicit holding out by Uber that the restaurant had any such association with Uber. It's a very – and of course, before we leave this emanation point – yes – perhaps – we have spoken of the relationship as being a quadrilateral one, what – perhaps the best way to think of it is of the Uber Eats platforms – the various platforms operating as a marketplace – a place that, in a virtual way, connects eaters, restaurants and delivery partners.

BROMBERG J: Except Uber has a longstanding reputation, if you like, in the transport business.

MR NEIL: Well, tentative as I am to accept your Honour's invitation, I – we won't, with respect, ...

BROMBERG J: But the very name Uber - - -

MR NEIL: Yeah.

BROMBERG J: The very name Uber would convey to the ordinary person some form of transportation service; wouldn't it?

MR NEIL: We could not accept that.

BROMBERG J: All right.

RANGIAH J: Mr Neil, on the emanation point. Presumably, that issue is judged objectively, but is it from the point of view of consumers or restaurants or both?

MR NEIL: Well, that's the last point that we would wish to make. It is all a question of perspective. The natural, perhaps instinctual perspective, is that of the customer – the so-called eater – but there's no reason to single them out in this quadrilateral relationship. The perspective of the restaurant is – and of the delivery partner – is just as valid. There's no reason - - -

BROMBERG J: Well, except for the authorities.

MR NEIL: There's no reason to select between them.

BROMBERG J: But don't the authorities concentrate on the public?

MR NEIL: Well - - -

BROMBERG J: The customers.

MR NEIL: Yes. And so take the case of the bicycle couriers case as the most obvious. I'm sorry, I think – our arrangement is such that the screen and the camera are widely separated so I keep looking at your Honour but in – from my perspective but in fact not. So please forgive me. The – take the celebrated case of the bicycle couriers; the vicarious liability context that underlies so much of the law in this area. Suppose the applicant had knocked down a member of the public in the street while effecting a delivery. There would be – unlike the bicycle couriers in Hollis, there would be no reason for any member of the public to think that the applicant was a representative of the respondent. And no reason to – in that regard, even if one were possessed of all of the facts – no reason to distinguish between the respondent and the restaurant in that respect, because the restaurant, just as much as the respondent, would have caused the applicant to be in a position where she did knock down a member of the public.

BROMBERG J: But the relevant public here is the customer; isn't it?

MR NEIL: Well, the answer we would make to that is why? There's no rational basis to select the customer as the point of reference here. The restaurant is just as much the customer of Uber; they pay for it. They pay for the delivery partner. They pay the money. They pay money expressly to throw the cost of delivery; not the respondent. So – so - - -

RANGIAH J: Mr Neil, was there evidence about what the customer sees or how the customer interacts with the app when they order?

MR NEIL: There was some evidence about that; it's in Mr Mulholland's statement. Perhaps one might start at page 221. Just leading up to this – Paragraph 7 explains the various apps and, significantly, for the purpose of answering your Honour's –

Justice Rangiah's question, your Honour will observe that there was one app for the customers – the eaters, one app for the delivery partners and then another app for the restaurants. They're all described in – they're described in paragraph 7. And then to answer your Honour's question, it might be important to look first at paragraph 12, and then particularly at paragraphs 13 and 14. That's the best evidence. That's the best evidence on that question.

RANGIAH J: Are there any screenshots of what the customer sees?

MR NEIL: No, but I'll have that – but may that be – might that be taken as a provisional answer and I'll have that checked.

RANGIAH J: All right.

MR NEIL: Perhaps if while that's being checked, may I go back to the service agreement, and just show your Honour's the provisions that deal with the – where one finds the provisions dealing with the payment of the – and calculation of the delivery fee. They're on page two-hundred and – first of all, 240 in the clause 4.1 in the red and the green section. And then over on page 241, the three highlighted sections; orange, green and pin – yellow.

WHITE J: What .....

MR NEIL: Yellow, green and pink on page 241. And these all deal with the – they're the calculation of the delivery fee.

WHITE J: I see.

MR NEIL: The calculation and payment of the delivery fee and the mechanism by which it is done. In short, and we will come to develop this a little later – but in short, the restaurant paid for – the customer paid the restaurant for the meal. The money was collected by Uber. The restaurant paid the delivery partner for a completed delivery. That money was also collected by Uber, held by it, and then remitted to the delivery partner less a service charge. And the provisions that we pointed to – a service fee, rather – but provisions that we pointed to on pages 240 and 241 all have that – together, have that effect.

BROMBERG J: Are there provisions in the agreements with the restaurants - - -

MR NEIL: Yes - - -

BROMBERG J: - - - that say so?

MR NEIL: We can show your Honours that. It's at page – it starts at 270 of part – of section C. And if I haven't tried your Honours' patience too much with the highlighted version, it's also in that bundle.

BROMBERG J: I see.

MR NEIL: And perhaps if we work through that. Page 270, the yellow section tells your Honours what the – how the system works. The pink section deals with the way in which the Uber app – or the part the Uber app plays in that arrangement. Then on page 271, delivery services are dealt with in clause 4 in the yellow highlighted section. Then if we – if your Honours would be good enough to go over to an addendum to the agreement which begins on page 277. The yellow highlighted section in clause 3(c) deals with the delivery services and how that's affected and how payment for the delivery services is made by the restaurant to the delivery partner. Then – and how that is dealt with by the respondent. The section highlighted in pink deals with the way in which the restaurant is paid by the customer and how that is handled. Clause 4 on page 278 is also important.

BROMBERG J: But the restaurant doesn't have – the restaurant doesn't negotiate a fee with the worker.

MR NEIL: It can do so.

BROMBERG J: Can it? Where – where's that?

MR NEIL: Would your Honour bear with me.

BROMBERG J: At 277 in the passage you just took us to, it says:

> *You will pay a delivery fee to delivery partners for each applicable order of meals based on a specified fee.*

Who specifies the fee?

MR NEIL: In general terms, it's specified, effectively, by Uber. But the delivery partner has the capacity to negotiate a lower fee.

WHITE J: A lower .....

MR NEIL: I'm sorry. Your Honour cut out at the end.

WHITE J: Did you say the delivery partner has the capacity to negotiate a lower fee - - -

MR NEIL: In effect, to offer to do the work .....

WHITE J: - - - than the partner would otherwise be entitled to for making that delivery?

MR NEIL: Correct. In other words, to offer to do the work for less.

WHITE J: And you rely on that?

MR NEIL: It's – I have to say, it is not a substantial part of our case. But it is an answer to the question that his Honour asked. There's a specified fee, but there is a capacity to depart from that fee, but only downwards.

WHITE J: Is there a capacity to pay the delivery person cash?

MR NEIL: The answer is yes, in the nature of gratuity, but not the delivery fee.

BROMBERG J: Because the customer pays Uber; isn't that right?

MR NEIL: No. The customer pays the restaurant using – but Uber collects that money on behalf of the restaurant.

BROMBERG J: No, no. The customer goes into an Uber app and transfers money. Am I right in thinking that that money is transferred to Uber?

MR NEIL: Physically, yes. It's transferred into Uber's hands. But it is transferred to defray an obligation that the user, the customer, has to the restaurant, not to Uber.

BROMBERG J: Okay. And it's - - -

MR NEIL: Uber's a connecting - - -

BROMBERG J: And it's a credit card transaction; it's not a cash transaction.

MR NEIL: Yes.

BROMBERG J: Is that right?

MR NEIL: Correct. Correct. So, yes, physically the money – the money – physically, electronically, the money passes from the credit card of the customer into Uber's hands before – and is then held by Uber. Uber deducts its service fee and pays the restaurant – the service fee that it charges the restaurant for the services that it has rendered in bringing the customer and the restaurant and the delivery partner together.

BROMBERG J: So if the delivery partner negotiated his or her fee downwards, how would that possibly work in this arrangement? Wouldn't the customer have already paid the specified fee?

MR NEIL: There's a mechanism by which the delivery partner could inform Uber of the lower negotiated amount.

WHITE J: And what happens then?

MR NEIL: Well, that – that's the amount that's paid.

BROMBERG J: But the amount has already been paid, hasn't it? The amount has already been paid when the customer ordered.

MR NEIL: No, no. See – no, no. It's paid at periodic intervals. I think weekly. Weekly. So the app calculates the amount of – on the restaurant side of the business, the app calculates the total number of transactions in which customers have ordered meals from a restaurant and paid for those meals, deducts the service fee and remits the rest to the – and remits the balance to the - - -

BROMBERG J: But if I'm a customer, and I make an order, I'm charged then and there, aren't I?

MR NEIL: Yes.

BROMBERG J: And I would be charged for the costs of the food and whatever additional add-ons including the so-called service – the delivery fee. So you specify - - -

MR NEIL: No, you're charged the cost of the – the customer pays the cost of the meal. The restaurant bears the cost of the service fee and the delivery.

RANGIAH J: Mr Neil, can I just ask you this. How does the customer know that they're ordering a meal from the restaurant rather than from Uber? And how do they know that the delivery partner is an independent contractor rather than an employee or an emanation of Uber?

MR NEIL: The answer to the latter is they don't know anything about the delivery partner. The app doesn't tell them anything about the delivery partner. I'm not sure – I have to – I'm not sure if there is direct evidence about this. But the only – anyone who uses the app will see the only piece of information that the customer, the eater, has about the delivery partner via the app or anything else from Uber is that once the meal has been collected and the delivery partner is on their way, the app will tell the user that so and so has collected the food and is on their way. And it's always the first name and nothing else. That's all they know. So, "Ian has collected your meal and he's on his way."

BROMBERG J: I didn't realise things were that tough at the bar, Mr Neil.

MR NEIL: I must say, anyone who – I was going to say anyone who saw that on their app that that would – it would strike fear in their heart as to the reliability of the delivery, but – and its timeliness. As to the first part of your Honour Justice Rangiah's question, on the app the user sees the name of the restaurant and, usually, photographs and so on that have been uploaded by the restaurant to portray its meals attractively and so on. So the customer is ordering from the restaurant by name and by reputation, presumably, in many cases. So they know everything about the

restaurant, name, address and so on, but, for practical purposes, nothing about the delivery partner.

BROMBERG J: What about the fact that the food is delivered in an Uber bag; isn't that the case or is that not always the case or what?

MR NEIL: It is sometimes the case, but not always the case. And it is certainly not required.

BROMBERG J: But Uber provides bags, does it?

MR NEIL: Only if the restaurant wants it.

WHITE J: And when it does provide a bag, does that bag have some identification of Uber on it?

MR NEIL: It can do.

WHITE J: I know it can; does it?

MR NEIL: No, I'm sorry, your Honour, by "it can do" is some bags provided by Uber have Uber's name on them.

BROMBERG J: And some don't?

MR NEIL: I'm not sure that the evidence is clear about that, but that is the implication that I have taken from it. There's some evidence about this at page 69 of part C. This is the transcript of evidence given by Mr Gupta and the way in which – your Honours will have noticed the way in which the matter proceeded at first instance was that, principally, because of language difficulties so far as one can tell, the evidence on behalf of the applicant was largely given by Mr Gupta. And he deals with the question of the bags at – perhaps, start at PN 321. Yes, 321 is really the point. And then there's a reference to Uber Eats brown paper bags in 322. The critical point here is that there was never any requirement to deliver the food in an Uber bag, but it could be done and the choice as to whether it was done was that of the restaurant, not of the delivery partner and not of Uber.

And that is dealt with in Mr Mulholland's evidence on page 235 in paragraph 109. And just around this, there's simply no – at the bottom, apart from the fact that when the delivery partner knocks on the door that is the end of a process that the customer has initiated by using the Uber app, there is nothing to associate a delivery partner with Uber. In fact, as your Honours have seen in clause 2.3 of the service agreement, there's a positive prohibition against conduct that might hold a delivery partner out to be a representative of Uber. Now, that's the opposite of an emanation – of the delivery partner being the emanation of Uber. And, at bottom, and that is the point that the Full Bench was making in paragraph 69, subparagraph (3), the plurality was making.

BROMBERG J: Is there evidence about the way in which Uber advertises this service?

MR NEIL: No, not as such, no. Now, that's what we wanted to say by way of the emanation point. May we complete our short survey of the salient provisions of the service agreement by pointing, first of all, to a number of miscellaneous provisions. First of all, on page 237, your Honours will see in a, I think, a dark pink highlighted section in the chapeau at the top of the page at about point 2:

Uber will licence you the provider app.

That tells one how a delivery partner comes to be using the partner app. There's a provision that deals with rating on page 239 in red. There's a provision that deals with tax in clause 4.9 on page 242. Finally, there are a number of provisions that either describe the relationship or give it a particular designation. The first of them is on page 237 in the passage highlighted in yellow. And then, the passage highlighted in purple which our learned friends have made some submissions.

BROMBERG J: Mr Neil, is your case dependent upon the court finding that, not only is there not a relationship of employee between the worker and Uber, but also that there's not a relationship of independent contractor - - -

MR NEIL: It's - - -

BROMBERG J: - - - between the worker and Uber.

MR NEIL: Expressly, no.

BROMBERG J: So you say we could find that the worker is an independent contractor and not an employee, obviously, but do you put that in the alternative or - - -

MR NEIL: No.

BROMBERG J: You don't.

MR NEIL: No. The only submission we make is that she was not an employee of us.

BROMBERG J: But the submission you do make is that the relationship between you and the applicant was that of a person and a collection agency.

MR NEIL: We point to provisions in the contract that say so. We don't ask your Honours to make such a finding. The conclusion that we ask your Honours to come to is that she was not an employee.

BROMBERG J: Well, I understand that, but it sometimes helps - - -

MR NEIL: And we - - -

BROMBERG J: It sometimes helps on that journey to understand whether there's an alternative relationship. Now, are you contending for that alternative relationship, a relationship of –I don't know, a person and a collecting agency?

MR NEIL: We're not contending for that relationship because we're not contending for a positive – for a finding as to any alternative relationship. We do not ask your Honours to enter upon such an enquiry.

WHITE J: Well, why not?

BROMBERG J: Why?

MR NEIL: Because, essentially, because it's not necessary. The only - - -

WHITE J: That might be right in the theoretic sense. But as the Presiding Judge has just put to you, it's natural to consider the alternatives. In just about all the employment cases, that's what happens.

MR NEIL: We understand that. And we are, of course, we are pointing to those provisions of the contract that describe the relationship. And we're pointing to those provisions of the contract that show how the relationship actually works in practice. What we're expressly not asking your Honours to do is to label that relationship. I - - -

BROMBERG J: I understand what that's – I understand why you would say, "That's not the ultimate question." But are you saying that we would not be, in any way, assisted in our task of determining the ultimate question by identifying whether or not an alternative characterisation fits or does not?

MR NEIL: We would say that that would be productive of error, with respect, because it inverts the statutory enquiry.

WHITE J: Should we note that your client does not wish to assist us in ascertaining the true relationship here, as part of our determination of whether or not it is an employment relationship?

MR NEIL: I – no, your Honour. What you, we, the submission that we are making is that there is no need for your Honours to make a positive finding as to what that relationship was or is. Of course, one looks at the terms of the contract that describe the relationship. And, of course, one looks at the terms of the contract that demonstrate how the relationship works. But one does it for the purpose of concluding that it is not a relationship of employment.

WHITE J: All right. Well, we actually operate in the real world here. Judgements are practical things, especially in this context. This is not a debating club. We've

not just got a theoretic construct to ask ourselves about. I'm puzzled as to why your client doesn't offer the court an analysis of the true factual element of the characterisation of the relationship?

MR NEIL: I fear that I may have, inadvertently, strayed into a position which is at cross-purposes with your Honour – with that which your Honour is putting to me. We're not contending for a label. And we're not – and we're doing so because, in our submission, that would be to invert the statutory enquiry. But we are, we hope, assisting your Honours by pointing to the way in which the relationship actually works - - -

BROMBERG J: No. No. But - - -

MR NEIL: The way in which it's described in the contract, and the way in which it actually works. And saying - - -

BROMBERG J: Of course you're not contending for a label. I'm sorry to cut you off. I mean - - -

MR NEIL: Yes.

BROMBERG J: - - - we're not asking you about a label. We're asking you about whether or not you contend for a legal characterisation? Or are you simply saying we should do nothing else but determine that the applicant is not an employee?

MR NEIL: That's the statutory question. It is, of course, a binary enquiry. If she's not an employee, then she will be either working for herself or working for somebody else. We do point to those provisions of the contract that tell your Honours that she was not employed by Uber. She was not paid by Uber. She was not controlled by Uber. That the money she received for the deliveries was paid to her by the restaurant. That it was collected on her behalf by Uber and held by it, effectively, as a trustee, and remitted to her less a service fee that Uber charged her for the use – for its services. And, finally, we point to the provisions that show that she used the app and had access to it as a licensee.

WHITE J: Your client has drawn up this careful contract with all these provisions in it, and either does not have a view as to what is the correct characterisation of the relationship or is not willing to disclose it to this court.

MR NEIL: I'm not sure how – the contract characterises the relationship. The contract tells one how the relationship works. I'm not laying as our defence - - -

WHITE J: If it does, why aren't you prepared to tell us in the submission what you say it is?

MR NEIL: The answer, of course, is that the answer to that question, if it goes beyond the terms of the contract, can't assist in the enquiry. It is, with respect, the wrong question.

BROMBERG J: If you accept that there's a binary equation here - - -

MR NEIL: I do.

BROMBERG J: - - - in terms of the performance of the work by the applicant, she was either an employee or an independent contractor.

MR NEIL: Yes.

BROMBERG J: You accept that.

MR NEIL: Yes.

BROMBERG J: You don't challenge the Commission's finding that she did not conduct a business. One question I've got for you is how can the applicant be self-employed if she doesn't have a business?

MR NEIL: She was working for herself, as Deputy President Colman held.

BROMBERG J: But isn't - - -

MR NEIL: It doesn't. It doesn't matter.

BROMBERG J: Working for herself in what? A business - - -

MR NEIL: If - - -

BROMBERG J: - - - presumably?

MR NEIL: There's – no, just working for herself. All of the authorities – the authorities, plainly, say that is not, it is possible for somebody not to be working in a business and not be employed by somebody else. That's the error. To try and explain what she is, in order to exclude the possibility that she's an employee, when the statutory enquiry is, she is an employee. Whatever she is, she's not a contractor to us. So that's, perhaps, the critical point.

BROMBERG J: Well, that's a question for legal characterisation. But you say that you can be an independent contractor and not have a business? I can understand if you said an independent contractor can be someone with a very simple business. But the facts here seem to be, and they seem to be accepted, that the applicant does not have a business. Can you be an independent contractor without a business?

MR NEIL: Yes. Yes.

BROMBERG J: Are there authorities that help you on that?

MR NEIL: Yes.

BROMBERG J: I should say, I'm happy for Mr Yaseen to help you on that, and not just take any more time. But I would be assisted if you can take me to authority on that issue?

MR NEIL: Yes. Perhaps, may we come back to that? It's – but to full – our principal submission in this area is that to embark upon that enquiry is to – perhaps, I will deal with it now. Jamsek is a recent authority dealing with the question. There is no, paragraph 6, Perram J deals with the suggestion:

> *that there is a natural dichotomy between, on the one hand, being employed and, on the other, conducting one's own business*

If there is no such dichotomy, it must be possible to be working for oneself without conducting a business depending on how one defines the business. And then, as soon as you embark upon that enquiry, you being to enter upon an inversion of the statutory test.

BROMBERG J: But the binary choice is between being an employee or carrying on a trade or business of his own. That's the binary choice. So you're either one or the other, aren't you? That's - - -

MR NEIL: The short answer to that question must be, "No." Or, the question of whether one is an employee would, by definition, be answered by determining whether that person was conducting their own business? And it's now settled that that is not the enquiry. Perhaps, this is the last sentence in paragraph 8 in Jamsek takes up the point. And we would respectfully submit that your Honours should not be distracted by that question. Suppose one were to find that a person was not conducting their own business and that the answer to that question really did determine the statutory question. How is it capable, one would ask, of pointing to the fact that she was – the worker was employed by a particular person is the only natural alternative?

BROMBERG J: It wouldn't, I'm not suggesting - - -

MR NEIL: And, obviously, that can't be so.

BROMBERG J: I'm not suggesting to you that it would point to a particular person as the employer. I'm not. I'm not suggesting that. You would obviously need to have evidence about the nature of the relationship between that person and the putative employee.

MR NEIL: Correct.

BROMBERG J: Employer.

MR NEIL: Correct. And that latter enquiry is the only legitimate enquiry. In a sense, much of the applicant's case partakes of the same difficulty. The applicant fastens upon the proposition that she was not conducting her own business. And then says, well, if she wasn't conducting her own business but she is working, she must be working as somebody's employee. Who can that be? It must be respondent. It must be Uber. In large part, that's the applicant's case. And that's a wrong enquiry, a wrong way to approach the task.

BROMBERG J: Well, I suppose, if you come to the view that someone's not working for themselves, the natural inclination is to think that the person must be working for someone else. Now, you might need evidence to identify who that other person is, but isn't the fact that a worker is not working for him or herself of relevance?

MR NEIL: That's a different inquiry if it please. We do contend that she is working herself. That's what Deputy President Colman found, for example, and we do contend to that conclusion.

WHITE J: Does that mean you've now landed on a position?

MR NEIL: I'm sorry, your Honour, that's a different question than I thought the question your Honour was asking me about was. I have no difficulty contending for what she was, but I thought your Honour was asking whether we would attach a label or a character or a characterisation to our business – to the respondent's business and our response to that was to say that's not necessary, but it is significant and relevant to point to the terms of the contract that explain the way in which our relationship with the restaurant and as well as this delivery partner works.

BROMBERG J: So you do contend that she was working for herself?

MR NEIL: Yes.

BROMBERG J: But you don't contest the Commission's findings that she didn't have a business; is that - - -

MR NEIL: Correct, yes. Yes, and that's because it's not necessary to – in order to demonstrate that somebody is not an employee it's not necessary to show that they've built up goodwill and they – and so on and all the other indicia of a business. In some cases that can be helpful like – but not in every case. Odco, for example, the workers there weren't running their own – conducting their own business.

BROMBERG J: I'm not sure about that.

MR NEIL: That wasn't the way in which the matter was resolved.

WHITE J: Have we now got to this position: that your client's contention is that she was properly characterised as not being an employee, but an appropriate characterisation would be that she was an independent contractor but not engaged in running her own business. She was - - -

MR NEIL: Yes, and/or was working for herself.

WHITE J: Isn't that what independent contractors offer to do as individuals?

MR NEIL: Yes. That she was an independent contractor working for herself.

WHITE J: A sole trader or a sole operator.

MR NEIL: Sole operator.

WHITE J: Yes.

MR NEIL: Yes.

WHITE J: Thank you.

MR NEIL: Now, at the risk of labouring the point, could I perhaps just quickly draw your Honours' attention to other passages – other aspects of the service agreement that deal with the descriptions of the way the relationship worked. Page 238 there's a – I'm sorry, we will pass over that one. Page 239 the section highlighted in yellow, page 243 the section highlighted in yellow and page 245 the section highlighted in green. And again at the risk of overstaying my welcome with your Honour Justice White, we are pointing to these provisions but we are not positively asking the court to make a finding as to the nature of the relationship other than it was not one of employment.

WHITE J: Right. I understand that. What I was looking for was assistance on – in coming to the question of whether you're wrong about that question, what are the other characterisations which might be appropriate here and how realistic they are.

MR NEIL: I understand.

WHITE J: And perhaps these are fairly orthodox tasks for courts in this position, and that's why I was puzzled that with all the resources available to your client it wasn't prepared to offer the court assistance about that.

MR NEIL: And perhaps I should say, your Honour, it may be that I – and the fault is mine – it may be that I had misunderstood the nature of the – or the precise inquiry that your Honour was making of me and resisting something that your Honour was not asking me to give. So if that has happened the fault is mine and I'm sorry. Now, could we draw attention also - - -

RANGIAH J: Sorry, Mr Neil, just before you move on, I've got a question as well. Is it the case that your client competes against other similar services?

MR NEIL: In general terms, yes. Deliveroo, Menulog were two such services identified in the evidence.

RANGIAH J: And there are a number of clauses that we've been taken to in the contract that talk about appropriate standards of behaviour and which also provide for ratings by customers.

MR NEIL: And restaurants, yes.

RANGIAH J: Are the purpose of those provisions to do with the goodwill of your client?

MR NEIL: Broadly, yes, to assist in the maintenance of standards that will attract restaurants and customers or eaters to mike our client's app rather than the app of other – of competitors.

RANGIAH J: So - - -

MR NEIL: And delivery partners too, of course.

RANGIAH J: So does your client then rely upon the manner in which the drivers carry out their work in order to build up or assist with its goodwill in its competition with its competitors?

MR NEIL: Yes, in the same way that it relies on the restaurants.

RANGIAH J: And the fact that one party is relying upon another one to assist in building up its goodwill, is that an indicia of an employment – or an indicator of an employment relationship?

MR NEIL: No. In our submission, that would be found in any commercial contract that involves the performance of work or the provision of services by some five other parties. That topic is the subject of the community guidelines and there in part C beginning at page 281. A critical feature of the community guidelines is that they apply to everyone. They apply to the restaurant – to consumers and restaurants and to delivery partners. One can see that at the top of page 281 under the – the passage under the heading Respect Each Other is addressed to all three parties. The passage under the heading Safety First is also directed to all three parties.

RANGIAH J: But why include these provisions if the delivery partner is not regarded as an emanation of your client?

MR NEIL: In order to make the use of the app attractive to everyone, to restaurants, to consumers and to other delivery partners. Critically the provisions are directed, as

we have said, to all three parties. No one is suggesting that the restaurant is an emanation of Uber and yet exactly the same – essentially the same requirements are imposed upon restaurants as upon delivery partners, putting it that – subject to the different nature of the work. No one is suggesting that the consumers are representatives of Uber, but similar obligations are imposed on them.

BROMBERG J: You don't have a contractual relationship with the consumer by which you can enforce these community guidelines surely.

MR NEIL: We can exclude them from our platform.

BROMBERG J: For doing what?

MR NEIL: The things that are described on page 282. The various forms of problematic behaviour that are described on 282, 283 and 284. We – we don't want consumers on our app who behave in these ways because that makes us an unattractive market place for restaurants and delivery partners. The very same, what the applicant calls sanctions, the very same sanctions are visited upon consumers who fall short of the standards that we require of participants in this quadrilateral relationship. So too, restaurants. One sees at page 284, 285, 286, 287, 288 and 289, one sees various forms of behaviour, various failures to meet performance standards on the part that – on the part of restaurants can lead to the restaurants being – losing their access to the platform.

RANGIAH J: Is there a contract between the consumer and your client.

MR NEIL: There is a – there is a contact but the terms of that contract are not in evidence. The – the fact that there is a contract is in effect discussed in paragraph 13 of Mr Mulholland's statement, page 223. But – but as we said, the terms of the contract are not in evidence. And if one – one goes back to the restaurant – to the restaurant one can see the very sorts of behaviours and performance standards that Uber makes a condition of participation in its – in the quadrilateral relationship, access to the app, are required of restaurants, as are required of delivery partners. Quality, timeliness, acceptance of all orders and so on. And this, so called, sanction for falling short of those performance standards is materially the same.

And then delivery partners, the circumstances in which they can lose access to the app, they are dealt with on page 289 and following. And they are described – your Honour's have been shown them all, they are described and explained in terms that make explicit the fact that the standards are imposed for the purpose of making the respondent's app attractive to other participants in the relationship, restaurants and consumers. We join – turning from the contract, the service agreement, the restaurant contract, the community guidelines, could we just point to some features of Mr Mulholland's evidence that I've – in addition to those we've already attended to. We – we will be in our submission illuminating.

Page 225, in addition to the paragraphs we've already mentioned. Paragraphs 25, 26 and 27 and on page 227, paragraphs 44 through to 52.

BROMBERG J: Sorry, 44 to.

MR NEIL: 52.

BROMBERG J: 52, thank you.

MR NEIL: Service standards at the subject of paragraphs 59 through to 64. The subject of the – of termination of the services agreement is dealt with on – in paragraph 74, 75 and 76. The applicant's use of the respondent's app is addressed in paragraph 81 ..... in subparagraphs (e) and (f), that the applicant rejected 558 delivery requests and cancelled 240 of the delivery requests that she had accepted. And no consequence was ever visited on her for either of those circumstances.

BROMBERG J: Over what period?

MR NEIL: It was – sorry, I will get that finding – there's some findings about this, at first instance – between September 2017 and January 2019 – the findings in the Commissioner's first instance are in paragraph 67.

WHITE J: But still again, possibly showing my ignorance, but when the request is made, does it go only to one driver or every – or does it go to multiple persons, so that any one of them could accept it or reject?

MR NEIL: No. It goes in the first instance to only one delivery partner, being the delivery partner that the app recognises as the one close – best able to effect the delivery because of their proximity to the restaurant. And then, if the – if it is not accepted by the delivery partner or accepted and then rejected by the delivery partner, it goes to the next closest.

BROMBERG J: But does the application know whether the driver is currently on a job or not? In other words, you might be the closest vehicle but you might already be on a job.

MR NEIL: Yes. It can detect that. Yes.

BROMBERG J: That's in the evidence somewhere, is it?

MR NEIL: Somewhere. Yes.

BROMBERG J: Okay.

MR NEIL: So if it please your Honours, that was the – or perhaps while we also have the first instance decision open, could we just remind your Honours of some findings that are salient. Page 34 of Part A, paragraphs 52, 53, 54 and 55.

BROMBERG J: Sorry. I've – where are you now – I've lost track?

MR NEIL: Part A, page 34 - - -

BROMBERG J: On page - - -

MR NEIL: - - - of decision of first instance.

WHITE J: I see. All right. Mr Neil, can I just go back to this question of rejection.

MR NEIL: Yes.

WHITE J: Does that mean that the applicant positively rejected a delivery request or simply did not take up a delivery request. That is the same - - -

MR NEIL: .....

WHITE J: It involved positive conduct or was it just an omission on her part, ... '

BROMBERG J: I don't think that's reject.

MR NEIL: So if it please your Honours, page 34, paragraphs 52, 53, 54 and 55, and on page 35 - - -

BROMBERG J: Just a minute. Fifty-two - - -

MR NEIL: Fifty-three.

BROMBERG J: Yes.

MR NEIL: Fifty-four and 55.

BROMBERG J: Yes.

MR NEIL: And at the bottom of the page, paragraph 60.

BROMBERG J: Yes.

MR NEIL: Then 62, 63, 64, 65 and 67 and, if it please, that's – those together, point to what, in our submission, are the salient features of the evidence and the findings pertaining to the relationship. Could we turn some particular topics and try and deal with them as quickly as we can? A central question in this case is whether the applicant had an obligation to perform work that the respondent required of her. Our submission is that there was no such requirement on the part of the respondent and no such obligation on the part of the applicant. We also submit that the Full Bench was right to regard that as a critical and decisive indication against a relationship of employment. And your Honours have now seen, the applicant had no obligation to

log on to the partner app. She was free to choose for herself whether, when and for how long she logged onto the app. Being logged on to the app was attended by no obligation or expectation on either side. She was free to choose for herself whether to accept any deliveries.

Your Honour, Rangiah J, asked about the significance of the circumstance that if a delivery partner who was logged onto the app rejected or declined three deliveries in a row, they would then be automatically logged off. There was no consequence to that, so the evidence went, and so the commission found all that was necessary was for the delivery partner to log back onto the app. It was, in effect, an automatic way to clear off the system people who were on it but inactive. The findings about this, at first instance, are in paragraph 53 of the Commissioner's decision, on page 34. The Full Bench deals with the point in paragraph 7 on page 77. And Mr Mulholland gives evidence about it in paragraph 51 of his statement at page 228. If the applicant chose to accept a delivery, if she made a positive choice to accept the delivery, she was then free to abandon it at any time. Both before and after she collected the meal from the restaurant.

BROMBERG J: Is that right?

MR NEIL: Yes - - -

WHITE J: Not after she collected the meal, was she?

MR NEIL: Yes. After she collected the meal. The only possible consequence of her decision to abandon the delivery or cancel it, after she collected the meal, was that she might be obliged to account for the meal itself. Which is a consequence of the fact that she held the meal, at law, as a bailee. He held the food as a bailee.

WHITE J: Your point – don't take to me it, but just tell me, where do I see in the contractual arrangement, a specification that she could cancel, even after having taken possession of the meal?

MR NEIL: We have drawn attention to those features of the contract that say that she could cancel a delivery at any time and Mr Mulholland deals with this, with that express point at 26 and 27 - - -

WHITE J: And are you saying that - - -

MR NEIL: On page 225 - - -

WHITE J: There would be no consequence if a delivery driver did that?

MR NEIL: Correct. Correct. Subject only to the fact that she might be obliged to account for the meal if it was thought that she held onto the meal in a way that was fraudulent. She collected the meal which, after all, had been paid for by the

customer. The customer's meal, she held it as a bailee. She might be obliged to account for it in that circumstance.

WHITE J: But that wouldn't be a basis for Uber Eats taking her off the applicant?

MR NEIL: No. No. Uber Eats was agnostic to the point – apart from that one qualification, was agnostic as to the point in time when the cancellation was effective. It could be cancellations made at any time equally before or after. And they were treated in the same ways, subject to that one qualification.

WHITE J: Well, they - - -

MR NEIL: ..... she had somebody else's property in her possession.

WHITE J: But that would mean that the customer wouldn't get their meal.

MR NEIL: Correct.

BROMBERG J: How is that going to effect the reputation of Uber, which you've told us, many times, Uber was very intent on - - -

MR NEIL: Presumably - - -

BROMBERG J: - - - how they - - -

MR NEIL: Presumably, not well. But Uber did not respond to that by requiring delivery partners to complete deliveries of meals that they had already collected. That – they did not do so. Now, as counterintuitive as it may seem, that's the evidence and that's the way it works.

BROMBERG J: Well, maybe that's because, as a matter of practicality, nobody would cancel.

MR NEIL: That's not a – we would respectfully submit that your Honour could not approach it in that way. That would be a piece of a priori reasoning. There's no evidence to support that. That's not the way in which it proceeded before the submission, and there are some findings about that at – I should just complete the – would your Honours just excuse me for a moment. 162? If your Honours could just - - -

BROMBERG J: It's a bit hard to imagine, Mr Neil – whether the driver is an employee or an independent contractor, it's just a bit hard to imagine that Uber would continue to provide tasks for a person who keeps absconding with the meal.

MR NEIL: As we say, as counterintuitive as it may seem, that's the evidence.

RANGIAH J: But the practical result of cancelling a delivery once the food has been picked up would be that the customer would have the person's first name, would give them a bad rating, and that bad rating could lead to the suspension or termination of use of the app. Is that right?

MR NEIL: Only – only as one element in a cumulative rating system. There's – there's no direct consequence. There's no direct link, between ..... - - -

WHITE J: But just - - -

MR NEIL: - - - effective of the – and the customer wouldn't – I'm sorry, your Honour, Justice White. May I finish this one answer?

WHITE J: You go ahead. You go ahead.

MR NEIL: The customer wouldn't know, or – I withdraw that. It would have the same effect for the customer, whether the cancellation had occurred before or after the meal had been collected. What the customer would experience is a delay in the provision of the meal. What actually happens in practice is that Uber pays the restaurant for the meal, and effectively replaces it. The Commission had dealt with this in a footnote; footnote 62, on page 56. So, in other words, Uber makes it good.

So here we have a circumstance where there's – there's no requirement that the applicant make herself available to work, and she has no obligation to do so. There's no requirement that when she was available, she must accept any of the work that was offered to her. And there was no obligation to do – on her part, that she do. There was no requirement - - -

BROMBERG J: Really, you're saying that there was no – no obligation to carry out the contracted task?

MR NEIL: Correct.

BROMBERG J: Well, I'm not sure that would make one an independent contractor or an employee.

MR NEIL: It would certainly make one not an employee, in our submission.

BROMBERG J: Well, I – it probably - - -

MR NEIL: It would be unheard of - - -

BROMBERG J: - - - probably wouldn't make one an independent contractor, either.

MR NEIL: That's a – if I may say, that's an ..... to which I don't – I think your Honour will understand if we don't go there again - - -

BROMBERG J: Well.

MR NEIL: - - - but it – the critical question is – the one thing it does not make her is an employee. It would be unheard of – unheard of that an employee would have no obligation to be available to work, no obligation – no – to have imposed on them no requirement to work, and to have no obligation to actually perform and complete the work.

BROMBERG J: Well, yes. As I say, that wouldn't be much of a contract, irrespective of whether it was an employment relationship or – or a service relationship.

MR NEIL: Well, it was the – it was the contract here. Yes, and in a sense, perhaps it's explained by the – by the technology, but the fact is if one goes back to any understanding of the essential features or characteristics of an employment relationship – essential in the sense that they tell you what employment is – then it must be included, in our submission, and on the authorities it does include an obligation to – a requirement to perform work and an obligation to perform the work that is reasonably required. If you don't have those two things, then you don't have a relationship of employment. And that's what – that's what's meant by "essential", that's the sense in which the full bench used it in paragraph 80.

BROMBERG J: Perhaps what it's indicative of is that the contractual terms don't reflect the reality.

MR NEIL: That would be – there is no basis upon which that conclusion could be reached. The reality is that there is in fact no requirement and no obligation, that's the plain fact. Yes, the contract said she does not – that she doesn't have to perform or complete the task, and that's the way it's actually performed on the evidence.

WHITE J: Right. Well, that's – that's what I wanted to ask you. What is the clause in the contract which you rely upon for this?

MR NEIL: Would your Honour excuse me for just one moment.

WHITE J: I noticed, if it's not distracting for you for me to talk while you're looking for that, that in paragraph 55, the commissioner at first instance said:

> *At least in theory, a delivery partner is also free to cancel the order after they have collected the food, however this may raise issues of fraud.*

You're talking, Mr Neil, but I think you've put yourself on mute. And so, I'm not able to hear you.

MR NEIL: I'm sorry, I've muted- yes, inadvertently. Where the commissioner was – used the language "in theory", it is probably to be understood, as we would read that, as a reference to the fraud exception. And the evidence was that when – when

the word "fraud" is used, it's used to describe the possibility that a delivery partner might have taken the food that had been entrusted to them – taken the meal that had been entrusted to them, or disposed of it in some way.

WHITE J: That's why I would like to see what the contract says, because expressed in that way the commissioner is saying "in theory, you're free not to – to cancel the order, but only if you expose yourself to some criminal sanction". You might ..... yourself for some sanction.

MR NEIL: Well - - -

WHITE J: So, that's why I would to see what the contract says.

MR NEIL: Okay. So, your Honour, paragraph – clause 2.3, page 238. It's in the yellow section, there's a sentence towards the end of that which reads:

> *You retain the option, via the provider app, to attempt to accept or to decline or to ignore a user's request for delivery services by the Uber services.*

And "user" is the restaurant in this contract.

BROMBERG J: Sorry, could you help me again, I've just got to the – to the clause. 2.3?

MR NEIL: 2.3 in the yellow section, towards the end.

BROMBERG J: Right. I'm not – I'm not on your highlighted - - -

MR NEIL: I see.

BROMBERG J: - - - can you give me the - - -

MR NEIL: Perhaps – it's in about – the end of the seventh line.

WHITE J: But that doesn't say that the driver can cancel after having taken possession of the food.

MR NEIL: It says:

> *…or to cancel an accepted request for delivery services by the provider app subject to the policies in the community guidelines.*

Then, one goes to the community guidelines, and they allow – under the heading "cancellation":

> *A cancellation –*

On page 292 refers twice to the concept of accepting a delivery request and then cancelling the trip. There's – there's no suggestion as to any limitation when that might happen. It can be done any time after you accept – after a delivery partner accepts the delivery request. And then, Mr Gupta gave some evidence about this - - -

WHITE J: Your client advertised to the users that the arrangement might be cancelled even after the drivers collected the food?

MR NEIL: There's no evidence about that one way or the other.

WHITE J: Would this be a feature it would want to promote? Again, I'm just wondering whether we're operating in the real world.

MR NEIL: Well, I'm sorry – I'm sorry, I should take that back. Yes, we are – it's in the community guidelines, which are available to everyone, published to everybody. They're designed to regulate everyone's behaviour.

WHITE J: At nowhere does it - - -

MR NEIL: Anyone who – sorry.

WHITE J: Just tell me in case I'm missing it on page 292. I still haven't seen somewhere that says that the driver can cancel after having taken possession of the food. As you said before, intuitively not right, that one would expect therefore that if that it be the case, there would be express words permitting it. So ..... - - -

MR NEIL: Well, that – that would be, in our respectful submission, an unjustified assumption. The plain fact is, every time the contract and the community guidelines talk about cancellation, they say it can be affected at any time after - - -

BROMBERG J: Well, I - - -

MR NEIL: - - - a delivery request has been accepted.

BROMBERG J: Well, I don't see the words "at any time" on the page.

MR NEIL: Well, it can be – there's no – there's no temporal or circumstantial qualification to that statement, either in clause 2.3 or in the community guidelines. And I repeat, at the risk of obduracy, the evidence is that that's what happened.

WHITE J: Yes, I think I understand why the commissioner used the words "at least in theory", but I suspect that the Fair Work Commission wanted to deal with reality rather than ..... - - -

MR NEIL: No – the other thing – this – with respect, your Honour, this is a new reality. This is – this is something that did not exist a decade ago. And those kind of assumptions are unsafe to make. Unsafe - - -

WHITE J: Mr Neil, while we're talking about reality, on page 293, under the heading "acceptance rates", where it said:

> *While declining deliveries does not automatically lead to permanent deactivation of your account-*

Etcetera, what does that mean, "not automatically lead to permanent deactivation"?

MR NEIL: I'm sorry, I just – your Honour just cut out at the beginning and I didn't quite hear the beginning of the question. Under – I'm sorry, would your Honour be good enough just to go backwards and direct my attention to the portion?

WHITE J: Page 293 - - -

MR NEIL: Yes.

WHITE J: - - - under the heading "acceptance rates".

MR NEIL: Yes.

WHITE J: And the sentence that says:

> *While declining deliveries does not automatically lead to permanent deactivation of your account –*

Etcetera, I'm just wondering what is meant – does – by "does not automatically lead -", does that mean it may lead to permanent deactivation of your account?

MR NEIL: No. no. Other than – no. The only consequence of declining to accept delivery requests is described in the last sentence in that section.

BROMBERG J: And what about the next bit of the sentence:

> *If you don't want to accept delivery requests, you can just go offline.*

MR NEIL: Yes.

BROMBERG J: Is that saying you can do that after you have picked up the food?

MR NEIL: This is acceptance, not cancellation; a different subject.

WHITE J: My Neil, in all this highly specific and prescriptive contract, is there anything that tells the delivery driver what she should do if they wish to cancel the delivery after having taken possession of the food?

MR NEIL: You just – process for cancelling a delivery was relatively straightforward and was done via the app. I don't think there was any - - -

WHITE J: I think you might appreciate my question's more specific than that.

MR NEIL: Yes, I understand. I .....

WHITE J: ..... very highly specific contract. Two, something that seems unintuitive that one can cancel the order after having taken possession of the food and therefore, drawing the dots, thinking if that be the case, one would expect the driver to be told what he or she should do in that circumstances. Question: is there something to that effect?

MR NEIL: I'm not aware of it in terms; no. It was treated in exactly the same way as any other cancellation. And the unchallenged evidence was it does happen.

BROMBERG J: Well, it might happen. It might – I mean, you know, employees sometimes don't perform the task allocated to the employee. That – the fact that it happens is a different question to whether - - -

MR NEIL: But it - - -

BROMBERG J: - - - there was no legal obligation to do it.

MR NEIL: And there is not. There is simply nowhere that one can find such an obligation and that's because it did not exist.

WHITE J: It's the same only that you have already referred to it. They have got the obligation of a bailee.

MR NEIL: But that - - -

WHITE J: .....

MR NEIL: But that's a different obligation; that's an obligation to account for the meal.

WHITE J: No, it's to do with it – that's what a bailment is; to do with it on the terms upon which the object is entrusted to you.

MR NEIL: And that's an obligation to the bailor. That's the restaurant, not us.

WHITE J: No. The bailee is subject to that obligation, Mr Neil. That's the - - -

MR NEIL: Yes ..... Yes. That's right and if – to the extent that she had such an obligation, she – as the bailee – she owed it to the bailor, and we are not the bailor. What's this? Could your Honours just excuse me for one moment. Sorry, that's ..... And there is one piece of evidence that bears on what the – happens when a delivery is cancelled and it, on reflection, does address your Honour Justice White's question. It's at page 202. And there are two screenshots there. The left-hand screenshot is

what the delivery partner sees ..... if they have cancelled a delivery. And then – and do you see the – your Honours will see there's a notice – they are notified the delivery has been cancelled. They won't be paid for the delivery but they will try and find another one and then, in blue, the words:

If you have the order, you can throw it away.

BROMBERG J: Sorry. Where are you looking; page 202?

MR NEIL: Page 2-0-2. And it's the left-hand screenshot, and this is a screenshot that the delivery partner sees on the app – the partner app – after they have cancelled the delivery.

BROMBERG J: But who has done the cancellation?

MR NEIL: The delivery partner. This notifies the delivery partner that the cancellation has been effected – their cancellation has been effected.

BROMBERG J: How do we know that?

MR NEIL: I will go back - - -

BROMBERG J: What about the customer?

MR NEIL: I will go back and see if I can find the evidence of – show your Honours where that happens.

WHITE J: What is the status of these screenshots? Remind me.

MR NEIL: They are from – I think Mr Gupta put them in evidence.

WHITE J: Yes. But what actually are they? Something sent out by Uber Eats.

MR NEIL: Yes. They appear on – that's Ms – your Honour will see Ms Gupta in the top right-hand corner of each screenshot; that's a photograph of her. Very faint, but that's her. This is what she sees on her mobile device when she is using the partner app.

WHITE J: But does this have any contractual pause, I suppose, is a critical question.

MR NEIL: We would say it's entirely consistent with the contract and with the evidence about the way in which the contract works. This is an expressed – this deals with expressly, and in terms, with what happens when an order is cancelled – when a delivery is cancelled and the delivery partner has the food in their possession.

WHITE J: Well, I - - -

MR .....: .....

WHITE J: In all fairness, it's rather implying this has been cancelled presumably by the consumer, possibly by the restaurant. It's not ..... cancellation by the delivery driver; is it?

MR NEIL: We would ask with respect – well – let me check that, but there's no basis upon which to assume that. .....

WHITE J: Well ..... to choose. It's third-person, passive voice; "has been cancelled", not "When you have cancelled …"

MR NEIL: Would your Honour forgive me perhaps by making the observation that those who use these apps more often perhaps than your Honour and I would know that the passive voice is the usual way in which these matters are dealt with. This is entirely conventional.

BROMBERG J: Well, even if that's right, it sounds odd that where the driver has cancelled, Uber will be saying "We'll try and find you another one."

WHITE J: And it's also odd when you see there's a hazard-warning sign or an alert sign there. No need to give an alert sign to the driver if it's the driver who has done the cancelling.

WHITE J: Again, Mr Neil, can we get all this thing in the real world.

MR NEIL: I'm sorry, your Honour is suggest – it is not possible to ignore the terms of the contract and the uncontested evidence by some piece of ..... reasoning made up largely of assumptions about the way in which this technological world operates.

BROMBERG J: It's got nothing to do with - - -

MR NEIL: I'm sorry, your Honour, but - - -

BROMBERG J: - - - the technological world.

MR NEIL: I'm sorry - - -

BROMBERG J: I mean, we are talking about the real world.

MR NEIL: But what assumptions is your Honour making in relation to the real world?

BROMBERG J: Well - - -

MR NEIL: How can one – upon what basis could one possibly deny what Mr Mulholland said?

BROMBERG J: The first assumption.

MR NEIL: It would be one thing – it would be one thing – one thing – if one could find a term of the contract that was inconsistent with what he said, but there is no such term; what he says is entirely consistent with what the contract says. This is, in a sense, perhaps one of the difficulties that one has in determining – if on an application for judicial review the question is determined all over again, de novo, as it were, in circumstances where your Honours are left to make assumptions about the real world by way of - - -

BROMBERG J: Well, that's not right either. You could have put other evidence before us if you wished to.

MR NEIL: If your Honour excuses me for one moment before I answer that question. I would, with respect, urge your Honours not to reject Mr Mulholland's evidence about the way in which the relationship worked by making assumptions about how the real world operates when those assumptions have – are true assumptions.

WHITE J: I'm not making any assumption. You might be misunderstanding what I said when I said can we operate in the real world. It's just that common sense prevails, I think, in a practical world. Documents convey a certain meaning. One can bring common sense to the understanding of what they convey, as opposed to some theoretic debating type approach to them. I'm thinking of all the theoretical possibilities there might be. I can't help thinking, Mr Neil, with reference to page 202 and that screenshot, that it is not addressing the circumstance in which the delivery driver unilaterally decides that he or she will not proceed to complete the delivery having taken ..... possession of the food. Now, if that has been operating in the virtual world, then I will have to accept that as a criticism. It doesn't seem to me to be so. It seems to me to be just trying to make sense of the very material that is before us – that your client relies and which you refer.

MR NEIL: If it please. Would your Honour excuse me for one moment.

BROMBERG J: Mr Neil, I notice the time. How much longer are you going to be? I appreciate you've had a fair bit of .....

MR NEIL: Yes. And I won't factor recovery time into the answer.

BROMBERG J: No.

MR NEIL: Look, probably – I'm sorry to say about an hour.

BROMBERG J: Yes.

WHITE J: What do you want to say that's over and above what's in the written submission? I mean, again, this is going to sound critical, Mr Neil, and I don't

intend it to be critical. But if we're taking up time debating what documents such as that at page 202 mean, then I'm querying why the Full Court should be sitting again to give you an hour.

MR NEIL: I understand. And I know your Honour ..... - - -

WHITE J: That does imply criticism, but I'm trying to emphasise that – I want to know that the extra time you're asking for is going to be on something that's a bit more – a bit more - - -

MR NEIL: ..... perhaps – I cannot resist making the observation. 202 was proffered as an answer to – at least a partial answer to a question that was asked of us. It was not something that I had intended to take up time going to.

WHITE J: I understand. But nevertheless, you might on reflection think it wasn't perhaps such a good answer.

MR NEIL: Possibly. If it please your Honour. I must say, it's – I would hope that of the hour – up to an hour – I would not be – I would certainly touch on subjects that have been dealt with in the written submissions but in a way that I would judge furthered the respondent's case. For example, in the written submissions we say outright that the – that a delivery partner could cancel a delivery at any time including after they had accepted the food. We referred to Mr Mulholland's unchallenged evidence to that effect. I had not anticipated that it would be necessary to defend that proposition beyond pointing to that evidence.

BROMBERG J: Well, look, the reality is - - -

MR NEIL: And perhaps I should say that – and again, I'm hoping that your Honour will understand that I'm not saying that by way of being precious, but I just – but by way of explaining I hadn't factored that into my timing.

BROMBERG J: I'm assuming that Mr Gibian will want some time in reply. And that's probably going to be in the order of 15 minutes to half an hour, I would have thought, at least. You're really asking us to sit till 6 o'clock. Is that really what's being proposed?

MR NEIL: Either that or another date is the alternative.

BROMBERG J: Well, I don't – I'm not in a position to know, without speaking to the other members of the court, what's possible. And I don't want to – I don't want to waste any more time - - -

MR NEIL: Another – I'm sorry, your Honour. If I could – I didn't mean to - - -

BROMBERG J: I can only say from my part that it would be difficult for me to sit beyond an hour.

MR NEIL: Another alternative would be for me to do it in writing, which is not perhaps the best alternative, but it is not one that I would argue against or seek to resist.

BROMBERG J: Well, the difficulty with that, often, in my experience, is that what we end up with is unmanageable submissions which tend to repeat themselves rather than provide any sort of elaboration on submissions already made.

MR NEIL: I'm sure that's a general proposition. I'm sure your Honour would not – well, I would hope that your Honour would not characterise submissions that I made in that way, especially now that I've learnt my lesson on font size.

BROMBERG J: Yes. Well – can't we - - -

RANGIAH J: Well, for my part, if Bromberg J were prepared to sit for another hour – and subject to White Js views, then I would be willing to do so as well. I must say, I wouldn't have thought, given the ground that Mr Neil has already covered so far, that it would take as much as an hour, but - - -

MR NEIL: I said up to an hour, yes.

WHITE J: I can – this is White J speaking. I can sit on longer. I've got the advantage of a half hour on you in Melbourne and Sydney.

BROMBERG J: Yes. All right. Well, Mr Neil, I would ask you to keep going. I would ask you to try and deal with it in 45 minutes if you can to give Mr Gibian an opportunity. And after 45 minutes, we will see whether an alternative, if you're not finished, is that we receive a short submission from you.

MR NEIL: Your Honours please. I will try and go as quickly as I can. Can I just remind your Honours of where the Full Bench deals with this issue – the issue of the obligation to work. The plurality does so in paragraph 69(1) and 70. And Deputy President Colman does so in paragraph 76, 78 and 80. The principle is discussed in Forstaff. We would ask your Honours to begin reading Forstaff at paragraph 67 where the genesis of the principles that are finally articulated in paragraphs 90 and 91 begin. The commission explains the principle upon which it was acting in paragraph 70, and at first instance, reaching back to earlier authority, in paragraphs 12 and 15. And the applicant seeks to deal with this issue in two ways.

One is to submit in paragraph 25 of the outline, for example, that the absence of an obligation on a worker to accept work at a particular time is not inconsistent with the existence of an employment relationship. There are two reasons why, in our submission, that submission would not be accepted. The first is that it's inconsistent with the reasoning in Forstaff which goes back to Automatic Fire Sprinklers. The second is that the applicant's submission does not grapple with the fact that not only did the applicant not have an obligation to accept work, she was never required to

perform work and she could abandon or cancel work that she had already accepted. Central to the applicant's case in this area

MR NEIL: She was never required to perform work and she could abandon or cancel work that she had already accepted. Central to the applicant's case in this area is an asserted analogy with casual employment. In our submission, casual employment is not analogous to the relationship between the applicant and the respondent. The applicant relies on this analogy in paragraph 25 of her outline and in paragraphs 13, 14 and 15 of her reply. She does so to bolster her argument that an obligation on the part of the worker to perform the work required of her is not characteristic of employment. The respondent, of course, says that it is, and the Full Bench agrees. We point to the analysis, in cases like Forstaff, to say that it's a necessary feature of employment. It's – it is – it must be right in your submission, that it is at least a powerful indication of a relationship of employment. And its absence is a powerful and persuasive indication of a relationship that is not one of employment.

The respondent put that in issue by suggesting that there is no such obligation in the case of casual employment but in our submissions, that's not correct. Whenever a casual employee enters into a particular casual engagement, that employee thereby assumes the same obligations that any employee assumes. An obligation to perform the work required of her during that engagement, in essentially the same ways as any other type of employee. It would, in our submission, be unheard of that a person could enter into a contract of casual employment and then just walk away from the walk, whenever they chose, for any reason or no reason, and without notice, as could happen here.

Well, said the applicant, in response to that, "What about casual employees who undertake the ..... of casual engagement under an umbrella contract?" That's the circumstance that your Honour, Bromberg J, and North J discussed in Quest South Perth. In paragraph 178, where your Honour has made the point that in the United Kingdom, there was no recognition of continuity of employment between casual and ..... as there is in this country, in where the facts warrant it. An umbrella – and that would lose the casual engagements together, which your Honours understand, that's what we're referring to when we talk about an umbrella contract. The respondent's answer to the applicant's reliance on umbrella contracts and between casual engagements is to say that if an umbrella contract is in itself to constitute a contract of employment, as opposed to some other kind of contract, then it must contain an obligation to accept work when required.

We provided your Honour, we hope, with a copy of Ryde-Eastwood Leagues Club, which is generally accepted as the starting point of the recognition in this country of umbrella contracts for casual employees that give rise to a continuity of employment, such as would a casual employee who had not been offered further casual engagements to invoke unfair dismissal jurisdiction of an industrial tribunal. And in that case, the Industrial Commission of New South Wales. And your Honours will see on page 400 and following, that the umbrella contract was one whereby the

employee had an obligation to accept work that was offered. For example, that was required. For example, look a page 400, last four lines, last sentence:

> *Casuals were rostered one week in advance according to a general seven day roster and the roster was published with the expectation casual employees would respond to it.*

And then, middle of page 401, end of the second full paragraph:

> *The respondent considered he had a continuing obligation to attend for work unless permission had been granted for his absence.*

And then further down, your Honours will see that the Full Bench quoted with approval from the decision of the conciliation commissioner who found at about point 6, that the casual employment pursuant to an umbrella contract in that case, involved an arrangement which relies on lasting performance.

who found at about point 6 that the casual employment pursuant to an umbrella contract in that case involved an arrangement which relies on lasting performance, each party having reasonable and calculated expectations of the other.

So that mutual obligation is an essential feature of an umbrella contract between casual engagements if that contract is to constitute a contract of employment and your Honours will – and to the same effect is the insistence in cases like Hamzy of the mutuality of obligation in casual and – that inheres in casual employment. On the worker's side a commitment to work. Now, we should also say that latterly the – I will do that again. The second way in which the applicant seeks to deal with the absence of any obligation to perform work is to submit that the amount of work she performed was regulated by what the applicant called sanctions which operated as a form of soft control so as to, in fact, require her to perform at least a minimum amount of work and that – the applicant's submissions in that area intersect with the submissions that she makes more generally on the indicium of control.

To label something a sanction is to invest it with connotations that the reality of this case does not support. In reality what the applicant calls sanctions were really negative stipulations of conditions of access to the respondent's platform and continued participation in the quadrilateral arrangement. The sources of these so-called sanctions are in clauses 2.3 and 3.1 of the service agreement, which your Honours have seen, and also in the community guidelines. As to the latter they are identical in character and in object to the sanctions that are applied to restaurants and consumers, the two other active – two other participants in the quadrilateral arrangement.

The Full Bench evaluated these so-called sanctions, the soft controls – as the applicant would have them – in two different ways. The plurality did so in paragraph 66 on page 102 of the appeal book – paragraph 66 – and Colman J looked at it in a – them in a slightly different way in paragraph 79 on page 105. We wanted to remind

your Honours, if we may, of two authorities that deal with this issue. The first is Eastern Band Services which is in part A. This case, as your Honours will recall, concerns somebody who was engaged to provide roadside services under the – on behalf of RACV. Page 415, paragraph 19 – 119.

And then if your Honours would be good enough, having read that, to drop down to paragraphs 122 and 123 and then your Honours will see the same reasoning and analysis that the plurality applied in this case, in our submission, correctly. To a similar effect is a passage from Aslam which is on – we hope your Honours also have. It's on page 55, subparagraph 5 of paragraph 138. An analysis which, in our submission, applies here in the way in which the plurality of the Full Bench did. Could we deal with that – move from that issue to deal with three discrete issues. First, that the question of non-exclusivity which the plurality dealt with in paragraph 69 in subparagraph 2. We've already reminded your Honours of Mr Mulholland's evidence in paragraph 52, on page 228. Could we also draw to your Honour's attention a passage of Mr Gupta's evidence on page – it begins on page 70 of part C and it begins at PN342 and goes all the way through to PN350.

Next, another discrete issue, the question of who paid the – the applicant, who paid delivery partners. The – the plurality in the Full Bench found that it was the respondent, Deputy President Colman dissented on that point. At paragraph 15 of his reasons that:

> *Plurality referred to clause 13.1 of the services agreement.*

Which your Honour's have seen:

> *Which identified the relationship between the parties as one of a – one in which the respondent acted as a payment collection agent for the purpose of collecting payments from users.*

At paragraph 16, the plurality referred to clause 4.1 which – by which delivery partners appointed Uber as their payment collection agent for the purpose of accepting the delivery fee. And then the Full Bench – the plurality conclusions here, on this issue are at paragraph 47, essentially the plurality found that it was the respondent Uber that paid the applicant, that no money changed hands between any restaurant and her and that the invoices prepared by the respondent by Uber purely notional. Now, we put that finding in issue for the purposes of these proceedings. While it's true that Uber attended to the physical task of transferring a payment to the applicant by electronic means, it did so as the appointed agent of the applicant and as an intermediary between her and the restaurants whose meals she delivered.

When it received the payment for her delivery from the restaurant, and while it held that payment before it's transferred to her, it did so effectively as a trustee. And that's reinforced by the following contractual terms and arrangements. Perhaps, I could just list them to save time. Clause 4.1 of the services agreement, clause 13.1 of the services agreement, clause 4 of the agreement between Uber and the restaurants,

and clause 3, subclause (c) of the addendum to that agreement. All of those provisions your Honour's saw earlier and then there are some invoices which are located on pages 486 to 490, and all of which ..... those arrangements.

That the Full Bench's – that pluralities erroneous analysis was, in our submission, substantially influence by its view that there was no contract between the applicant and the restaurant. However, in our submission, that view is incorrect. The correct position is that the applicant and the restaurant entered into contracts which clearly identified the essential features of the quadrilateral relationship, including those features which concern their relationship inter se. Those contracts plainly stipulate that the restaurant would pay her and that Uber would act as her agent in collecting and remitting that money to her. When she took possession of the meal from the restaurant in order to effect the delivery of that meal to the restaurant's customer, and the restaurant entrusted the meal to her, they created by that conduct, a contract which incorporated the features of their relationship that had already been established in the respective contractual documents. At that moment was plainly a contract between her and the restaurant and that contract incorporated by reference, all of the provisions, that had the effect that it was the restaurant that paid her and that Uber acted only as an agent for collecting and distributing that money.

Could we move from that to another discrete topic: the significance of contractual designations of relationships, those which deny that the relationship is one of employment. The terms of a contract are of course – and we make some – the full bench triggered that as a neutral consideration and we have submitted in writing that it is a consideration that should properly have a greater significance and one that points against this being a relationship of employment.

There are three recognised circumstances in which contractual designations have no significance: the contract is a sham; the contract was varied by conduct; or the contract contradicts the nature of the relationship actually created. And that's all dealt with in Jamsek at paragraphs 183 and 184. This case is not such a case. That being so, the law is and remains, as it was stated in Massey v Chaplain and we've set that out in paragraph 22 of our submissions.

Finally, one last discrete topic in this area: the Court of Appeal's decision in Aslam to which our learned friends took the court and about which your Honours had some questions. Our submission is that that decision is distinguishable and not helpful on the critical question before this court, as to whether the applicant was an employee or not. That's for two reasons. One is that Aslam deals with the discrete question, quite different question, of whether the driver partners of Uber rides in London were what our learned friends had called the so-called ..... workers under the legislation in force in the United Kingdom.

The second reason is that the Uber rides model in London, so the decision shows, is substantially different to both the Uber rides and Uber Eats model in Australia because of a regulatory requirement that, described at a very high level, requires that Uber in London must accept trip requests before they're despatched to driver

partners. And that's a consequence of the Private Hire Vehicles legislation in the United Kingdom.

At first instance the Commissioner distinguished Aslam and did so correctly, in our submission. That's at paragraphs 138 to 142 of the decision in first instance. The full bench referred to Aslam at two places in its – firstly, in its consideration of the first-instance decision at paragraph 26 and then in connection with the business question at paragraph 41. The full bench did not and in our submission, correctly did not rely on Aslam for its reasoning on the statutory question, whether there was an employee or not.

Aslam had been distinguished in Australia, we should mention, in the Commission in respect, not of Uber Eats but of Uber rides in Kaseris which is at – the medium-neutral citation of which is 2017 FWC 6610 at paragraphs 28, 64 and 65. The last point – the final point I wish to make is the piecework analogy – pieceworker analogy, which the applicant has relied upon today for the first time. To say that someone is paid as a pieceworker is to say something about the way in which their remuneration is earned and calculated. But it says nothing of itself, about whether they are an employee or not. That proposition is dealt with in Federal Commissioner of Taxation v Barrett – B-A-R-R-E-T-T – volume 129 of the Commonwealth Law Reports at page 394, the relevant passage is at the foot of page 405 and carries over to the top of page 406. Those are the discrete topics we wish to address by way of supplementing our written submissions.

Can we say this in conclusion, that the applicant, in the submissions made on her behalf, has suggested that some of the indicium should have a different weight than was ascribed to them in the evaluation of the commission, both at first instance and on appeal. What the applicant does not say is why the different evaluation for which she contends should result in a different conclusion, does not say why the differently expressed – differently evaluated indicium point to the conclusion that she is an employee. A significant feature of the applicant's submissions is that she repeatedly suggests that particular indicia, evaluated as she contends they ought to be, are consistent with a relationship of employment.

But she does not, because she cannot, assert that any of them lead to the conclusion that she was, in fact, an employee. That is – for that reason, and for the reasons we've submitted in our written submissions, the application should fail. If it please, unless your Honours have anything more of me, and I hope that that was shorter than an hour, those - - -

BROMBERG J: It certainly was. Thank you, Mr Neil.

MR NEIL: Something of a canter, but we've covered the ground, I think. And they're the submissions that we would wish to make, in essence, by way of supplementing that which we've put in writing.

BROMBERG J: Thank you, Mr Neil. Mr Gibian.

MR GIBIAN: Thank you, your Honour. Just on that last point, for the avoidance of doubt, we did say this, I think in a number of places in our submissions, including paragraph 33. But we do submit that when one looks – stands back and looks at the whole of the picture, one forms a view that Ms Gupta was an employee and entitled to make her application for unfair dismissal. Leaving that to one side – and we've said that repeatedly. Can I deal with some discrete evidentiary issues.

Firstly, there was a – a degree of discussion in relation to the somewhat improbable proposition that one can – that the delivery worker can retain the meal and cancel the order after they've collected it from the restaurant. I don't want to take too much time up with that, but can I just note that that is a matter dealt with in the community guidelines at page 295 and 296 within part C. At the bottom of page 295, there's a heading " ..... and misuse", and on 296 there's a heading at point 2 on the page:

> *What leads to you losing access to your account.*

And it here indicates:

> *We will imperatively deactivate any account of accounts associated with fraudulent – fraudulent activity or misuse, which may include picking up items without the intention to complete a delivery, creating dummy accounts, claiming fraudulent fees, intentionally accepting or completing fraudulent or falsified deliveries, claiming to complete a delivery without picking up the delivery item, and picking up a delivery item but not delivering it in full.*

So, the proposition that there was no consequence to cancelling an order after one had picked up the delivery item is obviously inconsistent with the community guidelines which are given force and make in the services agreement. We certainly don't read the reference to cancellation on page 292 as encompassing cancellation in those circumstances. And in any event, as we've said, the cancellation – the capacity to cancel, even before pickup, is heavily regulated in the sense that if the delivery worker's cancellation rate is above the levels stipulated, which is sort of suggested to be around five per cent – that would vary from city to city – then there will be consequences including deactivation of your account.

There was reliance on the screenshot at page 202 of the court book – of the part C, I should say, and the question was raised as to whether that was a – that screenshot on the left-hand side of page 202 was a reference to the cancellation by the delivery partner rather than by the consumer. Even just looking at it alone we would infer that it was by a consumer, but we don't have to wonder because Mr Gupta was cross-examined about this at page 65 in part C from PN279, where, firstly, we had suggested that there was – that Ms Gupta could cancel up to the time – the point of collection, to which there was agreement, but, as I said, there was consequences. Then at 280 it's put to Mr Gupta that she could cancel even after having picked up the food and the response was, "No, she can't." And at 281:

> *Well, I put to you - - -?---I tried once – I tried to do this once.*

And then the proposition is put again at 283, it was open to her after picking up the food to cancel the request, "No." So certainly that was not their experience and one certainly wouldn't infer that the screenshot that was attached to Mr Gupta's evidence was an instance of that occurring since his clear evidence was that that wasn't possible. As I said in my earlier submissions the capacity to cancel after acceptance but before pick-up existed. We accept that, but it was circumscribed by the consequences of cancellation – of deactivation if the cancellation rate of the individual rider exceeded the level stipulated by Uber in the community guidelines.

A point was raised as to the rejected requests. The evidence given by Mr Mulholland at paragraph 81(e) of this statement that there were 500 rejected delivery requests. It was suggested that those were actively rejected requests. Obviously Ms Gupta was represented by her husband in the proceedings before the Commissioner so I'm not sure that was explored in evidence, but Mr Gupta's evidence was that that was not the case. He gives that evidence on page 64 and – 64, I should say, of part C at PN269, really following on to 272, where he says – he denies that there were 550 rejected. He suggests rejected maybe 50. So I'm not sure that that differentiates between timed out, that is, ones that are not accepted within the 15 to 30 seconds, from actively rejected requests.

WHITE J: But there has been a finding in the Commission that's contrary to you on that, isn't it?

MR GIBIAN: Look, it's - - -

WHITE J: ..... Mr Mulholland's evidence.

MR GIBIAN: At paragraph 67 of the Commissioner's decision at first instance he appears – well, yes, he says – look, he does say in the final sentence of paragraph 67 that Ms Gupta "expressly rejected". As I say, I'm not sure that the evidence actually permitted a finding as to whether that was actively rejected rather than not accepting in total. I don't know whether that was a matter that was explored in argument before the Commissioner, noting the representation of Ms Gupta at that stage. If I can go back slightly. My learned friend dealt with the issue of exclusivity and whether it was possible or whether it was permissible to work with another app at the same time. I've just noted the findings of Commissioner Hampton at paragraph 92 in the first instance decision in relation to that matter as to the emanation issue. As to who a customer, or indeed a restaurant, would complain to about a delivery partner, it was suggested the customer may complain to the restaurant or perhaps anyone – or if it wasn't obvious, the customer would complain to Uber. Can I just note at page 291 of part C within the community standards, there is contemplation of an – or an inquiry into the conduct of a delivery partner. It's plainly contemplated by Uber that they will be made aware of behaviour in violation of the community standards, and indicated clearly to the delivery workers that that would be subject of inquiry, including suspension by way of a hold being put on the – their account, pending the completion of that investigation.

As to whether the customer would perceive the delivery worker to be a representative of Uber, I think what was really put was that "well, all that happens is that at one end of the process the delivery worker makes the delivery". That process, so far as the customer is concerned, involves nothing other than making the order through the Uber app, paying Uber through the Uber app and then a delivery worker attending their home or office premises and making the delivery. That is the extent of the ordinary undertaking of the process, the delivery worker is obviously the representative of Uber eats and the only representative of Uber eats with respect to which the – in relation to which the customer would have an interaction.

Furthermore, Mr Mulholland's evidence, at paragraph 14, in the final sentence, makes clear that the eater is given the cost including an itemised delivery fee. That is, the customer knows they are paying Uber a delivery fee for the delivery to be undertaken and that the person undertaking that – or completing that delivery is the person whose name they have been – whose first name, at least, they have been told by Uber, is the person completing the delivery in – on behalf of Uber in return for the delivery that has been paid by the customer to Uber. And as is noted at paragraph 35 of Mr Mulholland's statement, the eater is invited by Uber to rate the performance, among other things, of the delivery partner.

In terms of the – the fee, obviously it's stipulated by Uber and we would concur with the plurality in the full bench's observation that the recorded capacity to negotiate a lesser payment is of no commercial sense, and one can't imagine why it would ever occur. I would add to that that there's no practical possibility for it to occur. The – the delivery worker does not know the identity of the restaurant until after the order has been placed, after it has been accepted by the restaurant, after the payment has been made by the eater and after the delivery worker has accepted the request. It is only then that they're told the address and the identity of the restaurant. There's simply no practical capacity to negotiate any ..... arrangement. The whole process is superintended and is controlled by Uber.

As to the use of Uber bags, which is perhaps the emanation point as well, can I just note at page 69 in part C at PM322, I think my learned friend might come to that eventually, Mr Gupta's evidence was "well, they're just given the Uber bags – the bag with 'Uber' written on it by the restaurant, and they don't have a choice about what bag to use", so it's not a matter for them to determine. As to the nature of the relationship or the – whether Uber was willing to put forward what type of relationship it had with the delivery or with Ms Gupta, if it was not one of employment, can I just note what was said, I think, the same things are said in both Jamsek and both Personnel Contracting. But the reference I had was at paragraph 61 of Personnel Contracting within the judgment of Lee J where his Honour noted that:

The approach to such an assessment

It's at page 289 and 290 of the report:

The approach to such an assessment is deep-rooted in the common law and requires courts to draw a binary divide between two distinct types of a worker: an employee and an independent contractor

And it's in that context that one asks and, I think, my learned friend, "If she wasn't an employee, she must have either been working for herself or for someone else." And one, we don't think she could have been working for herself unless she had her own business, which all the Members of the Commission found that she did not. She, clearly, wasn't working for the restaurant. And in that sense, we embrace what was said. All the Members of the Commission, again, accepted that proposition when it embraced what was said by the plurality in the Full Bench at paragraph 45 of the Full Bench decision, but none of the, that there was no practical possibility or any feature of the creation of any type of relationship between the restaurant and the delivery rider, apart from anything else, because there was no possibility or reality of any communication, at all, to establish that relationship.

I think, ultimately, my learned friend wished to adopt what was said by Deputy President Colman alone in the Full Bench at paragraphs 82 and 83. There's the conclusion at paragraph 83 which is at page – sorry, at paragraph 82 which is at page 105 in Part All right. Deputy President Colman, in the final two sentences says that:

A conclusion that one entity is not her employer or principal does not carry any necessary implication or question as to who, as to whether some other entity has that status. There may simply be no employer or principal at all, and that that was the case here.

Over the page at 83, the Deputy President says:

It is clear that Ms Gupta was not running an enterprise with the usual indicia of a business

References to Quest South Perth, and the like. And acknowledging that there was some:

this may be a factor favouring the conclusion the person was an employee

He then says ..... :

In other cases, it may favour the conclusion the person was an independent contractor. But in the present case, the fact that Ms Gupta was not running a business does not favour either conclusion. In my view, the evidence shows that Ms Gupta was simply working for herself.

With the greatest respect, we don't understand, we don't think that that is coherent or has any sensible basis. If she was working for herself, it could only be in her own business. It's clear, on any rational inference from the facts, and on all the findings of the Commission, that she was not running her own business. She was working for

Uber providing delivery services that it had agreed to facilitate with restaurants. And the question, then, is, well, was she doing so as an employee or an independent contractor? We think it is a very significant consideration, in that respect, to say that she was not running her own business. And that clearly favours, we don't say this is decisive, but it clearly favours the conclusion that she was working for Uber as an employee.

My learned friend relied upon a passage in paragraph 6 of Perram Js decision in Jamsek
And that there was no:

> *natural dichotomy between,*

And I will find the exact wording. That there was no:

> *natural dichotomy between, on the one hand, being employed and, on the other, conducting one's own business.*

It becomes clear from paragraph 7 what his Honour was referring to. His Honour was referring to the circumstance, or answering the circumstance of a person who both had their own business and was working in another person's business, that it was possible to run one's own business and work within the other person's business, no that it was possible to work for yourself without having any business at all. If I could just have a short moment.

My learned friend suggested that the analogy with casual employment was inapt. In that respect, the basis upon which we referred to casual employment is to answer a submission that, "There had to be an obligation to perform work as and when demanded by an employer before an employment relationship could exist." The example of casual employment and odd, truly ad hoc casual employment basically demonstrates that that's the case.

My learned friend said, "Well, at least a casual employee, once they have accepted a particular assignment, ordinarily, can't just walk away halfway through it." I accept that would ordinarily be the case and that is a relevant consideration. We've referred, I've referred in my earlier submissions to Bowden which demonstrated, not necessarily. That is, the piece rate workers, fruit pickers there were able to walk away whenever they felt like it without sanction but were, nonetheless, employees.

My learned friend referred to Ryde-Eastwood and other cases, Hamzy, using the term "umbrella contracts". I'm not sure we ever used that term or relied upon that proposition in any particular respect. In any respect – in any event, those cases did not deal with the issue as to whether a person was an employee or not. They were all cases as to whether or not there was regular systematic casual engagement so as to provide at a – an entitlement to bring up their dismissal proceedings under the various – under the statutory regimes in riders with council and state regime enhance, eg, regime under the then Workplace Relations Act.

Two further points, my learned friend relied upon the RACV case and – sorry, another one to suggest that – that the application of performance or conduct requirements did not necessarily mean there was a – and sanctions did not necessarily mean there was a – a relationship of employment. I think so far as that goes we accept that but we think it is a strong indication. Can I refer, in that respect, to the fact that Personnel Contracting within the judgment of Lee J, at paragraph 169, it was recognised, quite properly in our submission, that the threat of termination for breaching behavioural – breaching policy or standards was a manifestation of control. A similar proposition was made in Bowden, with respect to the fruit picking workers at paragraph 26, where it was said:

> *The appellant's ability to influence and control the conduct of the seasonal workers by the prospect of exercising its right of summary dismissal or by refusing to reemploy at another season, was an important feature of the control the appellant was able to exercise over its itinerant workforce.*

And we think that that – the same observation would be made clearly here. Uber retains to itself the capacity to suspend, deactivate or terminate an account. If – whatever policies or prescriptions it provides from time to time. Finally, a submission was advanced, which wasn't advanced in the written submissions that the Full Bench was wrong to find that it was Uber that paid the delivery riders. I thinks it's probably sufficient that reliance was placed upon the invoices prepared – or that were in evidence and the contractual provisions. Can I just say that we, with respect, submit that the pluralities decision the Full Bench, particularly at paragraph 45, was obviously correct in that respect, the invoices were prepared by Uber, the fees were set by Uber and collected by Uber, in all respects, it controlled the entirety of the arrangements.

And one final point, and that is that my learned friend placed some reliance upon the fact that the community standards place obligation upon restaurants and customers as well as upon delivery partners. Can I say two things about, firstly, neither the customer, clearly not performing work for Uber in the same way that the delivery partner is, and obviously the obligations in that respect, fault be considered because on the delivery partner's fault considers its obligations upon them in their performance of work for Uber, which is obviously relevant to the characterisation of that relationship. The second point I would make in that respect, is that what that shows, the fact the obligations are placed upon customers and restaurants and the delivery partners, is that Uber controlled this whole exercise.

It controlled the placing of the orders, the – who was able to – to be a customer and have an account, what restaurants were able to be – participate or – or sell food through Uber's – through Uber, and which delivery partners were able to – were allocated work and were able to undertake work for Uber. It demonstrates that the delivery partners were working for Uber in Uber's business, which was to deliver food to customers who ordered it through their app. Unless there's anything further that I can assist with, I think those are the matters in reply.

BROMBERG J: Thank you, Mr Gibian. May I, on behalf of the court, thank counsel and those who have assisted them for the – their helpful submissions the court has received and can I also extend my thanks for the court staff and others who have stayed on for the extra time we've needed to utilise. The court will reserve its judgment. Would my associate please adjourn the court?

MR GIBIAN: May it please.

MATTER ADJOURNED at 4.17 pm INDEFINITELY