

WORKERS COMPENSATION COMMISSION

AMENDED CERTIFICATE OF DETERMINATION

Issued in accordance with section 294 of the *Workplace Injury Management and Workers Compensation Act 1998*

Matter Number: 3062/19
Applicant: Toby Hammond
First Respondent: Adam Nelson Painting and Decorating
Second Respondent: Workers Compensation Nominal Insurer
Date of Determination: 16 January 2020
Date of Amendment: 30 January 2020
Citation: [2020] NSWCC 30

The Commission determines:

1. The applicant at the time of his injury on 24 September 2018 was a “worker” within section 4 of the *Work Injury Management and Workers Compensation Act 1998* employed by the first respondent.
2. That employment was employment connected with the state of New South Wales within section 9AA of the *Workers Compensation Act 1987*.
3. The issues of payment of weekly payments and treatment expenses are stood over to a telephone conference to be held at 2.00 pm on Wednesday 22 January 2020 (or such other time and date as the Registrar may appoint) when directions will be made for the resolution of those issues should the parties be unable to reach agreement.

A brief statement is attached setting out the Commission’s reasons for the determination.

W Dalley
Arbitrator

I CERTIFY THAT THIS PAGE AND THE FOLLOWING PAGES IS A TRUE AND ACCURATE RECORD OF THE CERTIFICATE OF DETERMINATION AND REASONS FOR DECISION OF WILLIAM DALLEY, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Toby Hammond (Mr Hammond/the applicant) suffered severe cervical and thoracic spinal injuries on 24 September 2018, when he fell while engaged in painting the roof of a shed situated on a rural property known as “Ulupna Island Station” at Ulupna in the State of Victoria.
2. Mr Hammond was carrying out the painting work pursuant to a verbal agreement with Raymond Nelson (Mr Nelson/the first respondent), a painter carrying on business as “Nelson Painting and Decorating”. Both Mr Hammond and Mr Nelson were normally resident in New South Wales, Mr Hammond living at Bega and Mr Nelson at Tura Beach, a town on the south coast some 30 km south of Bega.
3. Mr Hammond and Mr Nelson had known each other for about eight years. Both had completed their apprenticeship, training with a business known as “Delso Painting”, Mr Nelson had started business as a sole trader in mid-2017. At the time of the subject accident Mr Hammond was aged 20 and Mr Nelson was aged 26.
4. Mr Hammond completed his trade qualifications in early 2018 and performed work as a painter with Mr Nelson for periods of time commencing on 23 March 2018.
5. In mid-2018, Mr Nelson provided a quotation to a representative of the owner of Ulupna Island Station for painting work to be carried out at that property. Mr Nelson asked Mr Hammond if he would assist in performing the work. Mr Hammond agreed.
6. An eight hour drive was required to reach the worksite and Mr Nelson and Mr Hammond travelled together in Mr Nelson’s vehicle, commencing work the following day, Friday, 21 September 2018. Mr Nelson had arranged accommodation for himself and Mr Hammond at a nearby location.
7. Following the fall, Mr Hammond made a claim for benefits under the New South Wales workers compensation legislation. Mr Nelson did not hold workers compensation insurance and the claim was also addressed to the nominal insurer, iCare workers insurance (the nominal insurer/the second respondent).
8. The first and second respondent’s each denied that Mr Hammond was a worker pursuant to section 4 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) or a “deemed worker” as provided by Schedule 1 to that Act.
9. An Application to Resolve a Dispute was filed in the Commission naming Mr Nelson as the respondent and claiming weekly payments and treatment expenses. Replies were filed on behalf of Mr Nelson and also on behalf of the nominal insurer maintaining that Mr Hammond was neither a worker nor a deemed worker and placing in issue incapacity and need for treatment.

ISSUES FOR DETERMINATION

10. The parties agree that the following issues remain in dispute:
 - (a) Was the applicant a “worker” within section 4 of the 1998 Act or a deemed worker within section 5 and Schedule 1 of the 1998 Act at the date of his injury on 24 September 2018?

- (b) If so, was the relevant employment connected with the state of New South Wales in accordance with section 9AA of the *Workers Compensation Act 1987* (the 1987 Act)?
- (c) If the applicant is found to be entitled to weekly compensation, what is the amount of his pre-injury average weekly earnings calculated in accordance with Part 3, Division 2 of the 1987 Act?

Matters previously notified as disputed

- 11. Although raised in the Reply of the second respondent, the issues of incapacity and requirement for treatment as a result of injury were not pressed at hearing.

Matters not previously notified

- 12. At hearing the applicant submitted that the circumstances of the work that Mr Hammond performed for Mr Nelson from 23 March 2018 were such as to constitute Mr Hammond a worker employed by Mr Nelson.
- 13. Alternatively, it was open to the Commission to find that there were a series of contracts and the agreement relating to the work to be performed at Ulupna Station would be viewed as an agreement for casual employment to enable performance of the contract to carry out painting work between Mr Nelson and the owner of the property.
- 14. The nominal insurer submitted that, if the applicant's case was to be advanced in the alternative on the basis of a discrete agreement in respect of the Ulupna Station property, this would raise an issue of whether the provisions of section 9AA of the 1987 Act were satisfied as to there being sufficient connection to the state of New South Wales, given that the work was to be performed in the state of Victoria.
- 15. Leave was granted to the respondents pursuant to section 289A of the 1998 Act to rely upon the provisions of section 9AA of the 1987 Act since the possibility raised by the applicant as to there being a discrete contract for service in respect of the work to be performed at Ulupna was a somewhat different proposition to that asserted by Mr Hammond in his statement in which he asserted that he had commenced employment with Mr Nelson in March 2018.

PROCEDURE BEFORE THE COMMISSION

- 16. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.
- 17. The matter proceeded to hearing at Wollongong on 3 September 2019. A direction was made formalising the appearance of the nominal insurer who had not been noted as a respondent in the Application to Resolve a Dispute. Mr Stockley of counsel appeared for the applicant. Mr Dickinson, solicitor, appeared for the first respondent, Mr Nelson, and Mr Grant of counsel for the second respondent, the nominal insurer.
- 18. Noting that Mr Nelson stated that his business had no employees and that iCare was resisting the claim on the basis that Mr Hammond was not an employee, it appeared possible that Mr Nelson was an exempt employer for the purposes of section 155AA of the 1987 Act. Mr Dickinson then made an application for a declaration that Mr Nelson was exempted by that section from having to hold a policy and was entitled to be represented by the nominal insurer in the proceedings.

19. The matter was then adjourned part heard for investigation of the position. A further telephone conference was allowed for the purpose of clarifying the situation and at that telephone conference the first respondent's application was withdrawn and the matter was fixed for further hearing with the location altered to Sydney as being more convenient to all parties.
20. The hearing of the matter continued on 11 November 2019 with leave being granted to the first respondent to file and serve written submissions. Those submissions were received and the hearing of the matter continued on 3 December 2019 when submissions on the issue of liability were completed. The issue of determination of the preinjury average weekly earnings was reserved for further submissions in the light of the outcome with respect to the issue of liability.

EVIDENCE

Documentary evidence

21. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents;
 - (b) Reply of the First Respondent and attached documents;
 - (c) Reply of the Second Respondent and attached documents;
 - (d) Documents attached to Application to Admit Late Documents by the applicant dated 8 August 2019, and
 - (e) letter from the solicitors for the applicant dated 5 November 2019 replying to a Notice to Produce with attachment of a quotation for painting work dated 1 May 2018 by the applicant.

Oral evidence

22. There was no application to adduce oral evidence or to cross examine any witness.

FINDINGS AND REASONS

Issue 1 – was the applicant a worker or, in the alternative, a deemed worker at the date of injury?

23. Mr Stockley submitted on behalf of the applicant that the appropriate approach was that based on Presidential decisions of the Commission such as *Marinic v RPC Interiors Management Pty Ltd*¹ which had adopted the reasoning in *On-Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No 3)*² (*On-Call Interpreters*). The “ultimate question/entrepreneur test” when applied to the agreement in place as at the date of injury indicated that Mr Hammond was not performing the work as an entrepreneur who owned and operated a business and was not working in and for his own business as a representative of that business. Accordingly, Mr Hammond should be found on the balance of probabilities to be a worker.

¹ [2019] NSWCCPD 11

² [2011] FCA 366

24. Mr Stockley noted that from 23 March 2018 Mr Hammond had performed painting work for Mr Nelson initially at the rate of \$25 per week. The work performed for Mr Nelson had been in respect of jobs quoted and arranged by Mr Nelson who would let Mr Hammond know when and where the work was to be carried out.
25. The consumables, including the paint, had been supplied by Mr Nelson and Mr Nelson also supplied the necessary equipment apart from the basic hand tools. The work at Ulupna was to take two weeks and Mr Hammond was to be paid in accordance with invoices rendered by him.
26. Mr Hammond did have public liability insurance but this had only recently been obtained for the purposes of Mr Nelson obtaining a contract with the local council. Mr Stockley submitted that Mr Hammond should be accepted when he stated that the public liability policy had been taken out at the request of Mr Nelson which illustrated control by Mr Nelson.
27. Mr Hammond had not advertised his services as a painter. The evidence was consistent with Mr Hammond being a young man who had recently completed his trade qualifications and had an unsophisticated approach to finding work.
28. With respect to the Ulupna contract Mr Nelson had quoted the job and arranged the supply of paint and equipment as well as the provision of accommodation. Mr Hammond was to work as a painter at an hourly rate and the inference should be drawn from the evidence that his work tasks were dictated by Mr Nelson and his work was not performed in furtherance of Mr Hammond's own business.
29. Although Mr Hammond may have provided invoices he was effectively being paid wages. The safe working documents ultimately produced by Mr Nelson were consistent with the conduct of an employer and the emails between Mr Hammond and Mr Nelson supported relationship of employer and employee.
30. Mr Stockley submitted that the evidence of the invoices pointed to a pattern of casual employment by Mr Nelson from 23 March 2018 onwards with periods when Mr Nelson had no work to offer Mr Hammond when he was then free to accept other work.
31. Mr Stockley submitted that the reality was that the parties had not turned their minds to the nature of the contractual relationship between them. He submitted that Mr Nelson would have been startled had Mr Hammond sent another worker to take his place and that, in reality, Mr Hammond would not have regarded himself as free to delegate the work to another tradesmen.
32. Factors pointing to the conclusion that Mr Hammond was a worker included the adoption of an hourly rate with no profit margin, the absence of goodwill generated by Mr Hammond's labour, the wearing of the T-shirt supplied by Mr Nelson advertising Mr Nelson's business, and the materials and equipment supplied by Mr Nelson.
33. The fact that the arrangements between Mr Hammond and Mr Nelson did not include deduction of taxation instalments and the absence of provision for overtime, holiday pay superannuation did not outweigh the weight to be given to factors such as control and organisation.
34. Overall it was open to find that there was an offer of employment capable of repeated acceptance or alternatively a new contract created from time to time between Mr Hammond and Mr Nelson. That contract in respect of the Ulupna property was a contract of service.

35. Mr Dickinson submitted on behalf of Mr Nelson that the evidence established that Mr Hammond was a subcontractor providing services under a contract for services rather than as an employee under a contract of service. He also submitted: “Moreover because he was clearly engaged in setting up business on his own account he was not a worker under the deeming provisions of the act.”
36. Mr Dickinson noted that since completing his apprenticeship with Delso Painting³ (Delso) Mr Hammond had been engaged as a painter by Mr Nelson and others.
37. Mr Hammond had left the employment of Delso upon completing his apprenticeship and had established his own business as a painter. Mr Dickinson pointed to the evidence of the respective statements and the invoices produced by Mr Hammond. Mr Dickinson noted that there was no written contract between the parties and submitted that Mr Hammond had sought work from Mr Nelson who had “provided work for him to do from time to time”. The evidence did not support a contention that Mr Hammond had commenced work for Mr Nelson and continued to work on a permanent basis.
38. Mr Dickinson submitted that both Mr Hammond and Mr Nelson operated very small businesses. Both were qualified tradesman and that contract arrangements between these should be regarded as arrangements between persons with similar skills in the context of Mr Hammond establishing his own business.
39. The appropriate test to be derived from consideration of the authorities such as *Stevens v Brodribb Sawmilling Co Pty Ltd*⁴ (*Stevens*), *Hollis v Vabuu Pty Ltd trading as Crisis Couriers*⁵ and *On-Call Interpreters* was a multifactorial one to be determined on the totality of the evidence.
40. Whereas the previous employer, Delso, had deducted income tax payments and made superannuation payments in the course of Mr Hammond’s employment with that firm, that was no longer the case after January 2018.
41. No tax was deducted from any work performed by Mr Hammond pursuant to an agreement with Mr Nelson. Mr Hammond had obtained an Australian Business Number. The tax return for the period to 30 June 2018 records the receipt of business income in addition to the wages received from Delso.
42. Examination of the tax returns supported a conclusion that Mr Hammond had received in excess of \$4,000 by way of business income for services provided to other people or entities. The evidence suggests that it was Mr Hammond to set the hourly rate. The payment of an hourly rate was not conclusive with regard to the existence of a contract of service.
43. Mr Hammond appeared to have performed work for a Mr Ryan Becker. The evidence of text messages established that Mr Hammond was seeking to advance his own business. He provided a quotation to a Mr and Mrs Ingram on 1 May 2018.
44. Mr Hammond had stated to the Work Safe Victoria investigator that he worked in his own name as a tradesman with his own business number and regarded himself as a subcontractor.
45. Mr Hammond had taken out public liability insurance which would not have been required if he had been employed by Mr Nelson.

³ Identified in tax records in evidence as “Delso Painting Pty Ltd”.

⁴ [1986] HCA 1; (1986) CLR 16

⁵ [2001] HCA 44; (2001) 207 CLR 21

46. Any control exercised by Mr Nelson over Mr Hammond was no greater than would be expected of a head contractor. Defective workmanship would be expected to be remedied by Mr Hammond as a subcontractor. There was no impediment to Mr Hammond delegating work to another suitably qualified tradesman.
47. Tools had been provided by Mr Hammond apart from a spray gun. The T-shirt provided to Mr Hammond as a convenience only and was not the case that Mr Hammond was obliged to wear it.
48. In Mr Hammond's area of expertise, it is not uncommon for tradesmen to be self-employed. The case was not one where a contractor attempted to escape liability for employees by seeking to label them as subcontractors. If the applicant's submission that Mr Hammond was not assuming the risk of the contract was accepted then this would constitute every subcontractor an employee.
49. Mr Grant submitted on behalf of the nominal insurer that the submissions of the first respondent should be accepted. Employment was a question of fact. The opinion of Mr Hammond expressed in his statement that he was an employee could not be given weight. The evidence established that Mr Hammond had become qualified as a painter, had obtained an Australian business number and established a business. From that point on he was responsible for payment of his own income tax and superannuation. Mr Hammond had claimed deductions for supplied equipment and set his hourly rate
50. Mr Hammond worked for other people other than Mr Nelson and submitted tax invoices indicating that he was conducting a business.
51. The scant evidence as to control did not go beyond normal supervision of a contractor. The nature and location of the task in Victoria was such that Mr Nelson as the contractor necessarily exercised a degree of control as a matter of practicality over Mr Hammond as a subcontractor. No weight should be given to the fact that Mr Hammond and Mr Nelson travelled together or stayed in shared accommodation.
52. The absence of the weekly rate, taxation deductions and payment of superannuation and holiday pay indicated employment as a sub-contractor.
53. In reply Mr Stockley submitted that it was not a matter of weighing different points of consideration but considering the overall situation.
54. The applicant was turning up for work at an hourly rate and obtaining no increase in the goodwill of any business of his own. Work was carried out in company with Mr Nelson except when Mr Nelson went to get supplies at Ulupna.

Evidence:

55. The evidence contains only a few areas of conflict. It is the inferences to be drawn from the evidence to which the submissions set out above are principally addressed.

The applicant.

56. A number of statements by the applicant were in evidence. The first statement in time is dated 22 November 2018. At that time Mr Hammond was still undergoing rehabilitation at the Royal Talbot Rehabilitation Hospital. He said that he was unable to walk and was using a wheelchair. Mr Hammond noted completion of his apprenticeship in January 2018 with Delso. He said that he had commenced work as a painter and decorator with "Adam Nelson Painting and Decorating on about 23 March 2018". He said:

"I was employed as a tradesman and as I had my own ABN I thought initially I was a subcontractor. When I started with Adam Nelson I thought I would be working for other people as I thought my job with Adam Nelson might be from time to time like a casual employee. However, this turned out not to be the case."

57. Mr Hammond said his first day at work with Mr Nelson commenced at 7.30 am. He said he was the only other worker. Mr Hammond said:

"I never got to do work for myself as the only work I did was for and with Adam Nelson 38 hours a week from 23 March 2018 until my injury on 24 September 2018 I did not do any work for other people during the week or on weekends or at all."

58. Mr Hammond said that the work was mainly residential work, painting and decorating. Mr Nelson supplied the paint and Mr Hammond used Mr Nelson's tools and equipment. He said that he usually commenced work each day at 7.30 am or earlier and had not taken time off to work for anyone else. He said that he was expected to come to work each day at 7.30 am and sometimes earlier. He said, "I never took time off to work for anyone else and I never worked for anyone else."
59. Mr Hammond said that he had paid his own tax. The work he performed was all performed in New South Wales until the job in which he was injured. He said that work was on a farm. They had completed painting a shed and started a second shed when the accident occurred.
60. Mr Hammond said that he started work on 24 September 2018 about 7.00 am. He and Mr Nelson were on the roof of the second shed, finishing the washing down of the roof. He said: "On 24 September 2018 I got tangled in the air leader of the spray gun and stepped back into a fibreglass skylight and crashed through it falling onto my back onto a metal gate and hitting my head on another metal gate lower down." He was flown to the Alfred Hospital in Melbourne. He said that Mr Nelson had subsequently contacted him and informed him that he was a contractor.
61. In a statement dated 18 May 2019 given to a Victorian Worksafe Senior Investigator, Mr Hammond again detailed his training and apprenticeship. He again noted the circumstances of the accident and his subsequent treatment.
62. Mr Hammond said:
- "I work in my own name, trading with the Australian Business Number 64877517387. I have had that ABN since March 2018. I have invoiced all the people for whom I have conducted work since then including Adam Nelson."
63. Mr Hammond said that on each occasion that he had worked with Mr Nelson it was Mr Nelson who would set up the job, quote it and make the arrangements for site access. Mr Nelson also purchased the paint. Mr Hammond would typically supply a four step ladder, basic hand tools like filling blades, scrapers, dusting brush and painting poles. He said that he owned his own private pressure washer and was asked to supply this for use on the job at Ulupna.
64. Mr Hammond said that as an apprentice he been given a \$200 voucher for a paint shop for purchase of paint brushes and rollers. With Mr Nelson he said, "if I used my own paintbrushes and other consumables, he would replace them for me." He said that Mr Nelson provided masking tape. His "core hours" were 7.30 am to 4.00 pm "and then over time". He said he was not paid loading in respect of overtime.

65. Mr Hammond said that he had asked for an increase in the hourly rate from \$25 per hour to \$30 per hour which had been agreed to by Mr Nelson. There was no setting of a different hourly rate specific to a particular job if it was dirty or difficult. With respect to the job at Ulupna, Mr Hammond said that Mr Nelson had quoted it and had paid Mr Hammond for the day spent travelling to the site. Mr Nelson also organised the accommodation. He said that Mr Nelson had agreed to paying \$40 per hour but actually only paid \$30 per hour.
66. Mr Hammond said that Mr Nelson would direct Mr Hammond in what he was to do and when. The work at Ulupna comprised the painting of the exterior and roofs of two houses and two sheds. Mr Nelson had estimated that “about a bit over a month’s work for the two of us”. Mr Hammond said he didn’t know how much the overall contract was worth. He said that he had a conversation with Mr Nelson on 21 September 2018 while they were unpacking the trailer in which Mr Hammond asked where the harnesses were. Mr Hammond said that he had previously seen Mr Nelson using a safety harness. Mr Nelson said that he had not brought any harnesses with him.
67. Mr Hammond said that an extension ladder supplied by Mr Nelson was used to access the roof. Mr Hammond noted the progress of the work including a discussion between the owner of the property at Ulupna and Mr Nelson which took place in the home where Mr Hammond and Mr Nelson was staying which was described as “a couple of minutes’ drive up the road from Ulupna Island station.”
68. Much of the next part of the statement comprises Occupational Health & Safety issues which are not strictly relevant to the current issue. Mr Hammond referred to a record of the text communication between Mr Nelson and himself on 18 June when he said that he had asked Mr Nelson for permission to take time off work to go with his partner for an ultrasound in respect of the partner’s pregnancy. Mr Hammond said, “other text messages show Adam giving me directions for work”.
69. Mr Hammond noted that earlier in the day on 24 September there had been an incident when he slipped and almost fell which was of concern because Mr Nelson had said that he was intending to go into town that morning.
70. Mr Hammond referred to his invoices and commented that the occasions where he had not worked for Mr Nelson was the only occasions on which he worked for other people and he denied that he had performed any work for Ryan Becker as asserted by Mr Nelson.
71. With respect to Mr Nelson’s statement (referred to below) Mr Hammond said that he disagreed that he was able to change the hours he worked without authority from Mr Nelson. Mr Hammond said the timesheets showed that he had worked 38 hours per week regularly. He had not provided paint and consumables and he denied that he had worked for other people while working for Mr Nelson. He commented with respect to Mr Nelson’s statement that the Ulupna job was to extend from 21 September to 4 October and said, “the overall context was that I had worked for him since March 2018 and a working relationship wasn’t just for that Ulupna site.”
72. In his statement dated 14 June 2019 Mr Hammond again details his trade training as an apprentice painter with Delso between 2014 and the beginning of 2018. After a short break Mr Hammond said that he commenced work for his brother who carried on the painting business “Hammond Painting and Decorating” doing jobs around Merimbula. After performing that work Mr Hammond said that he was then “signed off” as a qualified painter and decorator. He was at that time aged 20.
73. Mr Hammond said that “I then went to work for Adam Nelson in his business ‘Adam Nelson Painting and Decorating’. Adam was at least six years ahead of me in the trade and we had known each other since school.”

74. Mr Hammond said that he understood he was to be an employee of Mr Nelson's business not a subcontractor. He was paid \$25 per hour. Work with Mr Nelson commenced on 23 March 2018. In May 2018 the rate was increased to \$30 per hour. Mr Hammond would give Mr Nelson an invoice setting out his hours worked for the past week and Mr Nelson would pay by direct deposit into Mr Hammond's bank account.
75. Mr Hammond said that after he finished his trade qualifications Mr Nelson had offered him permanent work. There was no written contract.
76. Mr Hammond said that after he commenced working with Mr Nelson he worked at various locations on jobs that Mr Nelson had sourced, quoted and arranged. Mr Nelson would let him know when and where he was to work. Mr Nelson supplied the paint and consumables for the job as well as ladders trestles and other equipment needed.
77. Mr Hammond had basic hand tools. Mr Nelson provided him with work shirts which advertised Mr Nelson's business. He said Mr Nelson expected him to wear them while he was working with him.
78. With respect to the job at Ulupna Mr Hammond said that Mr Nelson had earlier visited the site and quoted it. Mr Nelson also arranged the accommodation and provided the meals while they were away.
79. Mr Hammond said that Mr Nelson believed the job would take "2 to 3 stents of 2 to 3 weeks away to complete". He confirmed that he travelled with Mr Nelson to Ulupna in Mr Nelson's vehicle. There was no discussion of workers compensation insurance.
80. Mr Hammond produced copies of invoices covering the period from mid-February 2018 to 19 September 2018. The invoices in evidence appear to be carbon copies of records from a standard Invoice Book such as might be obtained from a newsagent or stationer. There is a cancelled original invoice which provides a pro forma "tax invoice/statement". The original pages are serially numbered and provide for handwritten entry of the date, person to whom the invoice is addressed, the ABN of the recipient, order number, the supplier and the ABN of the supplier. Columns are provided headed "QTY, DESCRIPTION, PRICE, GST, TOTAL".
81. The invoices can be summarised as follows

Invoice	Finish	hours	Charge	Rate	Performed for
1	2/02/2018	29	\$737.50	\$25.43	Hammond Painting (brother)
2	27/02/2018	14	\$350.00	\$25.00	Hammond Painting (brother)
3	29/03/2018	33.5	\$837.50	\$25.00	Nelson
4	Cancelled				
5	30/03/2018	22	\$1,200.00	?	B & J Hammond
6	5/04/2018	24.5	\$612.50	\$25.00	Nelson
7	12/04/2018	36	\$900.00	\$25.00	Nelson
8	19/04/2018	37	\$925.00	\$25.00	Nelson
9	25/04/2018	30	\$750.00	\$25.00	Nelson
10	7/05/2018		\$1000.000		Hammond Conversions
11	10/05/2018	32.5	\$812.50	\$25.00	Nelson
12	17/05/2018	41	\$1,025.00	\$25.00	Nelson
13	24/05/2018	36.5	\$1,095.00	\$30.00	Nelson
14	28/05/2018	22	\$660.00	\$30.00	Nelson
15	30/05/2018		\$500.00		Hammond Painting (brother)

16	31/05/2018		\$500.00		Hammond Painting (brother)
17	7/06/2018	39	\$1,170.00	\$30.00	Nelson
18	14/06/2018	28.5	\$855.00	\$30.00	Nelson
19	21/06/2018	36.5	\$1,095.00	\$30.00	Nelson
20	28/06/2018	39	\$1,170.00	\$30.00	Nelson
21	5/07/2018	39.5	\$1,185.00	\$30.00	Nelson
22	12/07/2018	48	\$1,440.00	\$30.00	Nelson
23	19/07/2018	39.5	\$1,185.00	\$30.00	Nelson
24	26/07/2018	37	\$1,110.00	\$30.00	Nelson
25	2/08/2018	55	\$1,650.00	\$30.00	Nelson
26	9/08/2018	47.5	\$1,425.00	\$30.00	Nelson
27	16/08/2018	33.5	\$1,005.00	\$30.00	Nelson
28	23/08/2018	40.5	\$1,215.00	\$30.00	Nelson
29	30/08/2018	45.5	\$1,365.00	\$30.00	Nelson
30	6/09/2018	42.5	\$1,275.00	\$30.00	Nelson
31	13/09/2018	40	\$1,200.00	\$30.00	Nelson
32	20/09/2018	6.5	\$195.00	\$30.00	Nelson
Total			\$29,445.00		

82. The invoices include work done for an uncle and aunt over the Easter holiday (invoice 5). Another invoice (number 10) is said to include material supplied to Mr Hammond's parents' business "Hammond Conversions".
83. The column headed "rate" has been deduced by dividing the total sum by the hours worked. The total of the invoices directed to Mr Nelson to 30 June 2018 is \$13,092.50 and the total of the invoices directed to people other than Mr Nelson to that date is \$3,287.50 excluding invoice number 10 which includes materials.
84. Mr Hammond said that the invoices numbers 15 and 16 related to work performed on two days for his brother when Mr Nelson had no work for him.
85. After 30 June 2018, the only invoices are directed to Mr Nelson.
86. Mr Hammond said that he was asked by Mr Nelson to take out a public liability policy at some point. He said that Mr Nelson was applying for painting tenders with local Shire councils and it was a requirement of the tender process.
87. Mr Hammond said that when he was working with Mr Nelson "it was the norm for me to spend all day on the job with Adam". Mr Hammond said that he had his own scrapers and filling blades as well as his own brushes and pots. He said that he had not advertised his business but "Adam was offering full-time work so advertising was not necessary".
88. An earlier statement (in the form of a statutory declaration) supplied to an investigator by Mr Hammond dated 8 January 2019 was in evidence. The statement takes the form of answers to a series of questions apparently asked by the investigator. Mr Hammond said that Mr Nelson had controlled where he worked "as he organised each job I attended with Adam". He said that Mr Nelson would tell him where the jobsite was and what time to be on-site. He said that he was subject to disciplinary action "in the sense that Adam Nelson told me if I was doing something wrong and on occasion he would tell me not to do certain things." He said that Mr Nelson had provided him with a shirt with Mr Nelson's details on it which Mr Hammond had worn "pretty much every day".

89. Mr Hammond said he had not been required to display any signage on his vehicle in respect of Mr Nelson's business and there was no designated workspace.
90. Mr Hammond confirmed that he was being paid \$30 an hour "as an agreed amount for a painter's assistant/labourer with Adam Nelson". He confirmed that he would put in an invoice "by way of a time sheet" which calculated the number of hours worked at \$30 per hour. He said that Mr Nelson controlled how he worked, where to go, what job he was to do and how to do the job. He said he was supervised by Mr Nelson who observed the work that Mr Hammond was performing and would correct him if needed.
91. Mr Hammond said that he worked 38 hours per week plus overtime. He supplied his own painting trousers. Mr Nelson did not employ any other workers and he said that Mr Nelson was his employer. He said he had not worked "simultaneously for any other employer or otherwise".
92. With respect to materials Mr Hammond said:
- "When I was an apprentice it was necessary to have your own scrapers and filling blades which all painters have as their own on the job. Adam Nelson supplied all paint materials, plant, tools and equipment including but not limited to all paintbrushes, planks, ladders, trestles, tape, sandpaper, buckets and rollers."
93. Mr Hammond said he was not carrying out a trade or profession in his own right. He did not provide any warranty or guarantee to Mr Nelson and had no insurance other than the public liability insurance. Mr Hammond said that he did not have a business and did not have his own business premises. He said that he was not undertaking any business activity. He said his relationship with Mr Nelson "was to work for him on a full-time basis week in week out."
94. Mr Hammond said that he did not have a contract with Mr Nelson. He was not registered for GST. He said that he was unable to refuse work offered by Mr Nelson in the sense that "we went to work every day and did the job and I did the job I was asked to do". He said that he was not at liberty to carry out work for other entities. Mr Hammond said that he was not registered to pay GST and did not submit a business activity statement.
95. A further statement dated 25 July 2019 deals with issues relevant to capacity and medical treatment. The statement was not referred to in submissions.
96. Text messages from Mr Hammond's mobile phone were in evidence. In a further statement dated 23 October 2019 Mr Hammond provided an explanation and context with respect to those text messages. Text messages in April 2018 between Mr Hammond and Ryan Becker are said to relate to the local squash competition.
97. An exchange of messages on 1 May 2018:
- "No spray gun?
 Sorry bro forgot to let ya know Adam had dropped his off at mine before I went to yours this arvo. Need me to drop your steps around in the morning
 Nah you can use them if ya need? X
 Cheers bruv just give us a message if ya need them at all"
- is explained by Mr Hammond as referring to an arrangement with Ryan Becker to borrow his spray gun which became unnecessary because Adam [Nelson] "had loaned his to me instead." Mr Hammond said that the reference to "steps" was a reference to a small ladder.

98. Mr Hammond explained that text message on 10 May 2018 from Ryan Becker “would you work Saturday and Sunday this weekend?” Was turned down because he was attending a funeral on the Saturday morning.
99. Again, on 10 May 2018 Ryan Becker asks, “You working with Adam next week?” to which Mr Hammond replied, “Yeah bro”. Ryan Becker then asks “Will you be up for working arvos after working for him? X” Mr Hammond replied “Probs not because I think we are doing big days but I’ll let ya know”. Ryan Becker replied, “Come help me for a week at least you get paid (sic) 30 and (sic) hour”.
100. Mr Hammond explained this as “Ryan making a further request to me to work for him after my day’s work with Adam and offering \$30 per hour.” Mr Hammond said at that time he was being paid \$25 per hour by Mr Nelson. He noted that he had declined the offer of employment from Ryan Becker “as I was expected to work big days with Adam”.
101. Messages on 17 May 2018 are explained as relating to a social get-together with Ryan Becker on the following day. A copy of the Facebook entry from 11 July 2018 is explained as a discussion regarding “another tradesmen’s equipment that had gone missing”. An exchange of messages on 22 February 2019 is explained as arrangements to catch up socially with Ryan Becker.
102. A statement by Kim Hammond, Mr Hammond’s mother was in evidence. That statement was not referred to in submissions and refers to matters not directly relevant to the present issue. Mrs Hammond confirmed that Mr Nelson informed her following the accident that he had no workers compensation insurance as he considered Mr Hammond to be a subcontractor.
103. Tax assessments and taxation returns for the years ended 30 June 2017 and 30 June 2018 were in evidence. The latter return was referred to in submissions. The return shows income derived as an apprentice painter in the year ended 30 June 2018 of \$17,316 from Delso and business income of \$16,193.
104. Certificates show that Mr Hammond was awarded his Certificate III in Painting and Decorating on 12 May 2018 and formal completion of his apprenticeship dated 27 August 2018.
105. A worker’s compensation claim form in evidence dated 8 October 2018 nominated Mr Nelson as the employer.

Adam Nelson.

106. A statement by Mr Nelson dated 29 January 2019 was in evidence. Mr Nelson said that he had carried on business as a painter and decorator since mid-2017. At the time of making the statement Mr Nelson was aged 26.
107. Mr Nelson said that Mr Hammond was “at all material times also a sole trader operating as a painter and decorator”. He said that Mr Hammond started operating as a sole trader in January or February 2018, noting that Mr Hammond’s ABN was registered on 7 February 2018.
108. Mr Nelson said that Mr Hammond had not started any subcontracting work with him until March 2018. He was not aware whether Mr Hammond had business cards. He said that to his knowledge Mr Hammond had worked as a sole trader on a number of jobs “during the time I knew him and during the time I engaged him to assist with the work referred to below.” This work included work for Alex Hammond (Hammond Painting & Decorating) and Ryan Becker Painting.

109. Mr Nelson said he had quoted the Ulupna Island Station job in June 2018. He said his estimate was that the job would take two weeks. The quote was accepted and Mr Nelson said that he asked Mr Hammond "if he would like to come and assist". He said that Mr Hammond had agreed and added; "He was supposed to be there for the whole two week period."
110. Work commenced on 21 September 2018. Mr Nelson said that he and Mr Hammond had commenced work at approximately 7.00 am on the day of the accident. (Mr Nelson recorded that the accident occurred on 26 September 2018 but that is clearly a typographical error as he subsequently refers to an investigation by work safe Victoria on 25 September 2018 relating to Mr Hammond's fall).
111. Mr Nelson said the accident occurred about 3.00 pm when both he and Mr Hammond were working on the shed roof. He noted that Mr Hammond had fallen through a skylight in the roof. He said, "I had mentioned to Toby a few minutes before the fall to be careful of the skylight and not to step on it." Mr Nelson went on to describe the subsequent investigation of the accident.
112. Mr Nelson said that he recommenced work at Ulupna on 5 November 2018 and completed the work by 13 November 2018.
113. Mr Nelson said that he had been good friends with Mr Hammond for four or five years. They had played football together and worked with the previous employer together.
114. With respect to the arrangements between them, Mr Nelson said that he and Mr Hammond had driven to Ulupna Island station in his work vehicle. He said that Mr Hammond had not driven his own car to the job because it was an eight hour trip and Mr Hammond did not want to take his car. He said that Mr Hammond "had his own equipment" and he, Mr Nelson, had spray guns.
115. A Work Safe Victoria Entry Report dated 8 November 2018 was attached to Mr Nelson's statement. It does not assist in determination of the present issue other than to confirm Mr Nelson's belief that Mr Hammond was a subcontractor.
116. Mr Nelson also attached to his statement answers that he had supplied in relation to questions asked by an investigator from ProCare Investigations. Mr Nelson denied that he had controlled where Mr Hammond worked. He said "he worked for other people. If he was busy with someone else's job, he would decline the work I offered to him."
117. Mr Nelson said that he had not set the hours when Mr Hammond worked and that Mr Hammond had "work the hours he chose". Mr Hammond was not subject to disciplinary action or a code of conduct and was not required to wear a uniform displaying Mr Nelson's business logo. Mr Nelson did acknowledge that he had "provided Toby with some work shirts with my business name embroidered on it, however, he did not have to wear them." Mr Nelson said this was a common practice "as we are often given shirts by Mitre 10 local paint shop with their logo on to wear if we wanted to."
118. Mr Hammond was not required to display Mr Nelson's business logo on his vehicle. He did not have a designated workspace and did not require permission to subcontract any part of the work.
119. Mr Nelson said that payment was not made in accordance with an award or industrial instrument. He said that he initially paid Mr Hammond \$25 an hour on invoice but "After he subcontracted for some other people, he told me his hourly rate was going up and he would now be \$30 per hour."

120. Mr Nelson said that Mr Hammond was responsible for rectifying mistakes he made. He was asked "Was the relationship/work performed on a continuing basis e.g. start date but no finishing date?" Mr Nelson replied, "I would estimate how long the job might take and once the job was complete, that was the end of the job." He said that he did not control Mr Hammond nor supervise his work.
121. Mr Nelson said that Mr Hammond had not worked regular hours every week, and had provided his own protective clothing and at Ulupna station had been working under similar conditions to Mr Nelson.
122. In answer to the question "Did the claimant work simultaneously for others as well as you?" Mr Nelson said "Yes. Although I did supply Toby with a spray gun as did not have one to use on this job." He said that Mr Hammond had supplied his own plant/materials apart from the spray gun. He said the work Mr Hammond performed was part of Mr Hammond's normal business.
123. Asked "Did you pay the claimant, who then paid subcontractors with a profit margin?" Mr Nelson replied "No". He said that Mr Hammond was carrying out a trade or profession in his own right and completed work for other people on his own when it was offered.
124. Mr Hammond had not provided a warranty or guarantee with his work. He did not hold insurance apart from public liability insurance.
125. With respect to the question "did the claimant advertise their own services under their own name e.g. in the Yellow Pages, through a website, to letterbox pamphlets, local newspaper advertisements et cetera?" Mr Nelson replied:
- "Toby had only been a sole trader for approximately six months prior to the accident. At this stage, it was word-of-mouth that got him jobs. During this period, he performed work as a sole trader for others such as Alex Hammond (Hammond painting & decorating), Ryan Becker painting and also did some of his own work for people such as his father."
126. Mr Nelson said that Mr Hammond had not taken any work back to his own premises and that he and Mr Hammond were both painters by trade. Asked "Was the relationship only for a specified period?" Mr Nelson replied "Yes. Depending on jobs I had on. At times I would have no work for Toby or he would be doing other work."
127. Mr Nelson agreed to a no penalty clauses applicable to Mr Hammond. He believed Mr Hammond was registered for GST.
128. Mr Nelson provided examples of Mr Hammond refusing work which he said occurred "a few times". He said that in September in the week prior to going to Cobram (the main town near Ulupna) Mr Hammond had done his own work for the majority of that week. He said that on 18 March 2018, Mr Hammond had messaged him asking if he had any work and Mr Nelson replied that he had no work until the end of the week. Mr Hammond had said he was happy with this as he was working for Ryan Becker for a few days.
129. Mr Nelson said that on 20 March 2018, he had messaged Mr Hammond saying that he needed help with a job and Mr Hammond had replied that he was able to help as he had just finished a job with Ryan Becker that day.
130. Mr Nelson said on 29 April 2018, he had informed Mr Hammond that he had no work for at least a week's time as the job that he was going to perform with Mr Hammond had been put back.

131. On 30 April 2018, Mr Nelson said that he had messaged Mr Hammond to say that he had work in prospect. Mr Hammond replied that he would let Mr Nelson know if he could work or not “as he had work on of his own”.
132. Mr Hammond had messaged Mr Nelson on 1 May 2018, asking to use Mr Nelson’s spray gun on a job he was doing. He also said that he was looking at a job to quote.
133. Mr Nelson said that Mr Hammond had purchased most of the equipment necessary for a painter and he was at liberty to work for other entities.
134. Asked “what was the exact period during which the claimant is carrying out work on your behalf?” Mr Nelson replied, “For this job - 21 September 2018 to approximately 4 October 2018.”
135. Mr Nelson confirmed there was no written contract with Mr Hammond. He supplied other information with respect to the subject accident.
136. A further statement by Mr Nelson dated 9 July 2019 was in evidence. In that statement Mr Nelson addressed factual assertions made by Mr Hammond in the Application to Resolve a Dispute.
137. Mr Nelson denied that he had offered Mr Hammond permanent and/or full-time work. He said that in January 2018 he had sent Mr Hammond a text message advising him that he could not offer him permanent work. The exchange of messages is as follows:
- “Hey mate sorry it’s taken me so long to get back to you. At the moment I can’t afford to give you permanent work, may have times I have work that I can give you but at this stage it won’t be consistent. Sorry bra, I’ll give you what I can
- Too easy that’s all I’m after I can still give Alex and [sic] hand and that sort of stuff just jump between you two
- Ok no worries I’ll let you no [sic] wen [sic] I’ve got some bro
- Ok”
138. Mr Nelson said that was untrue that Mr Hammond had commenced working for him exclusively on 23 March 2018 as evidenced by numerous text messages and invoices issued to other people after 23 March 2018.
139. Mr Nelson again noted that on 29 April 2018 he advised Mr Hammond that he had no work for him. The relevant text message reads “Hey bro just been told I can’t work on either job this week so won’t have anything out at least a week’s time and I can get back into tura [sic]. Sorry mate”
140. Mr Nelson said that Mr Hammond had never asked him for a payslip, group certificate or made any comment with regard to superannuation. He noted that in his tax return for the year ended 30 June 2018 Mr Hammond had disclosed earnings of \$16,193 as business income.
141. Mr Nelson said that Mr Hammond was free to select jobs, days and hours. He produced a copy of a text message dated 1 May 2018 in which Mr Hammond had stated that he was looking at a job at 5 o’clock that day. The exchange of messages also refers to the use of Mr Nelson’s spray gun by Mr Hammond during that week.

142. Mr Nelson also referred to an exchange of messages on 30 April 2018: “Mite have some work towards the end of the week. got a job in tura. if your [sic] keen” to which Mr Hammond replied “Yeah bro I’ll let ya know just in the process of organising shit to do dad’s workshop. Do you have feathers number?” Mr Hammond again requests loan of the spray gun.
143. Mr Nelson produced copies of text messages sent on 20 March 2018 enquiring whether Ryan Becker (referred to as “bubzy”) had work for Mr Hammond. Exchange is as follows:
- “Hey bro!! has bubzy got work for you for the week??
- Nah I finished with him today whys that? You a bit short this week?
- Yeah I was meant to get a cherry picker but it’s been stuck in Tathra with the fires and was meant to use it Monday to Wednesday but been put back a couple of days. So, I find one I can use Thursday Friday but does not enough work for 2 blokes
- Yeah that’s all good mate. So, start next week? Any idea how long you have work for me for?
- Yeah I’ll have work for you next week. Should have a couple of weeks work for you
- Sweet cheers mate”
144. Mr Nelson referred to Mr Hammond’s statement that he had worked for his brother Alex on 30 and 31 May 2018 at a time when Mr Nelson had no work for him. Mr Nelson said this was not correct and that he had commenced a job on 22 May 2018 and Mr Hammond had also worked on that project. He said that Mr Hammond had chosen to perform work for his brother on 30 and 31 May 2018.
145. With respect to Mr Hammond’s invoices in evidence Mr Nelson noted that invoice number 5 dated 30 March 2018 confirmed that Mr Hammond working for “someone else” at that time. Invoices 15 and 16 also relate to work performed by Mr Hammond for his brother, Alexander Hammond.
146. Mr Nelson said that consumables had been supplied by Mr Hammond except for paint which he had included in quotations provided to his customers. He noted the return of paint trays, rollers and frames and poles to Mr Hammond following the accident.
147. Mr Nelson said that there was no obligation on Mr Hammond to accept the work at Ulupna Island station. He said there had been a discussion about which vehicles to take. Mr Hammond had not wanted to take his own vehicle as vehicle “would not make it over the mountains”. He said the accommodation provided in respect of the Ulupna job was provided by the owner. He denied that there had ever been agreement to pay \$40 per hour.
148. Mr Nelson said that he had a number of work shirts with his business logo printed that he gave out to “friends and family”. He said he had given a few of these to Mr Hammond “as a sign of goodwill”. He was not told that he had to wear them.
149. Mr Nelson commented on observations that he had made of Mr Hammond following the accident. He said that he had seen Mr Hammond on numerous occasions driving around Bega Valley in a car marked with “Hammond Painting and Decorating” which was Mr Hammond’s brother’s business. Mr Nelson said that Mr Hammond had regularly worked for his brother prior to his accident.” **No open quote.**

Consideration and findings

150. There is no dispute that Mr Hammond, at the time of his injury, was performing work pursuant to an oral agreement with Mr Nelson. It is the nature of that agreement that is in issue in these proceedings.

151. Subject to certain exceptions which do not apply in the present case, section 4 of the 1998 Act defines a worker:

“**worker** means a person who has entered into or works under a contract of service or a training contract with an employer (whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, and whether the contract is oral or in writing)”.

152. Section 5 of the 1998 Act gives effect to the provisions of Schedule 1. Clause 2 of that Schedule provides:

“(1) Where a contract:

(a) to perform any work exceeding \$10 in value (not being work incidental to a trade or business regularly carried on by the contractor in the contractor’s own name, or under a business or firm name), or

(b) [Repealed]

is made with the contractor, who neither sublets the contract nor employs any worker, the contractor is, for the purposes of this act, taken to be a worker employed by the person who made the contract with the contractor.”

153. As noted by Snell DP in *Marinic*, Roche DP referred to the following passage from On Call Interpreters in *Malivanek v Ring Group Pty Ltd*⁶ (*Malivanic*):

“207. In the pursuit of greater simplicity and clarity it is of assistance that the majority in *Hollis*, whilst applying a multi-factorial approach, provided a focal point around which relevant indicia can be examined. That focal point has been elsewhere expressed as the ‘ultimate question’ posed by the totality approach: *Abdalla v Viewdaze Pty Ltd* (2003) 122 IR 215 at [34] (referred to with approval by Crispin P and Gray J in *Yaraka Holdings Pty Ltd v Gilgevic* [2006] ACTCA 6; (2006) 149 IR 339 at [303]); and see Sappideen C, O’Grady P and Warburton G, Macken’s Law of Employment, (6th ed, Lawbook Co, 2009), at [2.80]. As Wilson and Dawson J in *Stevens v Brodribb Sawmilling Co Pty Ltd* [1986] HCA 1; (1986) 160 CLR 16 observed at 35 ‘the ultimate question’ was posed by Windeyer J in *Marshall v Whittaker’s Building Supply Co Ltd* [1963] HCA 26; (1963) 109 CLR 210 at 217, in a passage which the majority in *Hollis* strongly endorsed at [40]. The majority in *Hollis* (citing Windeyer J) said, the distinction between an employee and an independent contractor is ‘rooted fundamentally’ in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer’s business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur’s own business and not as a manifestation of the business receiving the work, the person providing the work is an employee: *Hollis* [39], [40], [47], and [57] and see *Sweeney v Boylan Nominees Pty Ltd* [2006] HCA 19; (2006) 226 CLR 161 at [30]–[32]. The English courts have taken a similar approach. There the

⁶ [2014] NSW WCCPD 4; 15 DDCR 146

'entrepreneur test' seems to be the dominating feature: Selwyn NM, Laws of Employment (2006) Oxford University Press at [2.34].

[208] Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

Viewed as a 'practical matter':

- (i) is the person performing the work an entrepreneur who owns and operates a business; and,
- (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?

If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee."

154. The determination of the "ultimate question" requires consideration of the relevant indicia bearing upon the agreement in place between Mr Hammond and Mr Nelson at the time of injury.
155. There is no dispute that, while formal certification did not issue until later in the year, by the end of January 2018 Mr Hammond had completed his apprenticeship with Delso as well as the educational requirements to work as a painter and decorator. The evidence of the invoices established that Mr Hammond invoiced his brother who conducted the business "Hammond Painting and Decorating" for 29 hours work over the previous week on 2 February 2018.
156. I accept that in February 2018 Mr Hammond obtained an Australian Business Number.
157. Mr Hammond states (and I accept) that in March 2018 he performed work for another painter and decorator, Ryan Becker, who carried on business in the local area. The text messages between Mr Hammond and Mr Nelson establish that Mr Hammond finished that period of work with Mr Becker about 20 March 2018 and then worked with Mr Nelson.
158. Mr Nelson disputes that he offered continuous and permanent employment to Mr Hammond. The evidence of the text messages suggests that the situation was that Mr Nelson would offer work to Mr Hammond whenever he had need of assistance. There is no suggestion that Mr Nelson employed any other person. I accept that this was a case.
159. Mr Nelson states that Mr Hammond was free to decline his request for assistance. He said that on a number of occasions Mr Hammond had worked for other people. Mr Nelson pointed to work performed for Ryan Becker and for Mr Hammond's brother, Alex Hammond. I accept that the nature of employment was casual and that Mr Hammond was free to accept an offer of work from Mr Nelson or to decline it.
160. I accept that Mr Hammond did work for his brother Alex and for Ryan Becker but this work appears to have been carried out prior to 23 March 2018 when the business relationship between Mr Hammond and Mr Nelson commenced.
161. Mr Hammond stated that he had only worked for others when Mr Nelson had no work for him. His invoice 5 refers to work performed for Mr Hammond's uncle and aunt on dates which correspond with the Easter holiday period in 2018. There is no suggestion that Mr Nelson had work for Mr Hammond on those dates. I accept that, apart from his work with Mr Nelson, Mr Hammond worked only for family members after 23 March 2018.

162. On Monday, 30 April 2018, Mr Nelson sent a message to Mr Hammond indicating that he might have some work towards the end of the week for him. That message is consistent with Mr Nelson being unable to offer Mr Hammond work during the substantial part of the week and is consistent with invoice 11 which shows the next day of work for Mr Nelson as being 7 May 2018.
163. There is no invoice relating to the work that Mr Hammond performed for his parents except for invoice 10 which is addressed to "Hammond Conversions" and records "supply factory door paint" for the sum of \$1,000. That invoice is dated 7 May 2018 and I draw the inference that any work done for Mr Hammond's parents at that time was done during the week when Mr Nelson had no work for Mr Hammond.
164. The invoices established that Mr Hammond again worked for his brother Alex on 30 May 2018 and 31 May 2018. Mr Nelson stated at this time that he was performing work on a house at Mirador (a township to the north of Merimbula). Mr Nelson stated that Mr Hammond had chosen to go to work at Jindabyne for his brother, Alex Hammond but does not specifically state that he had work for Mr Hammond after Friday, 25 May 2018.
165. The invoice for the week ended 25 May 2018 indicates that Mr Hammond worked with Mr Nelson on the Monday, Tuesday and Friday only. Mr Hammond does not appear to have worked on the Wednesday or Thursday.
166. The invoices clearly indicate that Mr Hammond did not work continuously for Mr Nelson but rather performed work when Mr Nelson had need of assistance. In the approximately 26 week period between 23 March 2018 and 24 September 2018 Mr Hammond performed some work for Mr Nelson in 25 of those weeks. In the week before the accident Mr Hammond worked only 6 ½ hours. There is no evidence that he performed other work in that week.
167. In the period from 6 July 2018 to 13 September 2018 Mr Hammond worked each week with Mr Nelson averaging in excess of 40 hours per week in each of those weeks.
168. I accept that there was no binding obligation on Mr Nelson to provide continuing work for Mr Hammond. The agreement established by the evidence is that Mr Nelson would offer work to Mr Hammond when he required assistance and Mr Hammond would accept that offer by presenting himself for work.
169. Mr Hammond would then continue to work with Mr Nelson until Mr Nelson no longer had need of his services. Each continuous period of work by Mr Hammond for Mr Nelson constituted a separate agreement.
170. The agreement pursuant to which Mr Hammond and Mr Nelson attended at the Ulupna property is somewhat different to the earlier agreements in that Mr Hammond was provided with meals and accommodation in addition to the hourly rate. That agreement was formed when Mr Hammond agreed to Mr Nelson's request or offer for him to carry out the work at Ulupna. It is the indicia relevant to that contract that have to be considered to determine whether there was a contract of service within section 4 of the 1998 Act or, in the alternative, the work performed was such as to satisfy the deemed worker provisions in clause 2 of Schedule 1 to that Act.
171. Pursuant to that agreement Mr Hammond undertook to perform work in return for consideration calculated at an hourly rate and continue to do so until his services were no longer required.
172. The High Court in *Stevens* set out a number of relevant indicia to be considered in relation to the agreement. The issue of "worker" needs to be decided in the light of those criteria.

Control

173. The respondents submitted that Mr Nelson exercised no more control over Mr Hammond than would be expected of a contractor supervising the work of a subcontractor. I do not accept that submission.
174. There is disagreement on the evidence as to how it came about that Mr Hammond travelled with Mr Nelson to Ulupna in Mr Nelson's work vehicle. Nevertheless, it is clear that Mr Hammond placed himself in a position where his mobility was dependent upon Mr Nelson if he wished to leave the worksite or the accommodation.
175. The accommodation was negotiated between Mr Nelson and the owner of Ulupna station. There was no practical way that Mr Hammond could arrange his own accommodation given that he was travelling with Mr Nelson and reliant on his vehicle.
176. The scope of the works was entirely in the hands of Mr Nelson. Mr Hammond was to be remunerated on an hourly basis and had no control over the length of time the job would take. Mr Nelson's estimate had been approximately two weeks.
177. Although there was little evidence as to how the work was shared between Mr Hammond and Mr Nelson, it appears that the tasks were shared with both attending to the washing down of the sheds in preparation for painting. There is no evidence that Mr Hammond at any time made any decisions as to what tasks were to be performed and/or the order of works.
178. Mr Nelson stated that he warned Mr Hammond of the potential danger of the presence of the skylight shortly before the accident occurred. That warning is consistent with the obligations of an employer towards a worker rather than to a subcontractor.
179. On balance I am satisfied that the element of control favours the existence of a contract of service.

Mode of remuneration

180. It is common ground that Mr Hammond was to be remunerated on invoice calculated on the basis of an hourly rate.
181. No invoices were rendered Mr Hammond in respect of the work at Ulupna but the previous practice, as demonstrated by the invoices in evidence, had been to render an invoice on a weekly basis while work continued. From 1 June 2018 to 13 September 2018 weekly invoices were rendered and there is no evidence to suggest that a different practice would have been adopted with respect to the work at Ulupna. I accept that the rendering of weekly invoices was intended to continue.
182. Mr Hammond's invoices did not include GST. The parties agree that this is a neutral factor as businesses having a turnover of less than \$75,000 in a financial year are exempted from that requirement. I accept that this is the case.
183. There is dispute on the evidence as to the agreed rate to be paid in respect of the Ulupna job but it is clear that it was to be an hourly rate. The rate which Mr Nelson asserts was agreed upon, \$30 an hour, would appear to be more consistent with a painter's wage rather than a figure calculated to provide Mr Hammond with monies over and above the wage to cover business expenses such as depreciation, purchase of equipment and superannuation. The fact that Mr Nelson considered \$30 per hour appropriate remuneration suggests the relationship of employer and employee rather than remuneration of a subcontractor.

184. I accept that no provision was made for sick pay, holiday pay or superannuation. No loading in respect of weekend work or overtime was paid.
185. I accept that Mr Nelson approached the agreement on the basis that he believed that Mr Hammond was a subcontractor. Mr Hammond also told an investigator at an early stage that he had entered into the contract believing himself to be a subcontractor. However, the intention of the parties is displaced if the contract as performed does not support that view.
186. The remuneration which Mr Nelson asserts was appropriate at \$30 per hour is more supportive of a conclusion that remuneration was at the level of a wage and not payment to a subcontractor. The sum of \$30 per hour is an extremely modest sum if the recipient is to fund his own income protection insurance, holiday pay and superannuation.
187. Mr Grant, for the nominal insurer, submitted that it was important to determine who fixed the hourly rate. The evidence is that, following Mr Hammond completing his trade qualification he performed work for his brother's business and was paid \$25 per hour. When Mr Hammond first commenced to work with Mr Nelson he continued to be paid \$25 an hour until about mid May 2018. At about that time the text messages establish that Ryan Becker offered Mr Hammond work at the rate of \$30 per hour⁷ although Mr Hammond did not accept the offer as he was at that time busy with work for Mr Nelson. From that point forward the invoices addressed to Mr Nelson adopt an hourly rate of \$30. How that situation arose is otherwise not the subject of evidence.
188. With respect to the Ulupna job, Mr Hammond asserted that Mr Nelson had agreed to a rate of \$40 per hour. Mr Nelson disputed this and there is no corroborating evidence either way. I could not be satisfied on the balance of probabilities that the rate of \$40 per hour had been agreed to by Mr Nelson.
189. With regard to establishment of the rate of \$30 per hour, it is probable that Mr Hammond informed Mr Nelson that he had been offered more money by Mr Becker and Mr Nelson agreed to pay the additional five dollars per hour. The presumption of continuity suggests that the rate would continue to be \$30 per hour in respect of the Ulupna job.
190. I do not accept that particular hourly rate is of substantial weight in determining whether he was employed as a subcontractor or a casual employee.
191. The hourly rate was not determined by Mr Hammond. The situation was that Mr Hammond appears to have nominated a figure which Mr Nelson would have been free to accept or reject. Mr Nelson could well be viewed as having set the rate by accepting Mr Hammond's nominated figure instead of going into the marketplace to find a cheaper alternative.
192. The mode of remuneration overall does not provide substantial assistance in deciding the issue. The rate of remuneration if anything points to Mr Hammond having been an employee, albeit on a casual basis. The basis of payment being an hourly rate is more suggestive of employment as a worker than as a subcontractor.

The provision and maintenance of equipment

193. Mr Hammond states, and I accept, that he had his own brushes, rollers, roller frames, poles and paint trays. It also appears that Mr Hammond owned or had access to a small set of steps which he had used on jobs with Mr Nelson. He also had a pressure washer he said Mr Nelson asked him to bring to the Ulupna job.

⁷ Application to Admit Late Documents by the applicant dated 28 October 2019, page 5

194. It is not disputed that Mr Nelson supplied the paint for the Ulupna job. Mr Hammond said that Mr Nelson also supplied the spray gun and the ladders. Mr Hammond said that he asked Mr Nelson about the availability of harnesses for working on the roof. Mr Nelson said that he did not have harnesses but it does not appear that Mr Nelson was of the view that Mr Hammond should have supplied safety equipment himself. I accept that Mr Hammond looked to Mr Nelson for the provision of this equipment as well as for other necessary equipment such as masking tape, paint, ladders and the spray gun.
195. Following the accident there are text messages relating to the return of Mr Hammond's equipment which appears to be limited to brushes, rollers and roller frames, trays and poles.
196. I accept that Mr Hammond had his own paintbrushes, rollers and frames, poles, paint trays as well as a pressure washer and small step ladder. Mr Nelson supplied the paint, masking tape, ladders and the spray gun.
197. Mr Hammond's evidence is that the minor items or items that were similar to those he had as an apprentice were typically owned by all painters. I accept that major items essential for performance of the painting contract were supplied by Mr Nelson including the paint, ladders to obtain access to the roofs and the paint spray gun.
198. Mr Nelson supplied Mr Hammond with shirts bearing Mr Nelson's business name which Mr Hammond wore. Mr Nelson said that Mr Hammond supplied his own "protective clothing" but the nature and extent of that clothing is unknown. Mr Hammond said that he provided his own trousers. I do not attach weight to the supply of protective clothing as I cannot determine what protective clothing was in use or what the practice in the industry with regard to the supply of such clothing may have been.
199. I am satisfied that the equipment supplied by Mr Nelson at the Ulupna job was essential to the job and Mr Hammond could not have completed the task without the paint, ladders and the spray gun. On balance the supplied equipment favours the existence of a contract of service.

The obligation to work

200. Mr Nelson submitted that Mr Hammond was under no obligation to work and provided examples when Mr Hammond had declined work offered by Mr Nelson. In the period after 23 March 2018 when Mr Hammond first performed work for Mr Nelson there appears to be only two occasions on which Mr Hammond worked for another person during the working week. Towards the end of April and in early May 2018 Mr Hammond worked for his parents. At least part of that time Mr Nelson had no work available as evidenced by the text messages. On one further occasion on the 30 May 2018 and 31 May 2018 Mr Hammond went to Jindabyne to work with his brother Alex. ("Hammond Painting").
201. Mr Nelson pointed to the exchange of text messages on (Monday) 30 April noted above. The text message from Mr Nelson states that Mr Nelson might have some work available for Mr Hammond towards the end of the week. The invoices establish that Mr Hammond had last worked for Mr Nelson on Wednesday, 25 April 2018.
202. It is not inconsistent with employment as a casual employee that a worker would decline such an offer of employment in circumstances where other work was available to him. On 7 May 2018 (the next Monday following the text message) Mr Hammond rendered an invoice to his parents for work that he had clearly done the week before. The invoices then indicate that he worked for Mr Nelson again on 7 May 2018 for eight hours.
203. I am satisfied that Mr Nelson did not offer Mr Hammond permanent or full-time employment at any stage. Rather Mr Nelson offered work when he required assistance and only for the duration of that requirement.

204. Mr Nelson noted that Mr Hammond had not worked for him in the week prior to going to Ulupna and said, “he did his own work for majority of that week”. There is no invoice supporting the proposition and no person is identified as a person for whom Mr Hammond worked. Mr Hammond said that he had not worked for anyone other than Mr Nelson and Mr Nelson does not say that he had work available for Mr Hammond in the week prior to the going to Ulupna.
205. Mr Nelson referred to the offer of employment on 20 March 2018 in which Mr Hammond acknowledged that he was available to work as he had completed the job with Ryan Becker on that day. That however took place before Mr Hammond commenced to work with Mr Nelson. There is no evidence that Mr Hammond worked with Ryan Becker after 23 March 2018. There is evidence from the text messages that Ryan Becker offered him work but Mr Hammond replied that he was not available as he was working for Mr Nelson.
206. With respect to the Ulupna job Mr Nelson stated “He [Mr Hammond] was supposed to be there for the whole two week period”.⁸
207. I accept that Mr Hammond was generally under no obligation to accept offers of work from Mr Nelson but I am satisfied in respect of the contract relating to the Ulupna job that Mr Hammond accepted the offer to go to Ulupna station and remain there for the duration of the work.
208. Mr Hammond was not contractually bound to remain at the premises in the sense that he had not contracted to complete the work. I do not think the particular indicia of “obligation to work” is of assistance in determining Mr Hammond’s status. The nature of the contract alleged by Mr Nelson with Mr Hammond serving as a subcontractor equally is not said to impose any obligation on Mr Hammond to complete the work but rather simply to perform painting work at a particular rate for an unspecified period of time.

The timetable of work and provision for holidays.

209. I am satisfied that the timetable of work was set by Mr Nelson in the sense that it was Mr Nelson who determined the date on which the parties were to travel to Ulupna, the date of commencement of work and the approximate finishing date. That timetable would have been dependent upon Mr Nelson’s assessment of the job which he quoted in June 2018.
210. No provision for holidays was made and did not appear the parties turned their mind to this question. The nature of the work was casual work comprising a series of contracts up to and including the Ulupna job.

The deduction of income tax

211. It is common ground that no income tax was deducted in respect of the monies paid by Mr Nelson to Mr Hammond.

212. In *Marinic* Snell DP noted (omitting references):

“[74] In *ACE Insurance Ltd v Trifunovski Buchanan J* (Lander and Robertson JJ agreeing) said:

[211] It is also difficult, in my view, to give much independent weight to arrangements about taxation, or even matters such as insurance cover or superannuation. These are reflections of a view by one party (or both) that the relationship is, or is not, one of employment. For that reason, in my view, those matters are in the same category as declarations by the parties in their contract

⁸ ARD p.104 (Statement of Mr Nelson paragraph 6)

(from which they often proceed). They may be taken into account but are not conclusive. These matters are less important than the adoption by the parties (where this occurs) of rights and obligations which are fundamentally inconsistent with basic requirements of a contract of employment, such as the ability to delegate the discharge of obligations under a contract to another person, or where there is a lack of control over how work is done.'

[75] In *On Call Interpreters Bromberg J*, to similar effect, observed:

"Each of these interpreters perceived themselves to be self-employed and had an ABN. Their evidence also indicated that they interacted with the ATO on the basis that they conducted a business. I attach little weight to those indicators. Obtaining an ABN is a simple process in which the existence of a business is not required to be demonstrated. Further, it is not surprising that in circumstances where these individuals perceived themselves to be self-employed that some of the regulatory requirements of a business were in evidence ... In the absence of other indicators of the existence of a business, the fact that some of the regulatory requirements of a business were in place, is likely to have had more to do with an incorrect self-assessed conclusion of the existence of a business than the fact of such a business existing."

213. While this factor points to there being a relationship of contractor and subcontractor, I accept that the fact that no income tax was deducted from the payments made to Mr Hammond is of little weight in assessing the nature of the contract to perform work in the circumstances of this case.

The right to delegate work.

214. Mr Nelson stated that Mr Hammond had the right to delegate the work to be performed under the contract to another qualified painter. In the practical circumstances of the case I do not accept that submission. I accept that Mr Nelson expected the personal services of Mr Hammond. He requested Mr Hammond to bring with him his pressure washer. The proposal involved sharing accommodation at a relatively remote location.

215. I accept that this was an agreement between two people who had known each other for many years and had completed their apprenticeship with the same employer. Mr Hammond had worked continually with Mr Nelson since 1 June 2018.

216. The idea that Mr Hammond could have supplied another qualified worker in his place is foreign to the way that the parties contemplated the agreement was to be performed. As a practical matter there can have been no realistic expectation that Mr Hammond might supply another qualified worker in his place at any time.

217. In reality I think that delegation of the job, given the personal relationship between Mr Hammond and Mr Nelson over the past years, was not something that was within the contemplation of either of them at the time. I do not regard this criterion as being of assistance in determining the nature of the agreement with respect to the Ulupna job.

The right to dismiss the person.

218. Whether the engagement of Mr Hammond to do work was regarded as a contract for service or a contract for services it has to be implied that the agreement subsisted for only so long as Mr Nelson had need of additional assistance. Consideration of this criterion is of no assistance in determining whether Mr Hammond was a "worker".

The right to dictate the hours of work, place of work and the like.

219. The evidence of the invoices suggests that no regular hours of work were fixed. Up to 28 May 2018 the number of hours worked varied from between 24½ to 41 in the week ending 17 May 2018. From 1 June 2018 to 20 September 2018 the hours of work vary between 6½ and 48 hours.
220. Whether Mr Nelson had the right to dictate the hours of work with respect to the Ulupna job is not the subject of direct evidence.
221. As noted above it is clear from Mr Nelson's statement that he expected Mr Hammond to remain on the job until it was finished ("he was supposed to be there for the whole two week period.") Mr Hammond and Mr Nelson commenced work on Friday, 21 September 2018 and continued work on the Saturday and Sunday. The accident occurred on the following Monday.
222. Mr Hammond states that he conformed to the activities of Mr Nelson. In the particular circumstances where Mr Nelson and Mr Hammond were residing at or near the worksite and travelled together it would be unsurprising that they worked similar hours.
223. The nature of the agreement relating to the Ulupna job was that Mr Hammond was present to assist Mr Nelson in fulfilment of Mr Nelson's contract with the owners of the property. The nature of the work relationship suggests that Mr Nelson would be in a position to direct when and where he required that assistance.
224. Whether Mr Hammond was viewed as an independent contractor or a casual employee the nature of the agreement was that Mr Hammond was present because Mr Nelson needed additional assistance. On either view this implied that Mr Hammond would conform to the needs of Mr Nelson with respect to the hours of work and the place of work.
225. Consideration of this aspect does not assist in determination of the issue.

The right to the exclusive services of Mr Hammond

226. The evidence of the text messages show that Ryan Becker asked Mr Hammond to assist him at one point but Mr Hammond replied that he was unavailable because he was working for Mr Nelson. That display of loyalty could be equally attributable to the hope of future employment as a subcontractor or the hope of further casual employment as a worker.
227. The evidence from Mr Nelson is that he expected Mr Hammond to remain on the job at Ulupna for the duration of the job which he estimated at two weeks. That expectation would apply whether Mr Hammond was working as a subcontractor or as a casual employee. It does not assist in determining the issue.

Other factors

228. The agreement between Mr Hammond and Mr Nelson has to be viewed in the light of their pre-existing friendship and familiarity with each other. There was clearly a degree of informality in their arrangements for the performance of work. Mr Nelson willingly lent equipment to Mr Hammond when he needed it. Mr Hammond was offered work by Ryan Becker as evidenced by text messages but declined it because he was working for Mr Nelson.
229. In determining the "ultimate question" consideration has to be given to the whole of the evidence. The respondents submitted that the whole of the evidence suggested that Mr Hammond was carrying out work as a subcontractor in his own business. I do not accept that the evidence, considered as a whole, supports that submission.

230. The evidence of Mr Hammond is that on completing his trade qualifications he worked for his brother. He completed 29 hours up to 2 February 2018 and a further 14 hours between 23 February 2018 and 27 February 2018 at a rate of \$25 per hour.
231. About that time, Mr Hammond obtained an Australian Business Number. Mr Hammond said that in March 2018, he worked for Ryan Becker and this is supported by text message to Mr Nelson in which Mr Hammond indicated that he had completed work with Mr Becker and was then free to work with Mr Nelson. There does not appear to be an invoice or any other record of payment relating to work done for Mr Becker.
232. Mr Hammond then worked for Mr Nelson from 23 March 2018 to 29 March 2018 completing 33½ hours at the rate of \$25 per hour.
233. He then worked over Easter 2018 for his aunt and uncle who appeared to have paid him at the rate of about \$40 per hour (invoice 5).
234. In early May 2018, Mr Hammond did work and supplied materials for his parents (Hammond Conversions). On 30 and 31 May 2018 he worked with his brother Alex Hammond who traded as "Hammond Painting and Decorating". It appears from the invoices that he was paid \$500 per day for work at Jindabyne.
235. The conclusion from examination of the invoices is that from 23 March 2018 onwards Mr Hammond performed work only for family members in addition to the work performed for Mr Nelson. From early June 2018 to 20 September 2018 the invoices indicate that Mr Hammond worked only for Mr Nelson.
236. The evidence establishes that Mr Hammond did quote a job in May 2018. Nothing appears to come of that quotation which was on the evidence available misdirected so that it did not reach the intended recipient. There is no evidence that any work was ever performed pursuant to that quotation.
237. Mr Nelson drew attention to the fact that suppliers provided shirts with their respective logos on as a matter of goodwill and stated he had done the same Mr Hammond. The position of a tradesman wearing clothing advertising the services of a supplier is a rather different situation to a tradesman wearing clothing that advertises a rival tradesman.
238. I accept that Mr Hammond did not advertise himself as carrying on a business. He had no business cards or signage. It does not appear that he caused any entry to be made in any trade directory or online and it is not suggested that his work vehicle carried any signage indicative of a business. He did not have a business name.
239. Mr Nelson said that Mr Hammond was relying on "word-of-mouth" but apart from work for his close relatives Mr Hammond had no public exposure other than when he was working with Mr Nelson from and after early June 2018. Particularly after early June 2018 there appears to be no effort by Mr Hammond to conduct a business on his own behalf.
240. I accept that the absence of payment of penalty rates, holiday pay and superannuation and the absence of deductions for taxation superficially point to Mr Hammond carrying on business but when viewed against the background of the unsophisticated nature of their relationship and the lack of any steps taken by Mr Hammond to promote his business, I conclude that his work with Mr Nelson with respect to the job at Ulupna was as a casual employee engaged to assist Mr Nelson in completing Mr Nelson's contract with the owner of Ulupna station for an estimated period of two weeks.

241. In terms of the questions posed in One Call Interpreters after weighing the various criteria, I conclude that Mr Hammond was not a person performing work as an entrepreneur who owned and operated a business and I conclude that, in performing the work at Ulupna Mr Hammond was not working in and for his own business as a representative of that business and not of the business of Mr Nelson.
242. Accordingly, I am satisfied that the respect to the Ulupna job Mr Hammond was a “worker” within section 4 of the 1998 Act employed by Mr Nelson.
243. If I am wrong in that conclusion it seems to me that the evidence establishes that Mr Hammond would have been a deemed employee pursuant to clause 2 of Schedule 1 to the 1998 Act.
244. There is no dispute that the contract was one for work exceeding \$10 in value. The contract was not sublet and Mr Hammond did not employ any worker. For the reasons set out above I do not accept that the work performed pursuant to agreements with Mr Nelson from and after early June 2018 was work incidental to a trade or business regularly carried on by Mr Hammond.
245. As noted above from that date Mr Hammond worked exclusively for Mr Nelson. He last quoted a job in May 2018 and there is no evidence of any attempt to seek other projects after that time.
246. I am satisfied that Mr Hammond may have considered himself as conducting a business when he first completed his qualifications but could not be said to have “regularly” carried on business after early June 2018 and probably not before that date.
247. With no attempt to advertise. Mr Hammond is content to wear the shirts advertising Mr Nelson’s business. He has no signage on his motor vehicle, no business cards, he does not hand out flyers or, on the evidence, seek to promote his own business.

Issue 3 - connection to the state of New South Wales

248. Section 9AA of the 1987 Act provides as follows:

“9AA LIABILITY FOR COMPENSATION

- (1) Compensation under this Act is only payable in respect of employment that is connected with this State.
- (2) The fact that a worker is outside this State when the injury happens does not prevent compensation being payable under this Act in respect of employment that is connected with this State.
- (3) A worker's employment is connected with--
 - (a) the State in which the worker usually works in that employment, or
 - (b) if no State or no one State is identified by paragraph (a), the State in which the worker is usually based for the purposes of that employment, or
 - (c) if no State or no one State is identified by paragraph (a) or (b), the State in which the employer's principal place of business in Australia is located.
- (4) In the case of a worker working on a ship, if no State or no one State is identified by subsection (3), a worker's employment is, while working on a ship, connected with the State in which the ship is registered or (if the ship is registered in more than one State) the State in which the ship most recently became registered.

- (5) If no State is identified by subsection (3) or (if applicable) (4), a worker's employment is connected with this State if--
 - (a) the worker is in this State when the injury happens, and
 - (b) there is no place outside Australia under the legislation of which the worker may be entitled to compensation for the same matter.
- (6) In deciding whether a worker usually works in a State, regard must be had to the worker's work history with the employer and the intention of the worker and employer. However, regard must not be had to any temporary arrangement under which the worker works in a State for a period of not longer than 6 months.
- (7) Compensation under this Act does not apply in respect of the employment of a worker on a ship if the Seafarers Rehabilitation and Compensation Act 1992 of the Commonwealth applies to the worker's employment.
- (8) In this section--

'ship' means any kind of vessel used in navigation by water, however propelled or moved, and includes--

 - (a) a barge, lighter, or other floating vessel, and
 - (b) an air-cushion vehicle, or other similar craft, used wholly or primarily in navigation by water.

'State' includes Territory and, in a geographical sense, a State's or Territory's relevant adjacent area as described in Schedule 1."

249. Mr Grant submitted that the State identified pursuant to section 9AA(3) as was the State of Victoria because the agreement was to be performed in Victoria and Victoria was the State where Mr Hammond "usually works" in relation to the agreement to do work at Ulupna. I do not accept that submission.

250. In *Martin v R J Hibbens Pty Ltd*⁹ Deputy President Roche said:

[30] It is accepted that the relevant terms of section 9AA(3) provide cascading tests for determining the State with which a worker's employment is connected. First, a worker's employment is connected with the State 'in which the worker usually works in that employment' (the 'usually works' test). If that test provides an answer to the question, there is no need to proceed further. If not, one applies the test in section 9AA(3)(b) and looks for the State 'in which the worker is usually based for the purposes of that employment' (the 'usually based' test). If that test provides the answer, there is no need to proceed further. If not, one applies the test in section 9AA(3)(c) and looks for the State 'in which the employer's principal place of business in Australia is located' (the 'principal place of business' test).

[31] In determining whether a worker usually works in a State under section 9AA(3)(a), regard must be had to the worker's 'work history' with the employer and the intention of the worker and employer. However, regard must not be had to any 'temporary arrangement' under which the worker works in a State for a period of not longer than six months (section 9AA(6))."

251. I am satisfied that the agreement to perform work at Ulupna was a "temporary arrangement" for work in the State of Victoria for less than six months and as such is to be disregarded in assessing of where Mr Hammond "usually works". Accordingly, the State cannot be identified pursuant to section 9AA (3)(a). It is therefore necessary to apply the test in section 9AA(3)(b) to determine the State in which Mr Hammond was "usually based".

⁹ [2010] NSWCCPD 83

252. I am satisfied that for the purposes of the agreement relating to the Ulupna job, Mr Hammond was based in the State of New South Wales. The evidence is that Mr Nelson contacted Mr Hammond in New South Wales in order to offer the work and the contract was accepted. Mr Hammond kept his equipment within the state of New South Wales and was driven from the place where he was based to the worksite by Mr Nelson.
253. The history of the relationship between Mr Hammond and Mr Nelson is of all contact with Mr Hammond taking place within New South Wales up to the point where Mr Nelson and Mr Hammond travel to Victoria. It was from his New South Wales base that Mr Hammond took his equipment including his paint brushes and rollers, roller frames poles and the water blaster.
254. In Victoria, Mr Hammond resided in temporary accommodation arranged by Mr Nelson. I could not be satisfied on the evidence that the accommodation in Victoria could be regarded as Mr Hammond's "base".
255. I am satisfied that Mr Hammond was "usually based" within the state of New South Wales and the provisions of section 9AA(3)(b) are satisfied.

Issue 3 – weekly payments in respect of incapacity.

256. I am satisfied that Mr Hammond was a worker within section 4 of the 1998 Act when he suffered injury in the course of his employment with the first respondent on 24 September 2018. No submissions were addressed to section 9A of the 1987 Act and it is clear that work was a substantial contributing factor to the employment. The case was conducted on the basis that incapacity due to injury was not in dispute and the parties agreed that Mr Hammond currently has no capacity for employment.
257. The issue of the preinjury average weekly earnings is to an extent dependent upon the findings with regard to the issue of employment and the application of section 9AA. Those issues having been determined; it is appropriate that the parties be provided with the opportunity to provide submissions as to the appropriate calculation of preinjury average weekly earnings in accordance with section 44C of the 1987 Act.
258. The findings that I have made necessarily involve a finding that Mr Hammond was not "continuously employed by the same employer for the period of 52 weeks immediately before the injury". (Section 44D(1)(a)). If employment is confined to the agreement in relation to the Ulupna job then the "relevant period" is defined in section 44D(1)(a) the relevant period would seem to be from 20 September 2018 to 24 September 2018.
259. I am not satisfied that Mr Hammond has discharged the onus of establishing that the rate agreed was \$40 per hour in respect of that period of employment. The appropriate findings appear to be that the pre-existing rate would continue to apply at \$30 per hour. That however is a preliminary view and may well be displaced by further submissions of the parties. That approach disregards the history of Mr Hammond's earnings because work was not always available to him.
260. It is appropriate that the parties have the opportunity to discuss this issue and I will request the Registrar to provide a further telephone conference so that arrangements can be made for supply of written submissions should the parties be unable to agree on appropriate figure for pre-injury average weekly earnings.

