SUPREME COURT OF QUEENSLAND

CITATION:	*Workcover Queensland v CRG Harvesting Pty Ltd* [2026] QCA 124
PARTIES:	**WORKCOVER QUEENSLAND** (appellant) **v** **CRG HARVESTING PTY LTD** ABN 48 164 598 547 (first respondent) **CARLO BASILLIO GERMANOTTA** (second respondent)
FILE NO/S:	Appeal No 4965 of 2025 SC No 5 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville – [2025] QSC 329 (North J)
DELIVERED ON:	3 July 2026
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2026
JUDGES:	Mullins P, Bond JA, Doyle JA
ORDERS:	**1. The appeal is dismissed.** **2. The appellant pay the respondents' costs of the appeal.**
CATCHWORDS:	WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – PERSONS ENTITLED TO COMPENSATION – WHO IS A WORKER OR EMPLOYEE – CONTRACT OF SERVICE OR INDEPENDENT CONTRACTOR – GENERAL PRINCIPLES – where the second respondent sustained an injury carrying out repairs to a tractor arising out of the negligence of the first respondent – where the appellant refused to indemnify the first respondent on the basis that the second respondent was not a worker for the purposes of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (the Act) – where the primary judge found that the second respondent was a worker – where the appellant contends that there was no contract between the respondents, or at least no contract of employment – where the appellant contends there was no intention to be legally bound, pointing to a wage reversal in 2019 – where the appellant contends that the structure between the respondents was a device or a sham – where the appellant contends that the primary judge wrongly had regard to the parties' subjective

intention in resolving these issues – whether the second respondent worked under a contract and was an employee for the purpose of the assessment of PAYG withholding under s 11 of the Act

WORKERS' COMPENSATION – ENTITLEMENT TO COMPENSATION – PERSONS ENTITLED TO COMPENSATION – WHO IS A WORKER OR EMPLOYEE – PARTICULAR OCCUPATIONS – COMPANY DIRECTOR – where a person is not a worker under the Act if they perform work under a contract of service with a corporation of which the person is a "director" – where the primary judge found that the second respondent was not acting in the position of a director of the first respondent – where the second respondent had signed Directors' Declarations and attended directors' meetings – where those documents were signed in error and not sent to any third party – where the second respondent provided minimal input at annual meetings – where the second respondent was not responsible for any of the managerial, administrative, financial or corporate governance affairs of the first respondent – whether the second respondent acted in the position of a director

DAMAGES – ASSESSMENT OF DAMAGES IN TORT – PERSONAL INJURY – INCOME LOSS AND LOSS OF EARNING CAPACITY – where the primary judge assessed the second respondent's impaired earning capacity to the date of the trial, having regard to past trust distributions, at $300 per week for seven years – where there are some disparities between the financial records and the figures the primary judge applied – whether the primary judge made an error which yielded an assessment beyond the limits of a sound discretionary judgment

DAMAGES – ASSESSMENT OF DAMAGES IN TORT – PERSONAL INJURY – METHOD OF ASSESSMENT GENERALLY – ASSESSMENT OF PROSPECTIVE LOSS – where the primary judge made a discount of 15 per cent for contingencies for future economic loss – where the second respondent had a pre-existing right shoulder condition – where expert evidence was led which suggested that such condition would have, but for his 2018 injury, restricted the second respondent's ability to perform farming work within five to ten years from 2023 – whether the primary judge erred applying a 15 per cent discount for adverse contingencies

Corporations Act 2001 (Cth)
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 11, s 48(1), Schedule 2, Schedule 6

Amaca Pty Ltd v Latz (2018) 264 CLR 505; [2018] HCA 22, applied
Aquisite Pty Ltd v Moss [2023] FCA 410, cited

BCI Finances Pty Ltd (in liq) v Binetter (No 4) (2016) 348 ALR 227; [2016] FCA 1351, cited
Cagney v D&J Building Contractors Pty Ltd (2025) 344 IR 435; [2025] QCA 116, applied
Calder v Boyne Smelters Ltd [1991] 1 Qd R 325; [1990] QSCFC 51, applied
CH Real Estate Pty Ltd v Shatford [2026] NSWSC 129, cited
Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd (2022) 275 CLR 165; [2022] HCA 1, applied
Corporate Affairs Commission v Drysdale (1978) 141 CLR 236; [1978] HCA 52, cited
Coshott v Prentice (2014) 221 FCR 450; [2014] FCAFC 88, cited
Doerr v Gardiner [2023] QCA 160, applied
EFEX Group Pty Ltd v Bennett (2024) 330 IR 171; [2024] FCAFC 35, applied
Equuscorp Pty Ltd v Glengallan Investments Pty Ltd (2004) 218 CLR 471; [2004] HCA 55, applied
Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296; [2012] FCAFC 6, applied
Hollis v Vabu Pty Ltd (2001) 207 CLR 21; [2001] HCA 44, cited
Husher v Husher (1999) 197 CLR 138; [1999] HCA 47, applied
Lewis v Condon (2013) 85 NSWLR 99; [2013] NSWCA 204, cited
Locke v H.C. Loneragan & Company Pty Ltd as trustee for the Loneragan Family Trust t/as Quantum Forensic Solutions [2025] NSWCA 166, applied
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638; [1990] HCA 20, cited
Pickersgill v Tsoukalas [2009] SASC 357, cited
R v Young (2021) 8 QR 68; [2021] QCA 131, cited
Raftland Pty Ltd v Federal Commissioner of Taxation (2008) 238 CLR 516; [2008] HCA 21, applied
Re ACN 092 745 330 [2017] NSWSC 241, cited
Re Valleys Rugby League Football Club Ltd [1997] 2 Qd R 645; [1997] QSC 21, applied
Sharrment Pty Ltd v Official Trustee in Bankruptcy (1988) 18 FCR 449; [1988] FCA 289, applied
Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16; [1986] HCA 1, applied
Todorovic v Waller (1981) 150 CLR 402; [1981] HCA 72, applied
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, applied
Wallaby Grip Ltd v QBE Insurance (Australia) Ltd (2010) 240 CLR 444; [2010] HCA 9, applied
Wilson v Peisley (1975) 50 ALJR 207; (1975) 7 ALR 571, applied

COUNSEL:	S J Deaves KC, with M A Rothery, for the appellant P T Cullinane KC, with L M Kennedy, for the first respondent C C Heyworth-Smith KC, with C Campbell, for the second respondent
SOLICITORS:	Jensen McConaghy Lawyers for the appellant Taylor Solicitors for the first respondent Macrossan & Amiet Solicitors for the second respondent

[1] **MULLINS P:** I agree with Doyle JA.

[2] **BOND JA:** I agree with the reasons for judgment of Doyle JA and with the orders proposed by his Honour.

[3] **DOYLE JA:** This is an appeal from a judgment determining that the appellant (Workcover Queensland) is liable to indemnify the first respondent (CRG Harvesting) in respect of its liability to the second respondent (Carlo) for injury sustained by him whilst carrying out repairs to a tractor. It may be assumed for these purposes that the injury arose as a result of the negligence by CRG Harvesting, including by one of its employees, Mr Sheedy.

[4] Workcover Queensland declined to indemnify CRG Harvesting on the basis that its policy of insurance did not cover Carlo, because he was not a "worker" for the purposes of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) (the Act). The primary judge rejected Workcover Queensland's contentions finding that Carlo was a worker and, relevantly, that he was not a director of CRG Harvesting.[1] Each of these conclusions is the subject of this appeal.

The Act

[5] Section 11 of the Act defines a worker as follows:

> "**11 Who is a worker**
>
> (1) A ***worker*** is—
>
> (a) a person who—
>
> (i) works under a contract; and
>
> (ii) in relation to the work, is an employee for the purpose of assessment of PAYG withholding under the *Taxation Administration Act 1953* (Cwlth), schedule 1, chapter 2, part 2-5; or
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> …
>
> (2) Also, schedule 2, part 1 sets out who is a ***worker*** in particular circumstances
>
> (3) However, schedule 2, part 2 sets out who is not a ***worker*** in particular circumstances.

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1 The primary judgment is *Germanotta v CRG Harvesting Pty Ltd and Workcover Queensland* [2025] QSC 259 (Reasons or R).

(4) Only an individual can be a ***worker*** for this Act."

[6] Part 1 of Schedule 2 of the Act gives an expanded scope to the definition of "worker." It is not necessary for these purposes to further refer to that part.

[7] Part 2 of Schedule 2 excludes certain persons from being a "worker." Item 1 of that part states:

"**Part 2 Persons who are not workers**

1 A person is not a worker if the person performs work under a contract of service with—

(a) a corporation of which the person is a director; or

(b) a trust of which the person is a trustee; or

(c) a partnership of which the person is a member; or

(d) the Commonwealth or a Commonwealth authority."

Grounds of Appeal

[8] The Notice of Appeal articulates grounds of appeal running over some seven and a half pages. There are five main grounds (though each relies on matters identified in a number of subparagraphs). In broad terms it is contended that the primary judge erred:

"A in making the finding that a contract of service existed between [CRG Harvesting] and [Carlo]…

B in making the finding that [Carlo] worked under a contract and/or was an employee for the purpose of assessment of PAYG withholding under the *Taxation Administration Act 1953 (Cwlth), schedule 1, chapter 2, part 2-5…*

C in making the finding… that [Carlo] did not act as a director of [CRG Harvesting] within the meaning of the *Workers' Compensation and Rehabilitation Act 2003*, and…

D in making the finding… that past economic loss in respect of [Carlo's] interest in the farm operated by the family trust ought be awarded the rate of $300 net per week for seven years, and…

E … in applying only a 15% discount to the award for future economic loss for adverse contingencies, including [Carlo's] pre-existing right shoulder condition."

Background

[9] Carlo was born in January 1973 and is married to Lisa. His brother is called Renato and previously was married to Stacey.

[10] There are three entities relevant to these proceedings.

[11] *First*, C & L Germanotta Pty Ltd as trustee of the C & L Germanotta Family Trust, a discretionary trust, operated a sugar cane farm at Sarina. This is the family cane farm of Carlo and Lisa. The shares in this trustee company were owned half each by Carlo and Lisa.

[12] *Second*, as potentially something of a hangover of a former cane harvesting business, some equipment remained owned by a partnership between Carlo, Lisa, Renato and (in prior years) Stacey, but which in the 2019 financial year was a partnership between Carlo, Lisa and Renato. In the year to 30 June 2018, and for some years before that, the sole source of income of that partnership, as stated in the financial reports, was from the hiring out of its equipment. That equipment included a number of harvesters and tractors. The financial material suggests that those assets were transferred or sold off at some time in the 2019 financial year (and that was to another entity related to members of the Germanotta family, but not including Carlo).

[13] The *third* entity is the first respondent, CRG Harvesting. At all relevant times it has conducted a cane harvesting business, harvesting cane for various farms in the Mackay vicinity, including the cane grown by C & L Germanotta Pty Ltd. Its formally appointed directors at relevant times were Lisa and Stacey. Stacey was removed or resigned as director on or about 3 September 2018. The shares in CRG Harvesting have at all times been owned 50 per cent by C & L Germanotta Pty Ltd and the other 50 per cent by R & S Germanotta Pty Ltd. The shares in R & S Germanotta Pty Ltd were at material times owned in equal amounts by Renato and Stacey.

[14] On 15 August 2018 Carlo was effecting repairs to a cane harvesting tractor. The primary judge found that that tractor was one owned by the partnership but used by CRG Harvesting in its business: R [31], [39].

[15] The primary judge also found that in the course of conducting repairs to that harvesting tractor, and principally through the conduct of Mr Sheedy, the tractor dislodged from a jack on which it was raised, crushing Carlo who had crawled beneath it to carry out some works: R [1], [32].

[16] The primary judge found that CRG Harvesting had the obligation to repair and maintain the harvesting tractor notwithstanding that it was owned by the partnership: R [34]-[39]. There is no appeal from that factual finding.

[17] I will defer discussion of other relevant evidence to the particular topics raised by the grounds of appeal.

Review of Some of the Primary Judge's Findings

[18] The primary judge had the benefit of seeing each of the various witnesses give their evidence over a six day trial. His Honour made some findings which rely significantly on his advantage in having observed the witnesses. One such finding should be mentioned at this stage.

[19] As to whether Carlo was acting in the position of director of CRG Harvesting (though not recorded in the ASIC records as such), his Honour found as follows:

> "[14] When giving evidence in chief and also when cross examined [Carlo] impressed me as a 'simple' man…

[15] While I accept [Carlo] had the skills necessary for machinery operation (for example when harvesting) and servicing machinery I conclude that he lacked the capacity to organise and direct a cane harvesting operation from day-to-day. These decisions were made by his brother Renato who directed [Carlo] what work he was to do from day-to-day, where and when he was to work. My conclusion is that [Carlo] not only lacked the capacity to direct the operations of [CRG Harvesting] he had no understanding of what a company director did.

…

[18] Melissa Doidge gave evidence (which I accept) that she had acted as the accountant and tax agent for [CRG Harvesting] since its inception in 2013. At its inception [Carlo] was not appointed a director of [CRG Harvesting]. To her knowledge he was never added as a director. Her evidence was that the documents Exhibits 7, 8, 9 and 10 which suggested [Carlo] was a director were not intended to be sent onto either the ATO nor ASIC. The documents were prepared by her office and sent for signature but the description of [Carlo] as a director was the product of administrative error. Concerning [Carlo's] involvement at meetings where financial and tax matters were discussed she said:

> …
>
> **What involvement in the meetings did you observe Carlo to have?---Very little. He was a man of few words. He often sat away from my desk, so in a meeting Renato and Lisa would often sit up at the table, and Carlo would generally keep his chair backed – backed away into the corner and wasn't actively engaged.**

…

[21] I was impressed by the witnesses called by [Carlo] or [CRG Harvesting], including Ms Doidge, Ms Guimelli and Mr Sheedy, as reliable witnesses. I also accept the evidence of Renato and Lisa. They impressed as reliable witnesses. Concerning [Carlo] I conclude that, notwithstanding his intellectual limitations, he was doing his best to give accurate answers but frequently I had occasion to suspect that he did not fully understand what was being asked of him and that occasionally he was prone to confusion and even inaccuracy."

[20] While not directly relevant to any factual challenge in the appeal, the primary judge also had to consider in substance in what capacity Carlo was working to maintain the tractor. As to that his Honour said (citations omitted):

"[33] Under cross-examination, [Carlo] agreed to propositions put to him that when he performed maintenance work on the tractor it was for the partnership. That evidence should be treated with scepticism in light of the evidence of Lisa and Renato.

> [34] [Lisa] gave evidence that on the day he was injured, [Carlo] was working on the tractor for CRG, not the partnership.
>
> [35] Her evidence was that CRG was responsible for the cost of maintenance or repair of the tractor, including the maintenance and repair itself.
>
> [36] Given [Lisa] was intimately familiar with the affairs of CRG as a director, her evidence should be preferred regarding these matters."

[21] These findings reflect the advantage the trial judge had of forming a view of the credit of various witnesses and also as to Carlo's comprehension and knowledge of administrative or managerial matters based on observing his giving evidence and in part comparing his evidence to that of other witnesses. Findings of primary facts which rely on those advantages of the trial judge should not be interfered with unless "they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'": *Robinson Helicopter Co Inc v McDermott* (2016) 90 ALJR 679 at [43].

Grounds A and B - The Contract of Employment

[22] It is convenient to deal with these grounds together. They also to some degree overlap with Ground C, and so while some of the facts will be dealt with here, I shall defer discussion of the substance of that ground until later.

[23] Workcover Queensland contended in substance that:

(a) There was no contract between Carlo and CRG Harvesting for the former to do work as an employee. This proposition was supported on a number of bases:

  (i) First, it was urged that the pleadings limited CRG Harvesting to a contention of a contract made expressly and verbally and not, as the primary judge found, to be inferred from conduct;

  (ii) Second, that the facts in any case did not show any contract made which was one of employment;

  (iii) Third, both as to what contract was made and the next issue of intention to be legally bound, particular significance was placed on a "wages reversal" effected late in the 2019 financial year (after the injury but so as to be "retrospective" to before that time).

  (iv) Finally, that there was insufficient evidence of an intention to enter into a legally binding contract which was one of employment. In part it was said the adopted structure was a device or a sham.

(b) It is wrong in deciding what arrangements were made and whether there was an intention to enter legally binding arrangements to have regard to the subjective intention of the parties.

The Primary Judge's Reasons

[24] There was no written contract of employment. Indeed in the presentation of the case below CRG Harvesting did not rely on there being direct evidence of any verbal

contract between CRG Harvesting and Carlo.[2] Such a case was perhaps open given the evidence as to the discussion with the accountant in 2013 prior to the formation of CRG Harvesting, but given the way the case has been argued it is not necessary to discuss this further. The primary judge did not base his finding on any express contract. Rather it was to be inferred from the parties' conduct: R [24]-[25].

[25] Workcover Queensland contended below and on appeal that in truth the arrangement by which money was paid to Carlo (and also Lisa, Renato and Stacey), insofar as it is suggested Carlo (or Renato) was an employee, was a sham. The primary judge rejected that contention: R [26]-[27].

The Pleaded Case

[26] Workcover Queensland contends the primary judge erred in not confining CRG Harvesting to the pleaded case that the agreement, if any, between it and Carlo was a verbal one made immediately prior to the incorporation of CRG Harvesting.[3]

[27] The primary judge did not explicitly deal with this contention but it can be deduced his Honour proceeded on the basis that it was open for CRG Harvesting to seek to make out a contract inferred from conduct.

[28] In my view there was no error in his Honour having done so.

[29] In the Third Party Statement of Claim by CRG Harvesting against Workcover Queensland it is alleged that at all material times Carlo was an employee of CRG Harvesting, employed as a cane harvester and a worker within the meaning of s 11 of the Act: at [5]. No particulars were given or sought in respect of this allegation and in my view in those circumstances it was open to CRG Harvesting to establish that contract from conduct.

[30] As against this Workcover Queensland relies on its pleading in paragraph [34] of its Defence. CRG Harvesting's Reply to that and the particulars provided of aspects of that Reply identify a verbal agreement between Carlo and CRG Harvesting made by Lisa and Stacey immediately prior to its incorporation. That aspect of the Reply, however, is directed to the pleading by Workcover Queensland of a contention that Carlo was not a worker because when working on the tractor on 18 August 2018 he was doing so on behalf of the partnership of which he was a member and which owned the tractor. The pleading and its particulars do not limit the scope otherwise of the allegation in paragraph [5] of CRG Harvesting's Statement of Claim against Workcover Queensland.

[31] Further, Carlo's Statement of Claim was pleaded in terms similar to those in paragraph [5] of the Third Party Statement of Claim. Workcover Queensland, pursuant to an order made 20 November 2023, was permitted to defend that claim and deliver a defence to it (which was done). No particulars were sought or provided of Carlo's allegation which might limit his case to one asserting only a verbal contract

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2 At trial Counsel for CRG Harvesting acknowledged at T6-45 from line 35 that there is no direct evidence before the court of a verbal contract. However, it was urged that by inference the primary judge should conclude there had been such a contract or (at T6-46 lines 11 to 15) that there was a contract by conduct.

3 Workcover Queensland's written submissions at [20] cross referring to its trial submissions at [55]-[69].

of employment. The issues in the trial, therefore, in my view encompassed the case of a contract to be inferred from conduct.

[32] Finally, it seems clear to me that the primary judge viewed the trial as having been conducted on the basis of the contract potentially being one which could be inferred from conduct. In that respect, in my view, he was correct.

Did Carlo Work Under a Contract and as Employee?

[33] Section 11(1)(a) of the Act prescribes two conditions, namely that the person works under a contract and in relation to the work, the worker is an employee for the purpose of assessment of PAYG withholding. This Court recently considered s 11 in *Cagney v D&J Building Contractors Pty Ltd* [2025] QCA 116. Consistently with that decision, whether Carlo is a worker under s 11(1) of the Act depends upon whether he was an "employee" at common law.[4] Conceptually there are two aspects to this: to identify whether there was a contract between Carlo and CRG Harvesting at all; and then to determine whether its terms reveal it was one of employment. However, they can be considered together.

The Applicable Principles

[34] The applicable principles governing whether a person is an employee in the absence of a written contract were summarised in *EFEX Group Pty Ltd v Bennett* (2024) 330 IR 171[5] (Katzmann and Bromwich JJ) as follows (emphasis added):

> "[7] This case did not involve any written contract at all, much less a comprehensive written contract. It was a wholly oral contract, with sparse details of the agreement reached expressed in the lead up to its formation. **In the absence of a written contract and no evidence of a particular conversation during which the contract was made, 'evidence of the parties' conduct must necessarily be considered in order to draw inferences as to whether the meeting of minds necessary to create a contract has occurred and what obligations they have thereby undertaken'**: *Personnel Contracting* at [177] per Gordon J (Steward J agreeing), as summarised in *Chiodo v Silk Contract Logistics* [2023] FCA 1047 at [9].
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> …
>
> [9] The terms of an oral contract may be able to be inferred from the circumstances, including in whole or in part from the parties' conduct or a course of dealing between them, or implied where necessary for business efficacy: *Realestate.com.au Pty Ltd v Hardingham* (2022) 406 ALR 678 at [21]-[22] per Kiefel CJ and Gageler J.
>
> …
>
> [12] **The central question that remains, under an unwritten contract as in a written contract, is whether or not a person is an employee**. As was observed in *Personnel Contracting* at

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4 *Cagney v D&J Building Contractors Pty Ltd*, supra at [5]-[6].

5 Applied in *Cagney v D&J Building Contractors Pty Ltd*, supra at [34], [37].

[39] per Kiefel CJ, Keane and Edelman JJ (see also [113] per Gageler and Gleeson JJ), while the dichotomy between a person's own business and the putative employer's business may not be perfect so as to be of universal application, because not all independent contractors are entrepreneurs, that approach is still useful. That is because it focuses attention on whether the putative employee's work as contracted to be performed was so subordinate to the putative employer's business as not to be part of an independent enterprise. It also avoids the danger of an impressionistic and subjective judgement, or ticking off a checklist, running counter to objective contractual analysis.

[13] **Once the contours of the legal relationship are identified, its characterisation as one of employment or not often hinges on two considerations** identified in *Personnel Contracting*, in particular by Kiefel CJ, Keane and Edelman JJ at [36]-[39], each of which may involve **questions of degree**, namely:

(a) the extent to which the putative employer has the right to control how, when and where the putative employee performs the work; and

(b) the extent to which the putative employee can be seen to be working in their own business as distinct from the putative employer's business."

[35] Lee J, while agreeing with their Honours, made some additional observations. His Honour noted:

"[59] Put another way, in the absence of a written contract, the established principles of inferring a contract from the acts and conduct of parties (as well as in the absence of their words), come into play, and such conduct may be considered not only for the purpose of inferring whether a binding agreement had been reached at some point in time, but also for the purpose of identifying its necessary terms."

[36] In *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165, there was a comprehensive written contract in existence. The issue was whether it was one of employment or by an independent contractor. Accordingly, the Court was not concerned with whether there was a contract at all, but whether its terms were such that it was to be characterised as a contract of employment. In that context, the plurality discouraged the use of what was described as a multifactorial approach discussed in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 (where there was no written contract). Rather the plurality preferred the approach of considering the written terms and whether they were to be characterised as the labourer conducting his or her own independent business, as distinct from serving in the business of the employer: at [35]. But their Honours noted it remained appropriate in the characterisation of a relationship to have regard to the factors identified in *Stevens v Brodribb Sawmilling Co Pty Ltd*, if they were concerned with the rights and duties of the parties as established by their conduct: at [61].

[37] In any event, in this case there was no written contract. Whether a contract of any kind existed was to be inferred from conduct and much of that conduct is likely also to be germane to the characterisation of the relationship as one of employment or something else.

[38] In *Stevens v Brodribb Sawmilling Co Pty Ltd*, supra Mason J (Brennan and Deane JJ agreeing) at page 24 identified certain indicia which guide the consideration of whether a person is an employee. These are:

(a) the degree of control which the former can exercise over the latter;

(b) the mode of remuneration;

(c) the provision and maintenance of equipment;

(d) the obligation to work;

(e) the hours of work and provision for holidays;

(f) the deduction of income tax; and

(g) the delegation of work by the putative employee.[6]

[39] The question of control (or more accurately the right to exercise control[7]), though described as a "prominent" or "significant" factor, is not determinative.[8]

The Circumstances in this Case

[40] Putting aside the question of whether the arrangements were a sham (or that there was no intention to be bound to a contract), in my view the primary judge was correct in concluding that there was a contract of employment between Carlo and CRG Harvesting.

[41] There are a number of things which lead to this conclusion:

(a) The context is significant. Prior to 2013 the cane harvesting business was conducted by the partnership of the family members but on advice from the accountants, a deliberate change was made (possibly motivated in part by perceived taxation advantages). CRG Harvesting was formed and its structure settled on as discussed above. It engaged at least seasonal workers, contracted with farm owners seeking harvesting services and earned all the revenue from that business.

(b) Carlo was paid a fixed and certain amount per week. This was for the whole of the year even though harvesting work is seasonal and accordingly for some parts of the year he would work long hours, and in other parts of the year he would work shorter irregular hours.[9] The cane harvest season was generally late May to December each year.[10]. During that period Carlo was in effect assured of work and during the off season, he had work to do though clearly fewer demands were made on him.

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6 See more recently *CH Real Estate Pty Ltd v Shatford* [2026] NSWSC 129 at [252] (Richmond J).

7 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 275 CLR 165 at [74], [88].

8 *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 24; *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 at [43]-[44].

9 T1-49 line 42 to T1-50 line 11.

10 T1-20 lines 31 to 32.

(c) When asked why he received these payments from CRG Harvesting he responded "[j]ust for working for them."[11] It was, he said, his salary.[12] His subjective view of the character of the payments is not germane, but it is at least clear he was not performing work as a gratuitous activity.

(d) Superannuation payments were made on his behalf by CRG Harvesting and deposited to a superannuation fund.[13]

(e) PAYG tax was withheld and remitted to the ATO (up to the reversal referred to by the primary judge).[14]

(f) This arrangement persisted for many years (from 2014 to 2018 at least).

(g) Payroll records were maintained by CRG Harvesting for all workers (including the seasonal or casual worker) which identified each of Renato and Carlo was receiving a salary inclusive of superannuation entitlements.[15]

(h) Carlo submitted tax returns for the financial years to 30 June 2018 which showed his receiving salary or wages from CRG Harvesting in those years.

[42] As to other features which bear upon it being an engagement of employment:

(a) Carlo did not himself provide the equipment he used in the harvesting (and on the primary judge's findings at least in part the equipment was owned by a partnership of which he was a member and hired to CRG Harvesting for that purpose).

(b) Carlo has not been paid long service leave. Carlo, when cross examined, said he did not believe he got paid annual leave or sick leave.[16] He did, however, take days off when he wanted to (during the period of the year not occupied for harvesting).[17] This is no doubt an atypical form of contract of employment. The pay slips identified that Carlo did get paid for time off identified as 'personal' or 'holiday': ex 36. It was neither pleaded nor were submissions advanced below, which addressed whether Carlo has some statutory or implied right to any additional allowance for annual leave or sick days. Even assuming he has no such entitlement, a contract by which he was to be paid a weekly salary and some paid time off for holidays or personal time, inclusive of (or so as to not include) any further allowance does not thereby at common law cease to be a contract of employment.

(c) There was evidence concerning whether Carlo worked at the direction of his brother Renato or indeed anyone.

  (i) Which farms CRG Harvesting was to harvest, it was said, was decided by Mackay Sugar.[18] But CRG Harvesting did this on a roster so that the first farm harvested in one year became last in the next year and so on. But, in addition, within each season those farms were progressively

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11 T1-26 line 24 to 25.
12 T1-25 line 44.
13 T2-58 lines 22 to 31; T2-59 line 36 to T2-61 line 15.
14 T2-34 line 36 to T2-35 line 31.
15 T2-55 lines 39 to 44; ex 33.
16 T2-25 lines 36 to 43.
17 T1-50 lines 6 to 11.
18 T1-21 lines 19 to 20.

harvested in accordance with that roster (say 10 per cent of anticipated harvest each time).[19]

(ii) On any particular day Renato told Carlo which farm was to be harvested.[20] In relation to the harvesting Renato supervised the employees, including Carlo.[21] Renato was primarily responsible to the harvesting activities.

(iii) Carlo, on the other hand, was principally responsible for the haul out aspect of the business, namely getting the cut cane loaded and transported to bins at the rail siding for transport to the mill.[22] His activities necessarily did not operate separately from the harvesting activities.

(iv) Neither Lisa nor Stacey supervised Carlo's (or Renato's) work.[23] Carlo explained this was because he had 40 years' experience farming.

(v) The position then is that Carlo was an experienced cane farmer and harvester who carried out his work without much in the way of supervision but who was directed by his brother which farms were to be harvested and in what sequence.

(d) In determining whether a person providing services is doing so as employee or on his own behalf (as contractor) the nature and extent of the putative employer's right to direct or control his performance of the work is a relevant factor. But, in my view, so too is the nature of the work. There is limited, if any, scope for supervision or control of Carlo's activities beyond that in fact exercised by CRG Harvesting through Renato in telling Carlo when and where to go in order to harvest cane and deliver the crop to the rail siding operated by or for the mill. Adopting the language from *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting*, supra, Carlo's work as contracted to be performed was so subordinate to CRG Harvesting's business as not to be part of an independent enterprise.

Salary Reversal

[43] Sometime approaching the end of June 2019 a meeting was held with Ms Doidge, of Inspire Accounting and Business Services, the accountant for CRG Harvesting and for the partnership and (up to 2015) also for both Carlo and Lisa.[24] The meeting was attended by Renato, Carlo and Lisa. After that meeting an email was sent to Carlo, Renato and Lisa. It proposed inter alia, the reversal of wages paid to Renato and Carlo then in total $80,000.00. Ms Doidge explained why this was done as follows:[25]

> "Can you tell his Honour what's – what that's about?--- We were – the profit for the period July to May show that there was likely to be a loss position of approximately $30,000 and then, in June, very little income earnt, but depreciation adding significantly to the expenses. So we

19 Renato at T4-59 lines 3 to 12.
20 T1-21 lines 13 to 14.
21 T2-16 line 43 to T2-17 line 2.
22 T2-16 lines 1 to 23 and 28 to 29.
23 T2-26 lines 34 to 46.
24 T4-92 to T4-93; T2-74 lines 6 to 18.
25 T4-100 lines 31 to 38.

> were predicting a loss in the company after paying wages of approximately $80,000 – or approximately, yeah, $80,000. So I suggested reversing Renato and Carlo's wages – Carlo's wages, so that they didn't have to personally pay tax on the income and – if they weren't able to get a tax saving in the company."

[44] This was then carried into effect.

(a) Carlo's tax returns for the year to 30 June 2019 did not show his receiving that level of wage or salary from CRG Harvesting. His salary or wage is identified as a payment from Workcover Queensland.

(b) CRG Harvesting obtained refunds from the ATO for the PAYG tax withheld for Carlo and Renato: ex 34.

(c) The payroll journal of CRG Harvesting for the financial year, seemingly relating to Carlo, shows a reversal out of various amounts and no sum paid as wage or salary: ex 34. The same was done for Renato's salary.

(d) The sums to that time received by Carlo were not refunded by him, but rather by book entry were shown as loans by CRG Harvesting to the C & L Germanotta Family Trust (and similar arrangements were effected in relation to Renato's salary).

[45] Stacey was not called as a witness. Renato was not asked about this reversal of wages at all. The relevant evidence was that of Ms Doidge, Lisa and Carlo.

[46] There was little cross examination of Carlo about these events. He accepted that documents he was shown for the 2019 financial year showed he received a gross salary of $6,422, that $2,006 was shown as tax withheld, and that his tax return was lodged on that basis.[26] Despite this he adhered to his evidence that he received about $1,000 per week from CRG Harvesting.[27] Otherwise he said he just relied on the accountants as to what was done.[28]

[47] Lisa, in cross examination initially said that she was not aware of the salary reversal which was effected in 2019.[29] She was not sure if the sums previously paid to Carlo and Renato were then described as loans.[30] She acted on advice from the accountants but accepted that ultimately the decision to do anything was hers.[31]

[48] Ms Doidge (in addition to the evidence extracted above) gave evidence that the reversal was her recommendation in a meeting on 26 June 2019 attended by Renato, Lisa and Carlo.[32] She believed they understood her and her practice was to secure their consent before doing anything.[33]

[49] I agree with the primary judge that these events, which occurred many months after the injury, cannot directly affect the issue of whether Carlo was a worker under

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26 T2-34 line 36 to T2-35 line 9.
27 T2-35 lines 11 to 14.
28 T2-35 lines 26 to 27.
29 T4-32 lines 30 to 34.
30 T4-30 lines 42 to 43; T4-31 lines 13 to 15; T4-35 lines 15 to 20.
31 T4-37 lines 6 to 8.
32 T4-102 lines 29 to 38.
33 T4-103 lines 9 to 12; T4-104 lines 3 to 14.

a contract of employment at the time of his accident. Conduct after the date of a putative contract may be relied on if it reveals objectively whether or not the parties had an intention to be legally bound when making that contract. But the circumstance of the reversals of the salaries occurred years after the formation of CRG Harvesting and the apparent commencement of Carlo's engagement and would be of no probative weight in the assessment or the parties' intention to be bound when the putative contract was made.[34] This is all the more so given the explanations given for why the reversals were made. On the evidence of Ms Doidge, it is clear that what was proposed at the meeting on 26 June 2019 was a departure from the arrangements that were then in place and her recommendation to reverse the sums paid as salary was to reduce the aggregate tax burden given the low revenues of CRG Harvesting.

[50] The wages reversal and the refunds secured from the ATO of the PAYG instalments made were not said to mean that the requirements of s 11(1)(a)(ii) of the Act could not be satisfied. It was accepted by senior counsel for Workcover Queensland (and in my view correctly) that whether those requirements were met needed to be answered in light of the facts at the date of the injury and not as affected by some retrospective reversal of the PAYG payments made. Rather the reversal was relied on as an admission: indicative of a lack of intention to be legally bound to a contract of employment at all or any such contract being a sham.[35]

[51] Subject to the matter discussed next, in my view no error is shown in the primary judge's conclusion that at the time of the accident Carlo was working under a contract with CRG Harvesting and that the nature of that contract was one of employment. It is a contract for employment to be inferred from the conduct of the parties as discussed above, but in particular the weekly payment to Carlo of a salary, withholding and remittance of PAYG tax, the regular crediting of superannuation to the account of Carlo and recording of the payments as salary in CRG Harvesting's financial records and by Carlo in his tax returns.

The Sham/Lack of Intention Contentions

[52] Workcover Queensland did not plead that any contract of employment was a sham. Thus it is not suggested that CRG Harvesting and Carlo entered into the form of an employment contract but so as to disguise from someone the true nature of their relationship (whatever that is said to be). Nor is it pleaded that the whole corporate structure of CRG Harvesting was a sham to conceal some other relationship (possibly a partnership) between Carlo, Renato and Lisa (and earlier, Stacey).

[53] What is identified in the Notice of Appeal (as part of Ground A) is an asserted error by the primary judge in finding "that the designation of [Carlo] as an employee of [CRG Harvesting] was not a sham."

[54] In *Sharrment Pty Ltd v Official Trustee in Bankruptcy* (1988) 18 FCR 449 at 454, Lockhart J (with whom Foster J agreed) considered the meaning of the word sham as connoting:

> "… for the purposes of Australian law, something that is intended to be mistaken for something else or that is not really what it purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front.

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34 See *Stephenson v Dental Corporation Pty Ltd* [2025] QCA 212 at [34]-[35].

35 Appeal transcript at T1-36 lines 29 to32.

> It is not genuine or true, but something made in imitation of something else or made to appear to be something which it is not. It is something which is false or deceptive."

[55] In *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471, Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ explained at [46]:

> "… 'Sham' is an expression which has a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences…"

[56] In determining whether the contract was a sham, the Court may look at post-contractual conduct: *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting*, supra at [177] (Gordon J, Steward J agreeing at [203]). Such conduct may show that the contract was concluded for some other purpose, serving "as a mere piece of machinery": *Raftland Pty Ltd v Federal Commissioner of Taxation* (2008) 238 CLR 516 at [34]. What must be established is that the parties intended the arrangement as a sham: to take a form different from their true agreement.

[57] As to this, the primary judge at R [27] stated:

> "In this context [Workcover Queensland] submits that the business arrangements were a sham. [Workcover Queensland] does not specify what transaction or arrangement was a sham (presumably it is the employment of [Carlo] by [CRG Harvesting]) and with what consequence. In *Equuscorp Pty Ltd v HGT Investments Pty Ltd* the High Court said:
>
> > '[46] Each of these transactions was legally effective. None of the transactions that took place on 30 June 1989 could be said to be a sham. The primary judge was wrong to characterise them, as he did by his references to "artifice", "facade" and "charade", as shams. **"Sham" is an expression which [h]as a well-understood legal meaning. It refers to steps which take the form of a legally effective transaction but which the parties intend should not have the apparent, or any, legal consequences.**'
> >
> > (emphasis added)
>
> My assessment of [Carlo], his wife Lisa and his brother Renato is that they intended that the business recommendations of their accountant would take effect and be legally effective. I do not accept the contention that the arrangements were a sham." (citations omitted).

[58] For Workcover Queensland to advance a contention that something was a sham, it would first have to have pleaded it and to have done so with specificity: UCPR rr 149 and 150(1). The primary judge noted that even in its submissions Workcover Queensland had not identified what it was that was a sham. There was no direct cross examination of the witnesses called to seek to establish that some transaction was a sham in the sense described in the authorities to which I have referred. Without

having suggested sham conduct to the relevant witnesses no finding could properly be made that they entered into a façade or charade transaction.[36]

[59] In those circumstances I do not believe there is any proper basis to now hold that some transaction was a sham in that sense.

[60] Putting aside the label of "sham" on appeal Workcover Queensland submitted that the facts were such that the primary judge ought to have concluded there was no intention to enter into a legally binding contract of employment (whatever else may have been intended). It relies on various things.

(a) First, the apparent readiness with which the wages reversal occurred is relied on as an indicator that there was no intention to enter into a contract of employment between CRG Harvesting and Carlo (and presumably also Renato).

(b) Second, the facts (it contends) show that both Renato and Carlo continued as they had under the partnership, drawing a fixed sum per week with the profits (or some of them) of the enterprise being thereby distributed equally between the families.

(c) Third, Carlo agreed with the suggestion that CRG Harvesting "was very much a joint enterprise between two families"; him saying that he supposed it was, carried on for their mutual benefit.[37]

(d) Ms Doidge gave advice concerning the establishment of the company CRG Harvesting and the original proposal concerning the payment of wages. By email dated 9 July 2013 to Lisa and Stacey she provided projections of tax payable by the then partnership and in future by the company. As to the latter her email referred to "wages to the 2 families of $67000 and split these between each couple to best suit each family": ex 22. The accompanying financial reports showed Carlo receiving $50,000, Lisa $17,000, Renato $33,500 and Stacey $33,500. The email further stated that superannuation will be payable on these amounts.

[61] However, these features do not, in my view, establish error by the primary judge. The advice given by Ms Doidge was to pay each family salaries in aggregate of an equal amount. The payments they were to receive were identified as salaries which would also attract a superannuation contribution. It was then anticipated that the four of them in different ways would be involved in the harvesting business with the two families providing a like level of value to the business. This could be achieved by payment of dividend or other ways but could also be achieved by the payment of salaries. There is nothing in the objective of achieving this by payment of equal salaries which makes pursuing that course one which is a sham. The very thing being considered by the accountant and those with whom she was discussing this, was that payment was to be made to, and received by, Carlo as an employee and that was then done.

[62] The reversal of the wages paid is in itself unusual but explained as something motivated by a poor profit projection for the 2019 financial year (recalling this was

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[36] See for example *Locke v H.C. Loneragan & Company Pty Ltd as trustee for the Loneragan Family Trust t/as Quantum Forensic Solutions* [2025] NSWCA 166 at [38] and [56] (per McHugh JA, Bell CJ and Adamson JA agreeing).

[37] T2-26 lines 1 to 4.

the year in which Carlo was injured) and a desire to minimise overall taxation. It was not alleged that any such arrangement was tainted as illegal. The primary judge found that the family members acted on advice from their accountant given in June 2019. Their doing so does not in my view retrospectively show that the arrangement to pay a salary was a sham as to 15 August 2018 or that there was no intention to be bound to the contract of employment which the primary judge found to have been made.

[63] Workcover Queensland in my view struggled to frame this submission. It sought to step back from saying it was contending there was a sham arrangement, but then in identifying the arrangements actually made as not objectively revealing an intention to be legally bound, resorted to describing those arrangements as a device or similar language. It was accepted that the payment of salaries is not a sham.[38] It was accepted that in 2013 the parties used a different structure (not that they created a faux appearance of doing so).[39] In 2013 a new structure for the conduct of the harvesting business was decided upon advice from accountants and then implemented. An aspect of that was that Carlo (and others) would work in the business and be paid a salary with superannuation contributions as employees. The company performed work for third parties, received and banked the revenue so earned, and used that in part to pay those salaries. Unless this is all a sham, and it is not shown to be, it cannot be said not to evidence objectively an intention to be legally bound to the contact of employment which is to be inferred from the facts as discussed above.

Subjective Intent

[64] The subjective intention of parties to a putative contract as to whether they intend to be bound or as to its construction are not material to those issues. It is urged by Workcover Queensland that the primary judge here erred in having regard to such subjective intentions in reaching his conclusions as to the existence and nature of the contract between Carlo and CRG Harvesting.

[65] The Notice of Appeal in this context referred to R [13], [25]-[27]. None of them in my view reveals that the primary judge erred in the respect contended for. In relation to whether or not the arrangements were a sham the primary judge did advert to the parties' subjective intention. That is entirely appropriate to such an issue: *Coshott v Prentice* (2014) 221 FCR 450 at [64]; *Lewis v Condon* (2013) 85 NSWLR 99 at [62]; *Pickersgill v Tsoukalas* [2009] SASC 357 at [39]; *Raftland Pty Ltd v Commissioner of Taxation* (2008) 238 CLR 516 at [146] (Kirby J).

[66] It is unnecessary to consider the first ground of the Notices of Contention filed by each of the respondents (other than to record my agreement with its substance) to the effect that if the primary judge did wrongly take into account the subjective intentions of the parties nonetheless his Honour's finding as to the existence and characterisation of a contract of employment was correct based on the objective material.

[67] For these reasons Grounds A and B are not made out.

Ground C – Carlo as Director

[68] Alternatively, Workcover Queensland submits that the primary judge ought to have found Carlo was a person who performed work under a contract of service with CRG

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[38] Appeal transcript at T1-16 line 30.
[39] Appeal transcript at T1-22 lines 1 to 8.

Harvesting but is to be taken not to be a worker by force of CRG Harvesting being "a corporation of which [he] is a director" within the meaning of Part 2 Item 1(a) of Schedule 2 to the Act.

[69] The Act defines a director to include:

> "(a) a person holding or acting in the position of a director (by whatever name called) of the corporation whether or not the person was validly appointed to hold, or is duly authorised to act in, the position; and
>
> (b) a person under whose directions or instructions the corporation is ordinarily controlled."[40]

[70] Ground C of the Notice of Appeal contends that the primary judge ought to have held that Carlo did "act as a director" of CRG Harvesting. Accordingly, it is that aspect of the defined term I will address.

The Test of 'acting in the position of a director'

[71] Relevantly what is in issue is whether at some relevant time Carlo was acting in the position of director of CRG Harvesting whether or not authorised to so act. The object of the preposition "in" is the "position" of director of that company. It is not necessary to find that Carlo did so to the exclusion of other persons (the appointed directors). However, the position being referred to is the position in the particular company, not simply performing one or more isolated acts.

[72] In *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, Finn, Stone and Perram JJ distilled from the relevant authorities various propositions, including the following:

(a) The notion that the person "acts in the position of a director"[41] contemplates that the person concerned, though not appointed a director, "has been acting in a role (or roles) within the company and performing functions one would reasonably expect to have been performed by a director of that company": at [65].

(b) The company's "commercial context, operations and governance structure" will vary the roles and functions being performed, but whether such conduct renders the person a director is "a question of degree having regard to 'the nature of the functions or powers which are exercised and the extent of their exercise'": at [66].

(c) The question of whether the person has acted as a director is one of substance: at [68]. The determination involves "the making of a value judgment about the proper characterisation of what in its context the person in question had been doing": at [70].

(d) The Court concluded that the person acting in the position of director "must be shown to have assumed or performed functions which only a de jure director or board can properly perform." However, their Honours cautioned that this

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40 Schedule 6 to the Act.

41 Which it was noted mirrored language used in *Corporate Affairs Commission v Drysdale* (1978) 141 CLR 236 at 242.

had the potential to misdirect attention. The enquiry is not limited to those functions which by the *Corporations Act* or the company's Constitution are required to be performed solely by the board (which might be capable of a priori enumeration) but extends to the raft of things (not capable of a priori enumeration) which might otherwise fall within the scope of the role of the board in managing the business of the company as to which there was a broad spectrum of activities that in any particular company may be the role of the board or of others: at [70].

(e) The relationship of a person with a company may evolve over time such that a person is a de facto director only for a limited period: at [67].

[73] These propositions show that whether or not someone is acting in a position of director will be a question of substance and also of degree. As Williams J in *Re Valleys Rugby League Football Club Ltd* [1997] 2 Qd R 645 at 656, remarked (of a like definition):

> "One of the problems in applying the definition, and it is of particular relevance here, is to determine how much a person must do before it can be held that such person is occupying or acting in the position of a director; for example, is attending and voting at one meeting of directors sufficient?"

[74] At one extreme, it may be doubtful whether one act would (at least generally) establish that someone was acting in the position of director. The drafter of the Act did not deem anyone who performs an act of a director to be a director for the purposes of the Act and it would be difficult to sustain such an approach on any purposive construction of the Act. As already mentioned, the noun is the "position of" director, not the mere performance of an act of a director. But at the other extreme, repeated performance of acts of directors of that company will be a powerful evidential basis for concluding that the person performing those acts was acting in the position of director.

[75] Whether a person is acting in a position of director is to be assessed objectively: see *BCI Finances Pty Ltd (in liq) v Binetter (No 4)* (2016) 348 ALR 227 at [241]; *Aquisite Pty Ltd v Moss* [2023] FCA 410 at [82]. But it is also relevant to take into account: (i) whether the company held that person out to others as a director, or whether the person did so himself or herself; and (ii) whether persons outside the company considered that person a director: *BCI Finances Pty Ltd (in liq) v Binetter (No 4)*, supra at [241]; *R v Young* (2021) 8 QR 68 at [99]; *Grimaldi v Chameleon Mining NL (No 2)*, supra at [75].

[76] The authorities on this point are concerned with different legislation (usually the *Corporations Act* or predecessor legislation) not always expressed in entirely comparable terms or seeking to effect like legislative purposes to the Act. Nonetheless the above summary in my view is apposite to the construction of the Act in this case.

[77] Two important factors emerge from these principles:

(a) Whether or not a person is acting in a position of director can change over time; and

(b) Attention needs to be paid to the corporate governance of CRG Harvesting, the nature of the things performed by the appointed directors and beyond that the degree of autonomy and apparent authority said to be that exercised by Carlo as someone making corporate decisions for CRG Harvesting.[42]

[78] I accept the submission made on behalf of Carlo that the onus was on Workcover Queensland to establish that Carlo was not a worker by reason of his being someone acting in the position of a director of CRG Harvesting: *Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* (2010) 240 CLR 444 at [35]-[36].

The Temporal Issue

[79] By the Act an employer, for each worker employed by it, is obliged to effect insurance for its liability for injury sustained by the worker: s 48(1). It is pleaded that the policy existed but Workcover Queensland denied its liability on the basis that Carlo was not a worker. For present purposes that is because it was urged he was a person who performed work under a contract of service with a corporation "of which the person is a director": Schedule 2 Part 2 Item 1(a).

[80] The application of this exclusion might be thought to be problematic where a person was alleged to be a director only for some limited period. The language of the exclusion utilises the present tense: he is a director. That might mean the question is to be tested when the policy is effected, or when the injury is sustained or perhaps both. The point was not directly addressed by the parties and accordingly I express no concluded view on the matter. In the present case I would not conclude that Carlo was a director at any time so that the issue does not arise. That said, the factual matters relied on to show that he might be said to have been acting in the position of director at any time in the year which included the date of injury was especially slight.

The Evidence of "Acting"

[81] For the reasons below, I do not believe the evidence supports a conclusion that Carlo was a director of CRG Harvesting within the expanded meaning of that word in the Act.

[82] The principal evidence as to his role in the affairs of CRG Harvesting came from Carlo and Lisa. It was to the effect:

(a) Carlo's wage was set by Lisa and Stacey after discussions by them with the accountant.[43] The decision to terminate his employment was made by Lisa (when he was injured).[44]

(b) Carlo had no role in employing staff or negotiating what they were paid.[45] This was done by Lisa and Stacey.[46]

(c) He did not have any involvement in making arrangements for CRG Harvesting to hire the tractor under which he was crushed. Those arrangements were made by Lisa and Stacey.[47]

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42 See also *Re ACN 092 745 330* [2017] NSWSC 241 at [113].
43 Lisa at T2-63 lines 5 to 8.
44 Lisa at T2-85 lines 21 to 26.
45 Carlo at T1-22 lines 9 to 31.
46 Carlo at T1-22 lines 25 to 26.
47 Carlo at T1-22 line 41 to T1-23 line 2.

(d) He played no role in arranging finance for any equipment, this being done by Lisa and Stacey.[48] Carlo was consulted about the purchase of a tandem trailer but the decision to acquire it was made by Lisa and Stacey;[49] Carlo suggested it was a decision made by Lisa and Renato, but not him.[50] Renato and Carlo were aware what equipment was needed but Lisa and Stacey made decision as to whether the company could afford it.[51]

(e) The transfer of assets from the partnership to the company was handled by Lisa.[52]

(f) He did not place orders on behalf of the company for parts.[53]

(g) Carlo had no role in depositing money to or withdrawing funds from the company bank account; did not sign cheques for the company or have any debit or bank card of the company.[54] He could not transact business or view transactions on the corporate bank account.[55]

(h) He had no email address of his own or access to the company's email;[56] it was only accessible by Lisa and Stacey.[57]

(i) He did not provide information to the accountants for preparation of the tax returns or financial statements.[58]

(j) His recollection was he only met the accountants together with Lisa where Lisa and Ms Doidge would meet concerning the company's affairs and then "we used to go to our farm meetings for our farm."[59] He did not contribute to the discussions about the company.[60] This too was the evidence of Lisa. She said he only came to meetings with Ms Doidge if they had matters to discuss concerning their own farm and that he was not consulted on matters concerning the business of CRG Harvesting.[61]

(k) Carlo was not at a meeting with accountants after 2016, or none that Lisa could recall.[62]

(l) Lisa and Stacey were responsible for the administration of the company (including all bookwork). Renato was making decisions on an operational basis more so than Carlo but he (Carlo) took more responsibility for the haul out side.[63] But Renato (not Carlo) supervised all employees.[64] Moreover, even as to the haul out activities Renato (not Carlo) made the bookings of the sidings

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48 Carlo at T1-23 lines 4 to 6.
49 Lisa at T2-85 lines 42 to 46; T2-86 lines 16 to 27.
50 Carlo at T2-24 lines 24 to 30.
51 Lisa at T4-25 lines 5 to 15.
52 Carlo at T2-22 lines 30 to 42.
53 Carlo at T2-27 lines 22 to 45.
54 Carlo at T1-24 lines 15 to 39.
55 Lisa at T2-63 lines 31 to 47 and ex 21.
56 Carlo at T1-23 lines 8 to 19.
57 Lisa at T2-59 line 21 to 34.
58 Carlo at T1-24 line 44 to T1-25 line 2.
59 Carlo at T1-25 lines 4 to 17.
60 Carlo at T1-25 lines 25 to 31.
61 Lisa at T2-89 line 24 to T2-90 line 8.
62 Lisa at T2-90 lines 20 to 28.
63 Carlo at T2-15 lines 25 to 42.
64 Carlo at T2-16 line 43 to T2-17 line 2.

for the receipt of the cane bins being hauled.[65] Lisa described Carlo was being involved in "field work."[66] Carlo described his role as "[j]ust driving the haul-out."[67] He was not consulted about business decisions.[68]

[83] It was not suggested to Renato that Carlo was acting in the position of director of CRG Harvesting or performing functions for the company other than of the operational or functional type Carlo himself described. On the other hand Lisa was very clear that Carlo was not a decision maker. She had made decisions despite his objection (though was not able to give examples);[69] she described him as someone who "struggles to read and write, so I conduct all of our business affairs with our family trust and I am also the director of CRG Harvesting."[70]

[84] Ms Doidge gave evidence that she ceased acting for C & L Germanotta Pty Ltd as trustee of the family trust around 2016.[71] She never saw Carlo in the absence of Lisa.[72] In relation to the meetings she had which Carlo attended she described him as never engaged, not active, and while addressed by the others present to see if he was okay with things would nod or shrug or the like.[73] However, she clarified that she could not be sure whether those occasions when Carlo might have had some input whether it related to the partnership or the company.[74]

[85] Workcover Queensland points to a range of things to suggest that Carlo was so acting. They include:

(a) First, his role as being responsible for the haul out work of the company (at least in the sense described above).

(b) Second, that those farmers who wanted to have CRG Harvesting conduct their cane harvesting would approach or be approached by and talk to Renato and Carlo.[75] Carlo's evidence was it was mainly Renato who did this.[76]

(c) Third, his attendance at and involvement in the end of year meetings with the accountants (as discussed above).

(d) Fourth, that he signed as public officer an ATO electronic lodgement form: ex 9.

(e) Fifth, that he signed forms opening accounts at Rabobank, signing as an Account Owner (as did each of Renato, Stacey and Lisa) and had complete authority to transact on the accounts (even if not exercised): exs 29 and 30. These were executed on 30 March 2015. I would be reluctant to give much weight to these events in 2015 in drawing any conclusion whether in or about 2018 Carlo was a person who performed work under a contract of service with a corporation "of which the person is a director" within Part 2 Item 1(a) of

65 Renato at T4-59 lines 29 to 37.
66 Lisa at T2-67 lines 1 to 4.
67 Carlo at T2-23 lines 25 to 26.
68 Carlo at T2-24 line 7 to 9.
69 Lisa at T2-71 lines 35 to 45.
70 Lisa at T2-71 lines 26 to 28.
71 T4-93 lines 40 to 41.
72 T4-107 line 31.
73 T4-97 lines 1 to 29.
74 Ms Doidge at T4-107 lines 24 to 29.
75 Renato at T4-59 line 44 to T4-60 line 1.
76 Carlo at T1-21 lines 35 to 40.

Schedule 2 to the Act. Subsequently, in turn each of Ms Doidge and the bookkeeper, Ms Guimelli were given limited access to the accounts by forms signed by Lisa on 23 June 2017 (ex 19) and by Lisa and Stacey on 20 November 2017 and 5 January 2018 (ex 20), each identified as director/secretary. Workcover Queensland points to the ability to give limited authority or access which was not done for Carlo; but it should also be noted that while others signed as director, Carlo did not do so on any bank form.

(f) Sixth, that minutes of a meeting of the directors held on 26 March 2015 show Carlo present with Lisa (as chairperson): ex 6. This records a resolution to shift the registered office of the company to Ms Doidge's firm's address. Again, I would be reluctant to give much weight to this event in 2015.

(g) Finally, there are three "Directors' Declarations" signed by Renato and Carlo above their typed names and the designation "director": one for the year to 30 June 2015, dated 18 February 2016 (ex 7); one for the year to 30 June 2016, dated 20 December 2016 (ex 8); and one for the year to 30 June 2017, dated 21 May 2018 (ex 10).

[86] As to the documents signed by Carlo:

(a) Ms Doidge identified it was an administrative error to designate Renato and Carlo as directors or to have Carlo sign them.[77] She knew they were wrong. It was suggested to Lisa that the documents must have been printed out by either Lisa or Stacey (at their homes) and so given by one of them to Carlo to sign. Lisa rejected that.[78]

(b) None of the Directors' Declarations or financial reports were provided to the ATO or ASIC.[79]

(c) Carlo signed what the accountants asked him to sign but it is a fair summary to say without considering what they were and he acted merely on their advice or instruction. Those documents which he signed as director of CRG Harvesting Carlo stated he signed because there were yellow stickers on them with "sign here."[80] He did not read them: R [29].[81]

The Primary Judge's Reasons

[87] The primary judge rejected Workcover Queensland's contention because it was contrary to or failed to give adequate effect to other evidence which his Honour set out at R [29] as follows:

> "1. [Carlo's] mental incapacities are of considerable significance in this context. He demonstrated difficulties with matters such as arithmetic, reading, writing and inferentially comprehension. Plainly, in my view, he demonstrated an incapacity to make decisions or direct activities in the interest of the company because of his limitations;

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77 Ms Doidge at T4-105 lines 31 to 43.
78 Lisa at T2-96 lines 34 to 35.
79 Ms Doidge at T4-99 lines 44 to 47.
80 Carlo at T2-32 lines 9 to 11.
81 Carlo at T1-44 lines 29 to 41.

2. [Workcover Queensland's] submissions do not give adequate weight to the evidence of the effectively subsidiary role played by [Carlo] in the affairs of the company. Essentially [Carlo's] activities involved operating farming machinery in the seasonal activities of sugar cane planting and harvesting. He was a machinery operator in connection with those activities and his duties on behalf of the company included repairing or servicing machinery;

3. The evidence that I accept is that [Carlo] in his activities as part of the operations of [CRG Harvesting's] enterprise was subject to the directions of his brother Renato;

4. … Plainly he was a PAYG employee receiving wages year round calculated in accordance with the tax office's requirements and the superannuation payments and arrangements consistent with employment as a worker should not be overlooked. In this context the record keeping and decision making required of an employer were performed by his wife, Lisa;

5. The submission is inconsistent with the documentation in records kept by or available to [CRG Harvesting];

6. Considerable reliance is placed upon the documents Exhibits 7, 8, 9 and 10 on their face record [Carlo] as a director and provision was made for him to sign. But this circumstance, according to Ms Doidge, whose evidence I accept, arose as a result of administrative error and did not accurately record [Carlo's] position and role;

7. In this context I accept [Carlo's] evidence that he did not read the documents before signing them;

8. Even if he had read them, my assessment of [Carlo's] capacities is that he would not have understood them nor have any inkling as to their implications;

9. The circumstance that [Carlo] was consulted by Lisa or his brother Renato is neither here nor there. [Carlo] was working on machinery when injured. He was repairing a fault in the steering. Plainly he had some facility or capacity to evaluate the merits of one tractor or piece of machinery from another but that does not bespeak the actions of a guiding mind of a corporation, rather an employee whose opinion on some matters might be valuable in the circumstances." (citations omitted).

[88] His Honour concluded at R [30] that:

> "The evidence of Lisa and Renato, supported by the evidence from Ms Doidge and Mr Sheedy, concerning the nature of the work done by [Carlo] in furtherance of his activities for or on behalf of [CRG Harvesting] support my view of [Carlo] that he lacked the capacity to perform the duties of a director. The evidence as a whole comfortably satisfies me that [Carlo] did not at material times act as a director of [CRG Harvesting]."

Discussion

[89] The issue, of course, is not whether a person is or is not efficient in acting in the position of director. A person may be acting in that role even if not very capably. But in this case the primary judge's conclusion was, in my view, correct.

[90] None of the witnesses identified Carlo as someone who was functioning as if acting in the position of a director. Given the primary judge's view as to his capabilities this is what might be expected. It can be inferred others too would have been aware of his limitations in that regard. That was the direct evidence of Lisa.

[91] He did discuss with cane farmers their using CRG Harvesting to harvest their cane but largely this was done by Renato and while no doubt important to the business is not shown to be an activity of the kind conducted by the directors of this company. It is accepted that he conducted the haul out activities but that is indicative of his position as an experienced cane harvester. Even in that role he was allocated the work (in the sense discussed above) by his brother who supervised the employees and booked the sidings.

[92] The managerial and administrative affairs of CRG Harvesting were conducted by Lisa, Stacey and perhaps even Renato. All financial matters were administered by Lisa and Stacey and all financial decisions made by them. Carlo had no financial role in the affairs of the company. Nor did he make decisions to hire or fire staff.

[93] He participated in opening accounts with the bank in early 2015. In signing as an account owner he arguably might be said to be holding himself out or held out by the others, to be a director. But equally he was a director and shareholder of a 50 per cent shareholding in CRG Harvesting and the bank form does not identify him as director of CRG Harvesting when signing as account owner. But whatever that form may have conveyed, to the bank's knowledge he had no means of viewing or transacting on the accounts: ex 21.

[94] As to those annual meetings with the accountants that he attended, he only did so accompanying his wife, who was a director, and he offered little in the way of input. He was there also to be involved in the meeting when it turned to the affairs of C & L Germanotta Pty Ltd, and the partnership. At the highest for Workcover Queensland he was consulted and signified his agreement with what one of his relatives asked of him. He made no contribution to the governance of the company by his attendance or input.

[95] The most significant factors in favour of his acting in the position of director was his signing the Directors' Declarations. The law does attach significance to a person signing a document even if without reading it, and that is not confined to contractual documents: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [47]. That is why these documents and Carlo's signature on them deserve close consideration. But these were isolated acts, two in 2016, none in 2017 and one in May 2018. The evidence was he signed without reading them. The documents were prepared in error and relevantly not used by him or indeed the company to hold him out as a director to any third person. The recipient (Ms Doidge) knew they were not correct. Whether or not he has been acting in the position of director is to be objectively ascertained. His own view that he was not so acting would not be relevant. But that he did not read the documents, was a poor reader, and that they

were not used to present to anyone not knowing they were erroneous are objective matters.

[96] Having regard particularly to the documents signed as director after 20 December 2016 and prior to the injury, there was only one instance of his signing a declaration as director and that was in May 2018. Testing the matter as a matter of degree having regard to "the nature of the functions or powers which are exercised and the extent of their exercise" (*Grimaldi* supra at [66]) that is insufficient, in my view, to establish that he was acting in the position of director of CRG Harvesting. The requirement that it be established Carlo was acting in the position of a director of CRG Harvesting is not met by pointing to such isolated instances of acting, without reading the documents, as if a director.

[97] Other than in relation to the field work of conducting the haulage activities, the evidence does not suggest Carlo made decisions at all. Even as to that he had limited autonomy as the haulage work necessarily followed the flow of the harvesting work and the more managerial matters (booking sidings and supervising staff) were carried out by Renato. As to all matters of corporate governance, management and administration Carlo played very much a secondary, if any, role.

[98] For these reasons Ground C is not made out.

[99] Again, it is unnecessary to consider the second ground of the Notices of Contention filed by each of the respondents (other than to note my agreement with its substance) that if the primary judge took into account the subjective intentions of the parties nonetheless his Honour's finding as to Carlo not acting in the position of director was correct based on the objective material.

Ground D – Past Economic Loss

[100] The primary judge undertook an assessment of damages representing Carlo's loss of earning capacity arising from the injury. One aspect of making that assessment was to identify a component representing the value of that loss of earning capacity to the date of trial. The primary judge assessed Carlo's impaired earning capacity in conducting cane harvesting in respect of the period to trial at $1,000 per week: R [70]. But that was not the sole financial consequence of the impairment to his capacity to work. The primary judge also had regard to the value of his earning capacity as represented by his past earnings from C & L Germanotta Pty Ltd as trustee (his own farm).

[101] The principles for the assessment of 'past lost earnings' were discussed in *Doerr v Gardiner* [2023] QCA 160. A number of principles inform the approach in this case.

(a) While it is convenient to refer to past or future lost earnings, what is being assessed are the damages for the loss of earning capacity: at [165].

(b) This involves a plaintiff establishing both an impaired earning capacity and the extent to which that is or may be productive of financial loss: at [166].

(c) Once the Court is satisfied that the diminution of earning capacity will (on the balance of probabilities) be productive of some financial loss it must then assess the value of that by reference to a range of probabilities, possibilities and contingencies: at [167].

[102] Additionally, in principle at least, the process does not involve making an assessment of the dollar figure Carlo might have obtained as a distribution from the trustee conducting the business of the farm as such, but rather "the enquiry is about what *could* the plaintiff have done in the workforce but for the accident and what sum of money would the plaintiff have had at his or her disposal": *Husher v Husher* (1999) 197 CLR 138 at [23].

The Primary Judge's Reasons

[103] In addition to the $1,000 per week referred to above, in assessing Carlo's loss of earning capacity, so as to derive a component for an award of damages from the date of injury to the date of the trial (some seven years), the primary judge had regard to the amounts Carlo received from the trust which operated his cane farm. The primary judge awarded a total of $109,000 representing $300.00 per week for seven years.

[104] The primary judge's reasons, were:

> "[64] There is no doubt that [Carlo] has been grievously injured and suffered multiple injuries with debilitating consequences affecting him in a variety of ways. His capacity to work as a cane farmer or as a machinery operator has been destroyed…
>
> …
>
> [72] In the three years before the accident [Carlo] was paid income from the trust; in 2016 at an average of $30.00 net per week; in 2017 at an average of $186.00 net per week and in 2018 an average of $176.00 net per week. The average of those three years is $130.00 net per week. Apart from the 2019 financial year ($520.00 net per week) the payments of profits by the trust to [Carlo] have been negligible. [Carlo] contends that the payment of income to Lisa should be taken into account in assessment of the loss of income awarded to him consistent with *Husher v Husher* (1999) 197 CLR 138. The farm income reflected in the payments to [Carlo] demonstrate that in the year subsequent to the accident the farm business has undergone a catastrophic decline in income. This indicates that the input or the contribution a fit and healthy [Carlo] made was necessary to the viability of the business. But the evidence in this case differs from *Husher* and cases where it has been applied. My assessment of Lisa is that her administrative input would also be necessary to a prosperous farming enterprise. In this vein my assessment is that [Carlo's] manual labour is necessary to the farm business and, left to his own devices, [Carlo] would not have been able to operate the farming business insofar as it involved activities such as budgeting and paying bills. To the extent that the farm was, before the accident, a success my assessment is that both [Carlo] and Lisa contributed to the farm's success.
>
> [73] The average for the 2019 year of $520.00 net per week is not a true reflection of the earnings of [Carlo]. It finds no support in the profits in the years before or subsequent. Taking into

> account the contribution to the farm income by Lisa in my view the evidence supports an assessment of past loss of farm income attributed to [Carlo] of $109,000.00 which is based on a loss of $300.00 net [per week] for seven years."

Workcover Queensland's Contentions

[105] Workcover Queensland does not dispute that Carlo's earning capacity was diminished by the injury. Nor is it disputed that it was on the balance of probabilities productive of some financial loss. There is no challenge to the assessment of the lost earnings to trial from the employment with CRG Harvesting and no challenge to the findings that Carlo was not able to work as effectively in the cane farming business of the trustee.

[106] In any case the primary judge found that Carlo, as a result of the injury, was not able to work the farm as he previously had done. Carlo's evidence was that since his injury he performed some tasks on the farm, including, as he described it driving around on a buggy supervising his son Michael.[82] He also continued to repair equipment if damaged,[83] assist Michael with irrigation and performed some slashing for a while, and operated some planting and hoeing equipment but only at a slow pace.[84] Initially after the injury, it was said Michael worked for no pay (for six months) but thereafter was paid $600.00 per week increasing to $700.00 per week.[85]

[107] The evidence plainly established that Carlo's capacity to work had been significantly affected by the injury and that is not disputed.

[108] Rather, Workcover Queensland challenges the assessment of the $300.00 per week allowed for by the primary judge on the bases that:

(a) It has not been shown that Carlo's injury was the cause of any loss of profit by the trustee in the relevant years (there being evidence which showed the cause was as likely to be something else);

(b) The loss of income from the trust by distribution of profit was the *only* basis upon which Carlo had pleaded his claim for that component of past economic loss; and

(c) Accordingly, Carlo had failed to discharge the onus of proving this loss.

The Financial and Other Evidence

[109] The trust's financial records and Carlo's own tax returns show as follows:

(a) The trustee's financial reports for the year to 30 June 2015 show total cane proceeds of $421,756, salaries to associated persons (not Carlo) of $10,560 and net profit of $91,259, a carry forward loss of $14,733 leading to a taxable profit of $76,486 of which Carlo received a distribution of $11,655 and Lisa a distribution of $63,607.

(b) For the year to 30 June 2016 the trustee's financial reports show total cane proceeds of $407,570, salaries to associated persons (not Carlo) of $10,560 and

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82 T1-45 lines 34 to 35.

83 T1-47 lines 8 to 13.

84 T1-45 line 33 to T1-46 line 16; T2-40 line 17 to T2-41 line 44.

85 T2-106 lines 15 to 25.

net profit of $122,466 of which Carlo received a distribution of $1,562 and Lisa a distribution of $60,036. The sum of $1,562 is also the sum which appears in Carlo's taxation return as his income from the trust and represents the amount of $30.00 per week to which the primary judge referred.

(c) For the year to 30 June 2017 the trustee's financial reports show total cane proceeds of $380,473, wages to associated persons (not Carlo) of $10,560 and net profit of $92,313 of which Carlo received a distribution of $15,126 and Lisa a distribution of $ 77,187. The sum which appears in Carlo's taxation return as his income from the trust is $9,684 (not $15,126) and it is this lower sum which leads to the amount of $186.00 per week to which the primary judge referred.

(d) For the year to 30 June 2018 the trustee's financial reports show total cane proceeds of $390,115, wages to associated persons (not Carlo) of $15,000 and net profit of $92,846 of which Carlo received a distribution of $22,328 and Lisa a distribution of $70,518. The sum which appears in Carlo's taxation return as his income from the trust is $9,1726 (not $22,328) and it is this lower sum which leads to the amount of $176.00 per week to which the primary judge referred.

(e) For the year to 30 June 2019 the trustee's financial reports show total cane proceeds of $290,428, wages of $6,440 (not to Carlo) and net profit of $43,833 with Carlo receiving no distribution and Lisa a distribution of $43,833. The submissions made below for Carlo identified his having received $27,067 from the trust that year, but that sum appears to have been his share of the profit on sale of partnership assets (the machinery sold that year to another family company). It is this partnership profit share which leads to his Honour's figure of $520.00 per week.

(f) For the year to 30 June 2020 the trustee's financial reports show total cane proceeds of $325,281, wages of $3,080 and a trading loss of $37,270 (depreciation having increased in that year over the preceding year by about $50,000). Other income led to a small net profit of $1,451 all of which was distributed to Carlo.

(g) For the year to 30 June 2021 the trustee's financial reports show total cane proceeds of $421,620, wages of $21,536 and net loss of $2,872 (depreciation having increased in that year over the preceding year by about $60,000, and wages by some $18,500).

(h) For the year to 30 June 2022 the trustee's financial reports show total cane proceeds of $326,480, wages of $34,351 and a loss of $83,542.

[110] The primary judge's finding that both Lisa and Carlo previously had contributed to the profitable operation of the farm also is not disputed. The net profit for each of the four years to 30 June 2015 to 2018 ranged between $91,259 and $122,466 with the average being $99,721.

[111] However, from the financial reports the primary judge concluded "[t]he farm income reflected in the payments to [Carlo] demonstrate that in the year subsequent to the accident the farm business has undergone a catastrophic decline in income. This indicates that the input or the contribution a fit and healthy [Carlo] made was necessary to the viability of the business.": R [72].

[112] While revenue dropped significantly in 2019 nonetheless a profit (albeit reduced) was derived. That there was a profit despite reduced revenue is in part attributable to a reduction in certain variable costs namely of water charges, cane harvesting, wages and repairs and maintenance (which in aggregate dropped by some $94,000). The cane harvesting season was from May 2018 to December 2018 (or perhaps a little later). It is not obvious on the evidence what impact Carlo's injury in August 2018 would have on cane planting to be harvested later in that financial year or whether it would be likely to have significant effect on the cane farm's revenue until the following (2020) financial year.

[113] There was no detailed analysis of the financial records or the transactions they record. There was no analysis of the reasons for the fluctuations in revenue (that is whether in part the changes in revenue were due to demand or price fluctuations, weather or other factors affecting yields, or no doubt many other possibilities).[86] Experienced cane farmers (Carlo and Renato) were called but did not give any evidence to explain these movements in revenue and profits.

[114] Moreover, there is no consistent trend (other than reduction in profits), and why this may have been so, was not explored at trial.

[115] After the 2019 financial year, 'trend' provides little support for the primary judge's conclusion.

(a) In 2020 the level of revenue from cane recovered marginally, but a loss was suffered. Reversing out the increase in the depreciation over the prior year would produce a modest profit (around $13,000).

(b) In 2021 revenue recovered to levels comparable to (and to some extent higher than) those of before the injury. However, again a loss was sustained. A modest profit of some $40,000 would have been returned but for the further increase in depreciation.

(c) In 2022 cane proceeds dropped again and the size of the loss increased.

(d) There is no direct evidence of the profits or losses in subsequent periods. At the time of trial there would only have been one full financial year completed but another approaching its end. Two cane harvest seasons would have been completed in that time and it seems likely that data would have been available to show what the levels of revenue and profit or loss had been. None of this was led or cross examined about.

[116] A mere review of the financial reports does not establish that the injury caused the reduced earnings in subsequent years (whether by reason of the additional burden of wages or the less efficient conduct of those wage earners compared to Carlo).

[117] However, the evidence was not confined to merely reviewing the financial reports. Each of Carlo, Lisa and Michael gave evidence of the reduction in Carlo's effectiveness and ability to conduct the farm. Michael was paid a wage but the evidence was that he was a less able farmer than his father.[87]

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86 See the observations in *Doerr v Gardiner* [2023] QCA 10 at [130] as to what would be a more acceptable means of proving loss from such financial records.

87 Quantum Statement of Carlo at [30]; Carlo at T1-45 lines 33 to 35; T1-47 lines 5 to 13; T1-48 lines 5 to 23; T1-50 lines 26 to 35; T2-41 lines 41 to 44; T2-42 lines 12 to 18; Lisa at T2-47 line 34 to T2-50 line 12; Michael at T2-105 lines 34 to 42; T2-110 lines 22 to 25.

[118] Apart from the issue of whether it was open to do so on the pleadings, it would have been necessary in assessing the contribution in dollar terms to the damages of the loss of earnings capacity (represented by the period to trial) to assess the value of that by reference to a range of probabilities, possibilities and contingencies concerning what Carlo could have earned but for his injury. It might have been possible to:

(a) Take account of what he might have earned as a labourer in a cane farm not being his own.

(b) Take into account as a possibility that he might (but for his injuries) have received money from the trustee distributing to him its (ex hypothesis greater) profits or indeed what the total profits of the farm might have been and notionally attribute value to the contribution made by Carlo and Lisa respectively.

[119] The approach of the primary judge is set out above. There are some aspects of that approach which should be noted.

[120] The figures which appear at R [72]-[73] as Carlo's trust distributions are extracted from submissions made on behalf of Carlo at the trial.[88] However, the evidential foundation for some of the figures is not plain. I have identified above the disparities between the financial records and the figures adopted by the primary judge.

[121] I agree that the 2019 year is atypical (R [73]) but for the reason that Carlo's earnings that year were from the sale of assets which is irrelevant to the worth of his lost earning capacity.

[122] The trust financial records for three years prior to the injury show trust distributions to Carlo in aggregate of $39,016 or $250.00 per week. The income tax returns of Carlo would show a lower aggregate and weekly figure, which is that used by the primary judge in the calculation he undertook which identified $130.00 per week.

[123] The approach of the primary judge does not explicitly address the facts in terms of the trading of the farm at all in the 2020 or later financial years; how that compares with the hypothetical outcome if Carlo had not been injured (identifying the probabilities, possibilities and contingencies) or how that evidence might be relevant to what Carlo might have earned from the trust but for his injury.

[124] The primary judge took into account Lisa's contribution in the passages extracted above. It is not clear how this was relied on to influence the primary's judge's ultimate conclusion to assess the component of reduced earning capacity represented by past economic loss at $300.00.

[125] In my view the primary judge did fall into error in these respects.

[126] The calculation of damages is a process of judgment rather than calculation: *Todorovic v Waller* (1981) 150 CLR 402 at 412-413 (Gibbs CJ and Wilson J) applied more recently in *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at [92] (Bell, Gageler, Nettle, Gordon and Edelman JJ). Assuming that there was some error of principle or misapplication of the facts by the primary judge so as to amount to error, nonetheless the Court needs also to be satisfied that the error is such as to vitiate the decision,

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88 Carlo's Trial Submissions at [150].

having yielded "an assessment beyond the limits of a sound discretionary judgment, ignoring variations beyond those limits which are de minimis": *Wilson v Peisley* (1975) 50 ALJR 207 at 217 in *Calder v Boyne Smelters Ltd* [1991] 1 Qd R 325 at 349 (Cooper J, Kneipp J agreeing at 326).

[127] Before considering whether in this case the end result is beyond those limits, I will deal with the issue as concerns the pleaded case.

The Pleaded Case

[128] The Statement of Claim filed on behalf of Carlo pleads that he lost income which he would otherwise have earned and also that he has and will continue to suffer economic loss: Statement of Claim at paragraphs 15(c) and (d).

[129] In paragraph 16, as to the past economic loss, it is pleaded:

> "…
>
> (b) [Carlo] has suffered past economic loss (calculated to 15 January 2022 and to be updated from time to time) compensable in the amount of **$305,019.20** calculated or estimated taking into account the following matters:
>
> …
>
> (iii) immediately prior to the accident, [Carlo] also operated a cane farm, which provided him with additional income;
>
> (iv) [Carlo], immediately prior to the incident, as both a cane farmer and an employee of [CRG Harvesting], performed the following tasks:
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> (A) hauling cane using a tractor and 15 tonne bin;
>
> (B) filling loco bins, requiring high levels of spinal rotation;
>
> (C) harvester operation;
>
> (D) fertilizing whereby he was required to climb up and down the fertilizer box and lift chemicals;
>
> (E) climbing vertical ladders into large machinery;
>
> (F) setting up and dismantling irrigation pipes;
>
> (G) repairing and performing works on farm machinery; and
>
> (H) undertaking a variety of manual handling, tasks associated with the operation of a cane farm.
>
> …
>
> (vii) given the nature of the injuries, [Carlo] was unable to return to work following the incident and as a result of the incident required a full-time labourer to assist in operating the cane farm;

(viii) [Carlo] would have continued to earn not less than $1,060.00 net per week in his employment as a cane harvester had he not been injured in the incident;

(ix) [Carlo] would have continued to earn not less than $700.00 net per week generated from operation of the cane farm as compared to what he can now earn taking into account the need to employ paid labour to replace [Carlo];

…

(xi) accordingly, in the period from 15 August 2018 to the date of this pleading (15 January 2022) of 178.42 weeks, [Carlo] would have earned $124,894.00 as a cane farm operator ($700.00 net per week x 178.42 weeks)."

[130] In the course of the trial an objection was taken on behalf of Workcover Queensland to paragraph 30 of the Quantum Statement of Carlo because it was suggested it was seeking to advance a claim for this component of past economic loss on the basis of it being equal to the cost to CRG Harvesting of securing substitute labour from Michael. It is enough to set out the first two sentences of the paragraph which stated:

> "As a result of my inability to do the manual farming work, the Family Trust has… employed my son, Michael to do work… All the work that Michael is employed to do is work that I would have done myself if I had not been injured…"

[131] There was some discussion about that Quantum Statement and the terms of paragraph 16 of the Statement of Claim. The objection was overruled. I do not read his Honour's reasons for overruling that objection as providing support for the contention now advanced by Workcover Queensland. The ruling itself is not the subject of any challenge in the appeal but it is instructive to set out part of his Honour's reasons as they indicate, as far as the trial judge was concerned, with the way the case was pleaded and conducted.

> "It is often not fully appreciated or overlooked in cases involving claims or economic loss consequent upon personal injury that… the function of the court is to attempt to measure the loss suffered, being… otherwise expressed as a diminution in earning capacity…"[89]

[132] After referring to the pleadings his Honour concluded:[90]

> "Evidence could be led and is admissible, in my view, from substitute labourers, be they be persons independent of the family or family members, who might give evidence of what they were paid conducting work identical to or similar to work that… used to be done by [Carlo]. That evidence serves to shore up or attempt to shore up a claim for – for loss of earning capacity. But it does not substitute a different claim from that as pleaded. In other words, [Carlo's] claim is particularised and pleaded, specifically capped in the amounts that I've indicated. Whether the evidence that is forthcoming is persuasive that it is

89 T1-42 lines 1 to 4.
90 T1-42 lines 26 to 35.

> a proper measure of his loss of earning capacity remains to be seen. And that's a matter for the evidence. I overrule the objection to paragraph 30 of the statement of loss and damage."

[133] His Honour clearly had in mind that evidence of what other labourers might be paid to do the same kind of work would be relevant to Carlo's loss of earning capacity presently under consideration; and that the terms of paragraph 16 of the Statement of Claim did not preclude that.

[134] In the end, and not without some hesitation, I agree. The Statement of Claim, while using the language of past economic loss is directed to assessment of a part of the damages for loss of earning capacity. It then identified factors to be taken into account in assessing, not as themselves defining, the loss. Moreover, they are to be taken into account not simply to calculate damages but also to estimate them. The Quantum Statement dated 28 February2024 (the trial commencing on 4 March 2024) identified, at least to the trustee, the worth of the work Carlo could no longer perform as the sum paid to Michael for that work. The primary judge viewed such evidence as relevant to Carlo's claim and I agree.

The Conclusion on Past Economic Loss

[135] I am not satisfied that the errors identified above are such as to vitiate the decision having yielded "an assessment beyond the limits of a sound discretionary judgment." This is principally for the following reasons.

[136] The injuries suffered by Carlo are of a nature that would have precluded his effective operation of the farm. The evidence clearly establishes this.

[137] The only evidence of the worth of the labour performed by Carlo (being that paid to Michael) is that it was initially $600.00 per week increased to $700.00 per week.[91] However this needs to be viewed with some caution. The financial records show wages decreasing in the 2020 year, then increasing in the 2021 and 2022 years but not to the extent that would reflect such payments for a year to Michael. Lisa on the other hand said that any wages paid to Michael would be reflected in the trustee's financial reports and that Michael was only paid wages for period in 2019.[92] The only wages shown in the 2019 finance reports total $6,440. However, Michael was not challenged on this aspect of his evidence and the primary judge seemingly formed a favourable view of his reliability as a witness: R [21]. These wage levels are matters to which some regard properly may be given.

[138] It is right that the financial reporting for the years 2019 to 2022, cannot be relied on as establishing that the reduction of profits in those years was caused by Carlo's injury. But, other than in respect of the 2019 year, the primary judge did not explicitly proceed on that basis. His Honour looked only at the past years. Having done so he concluded that on average in those years Carlo's receipts were around $130.00. The correct figure should have been around $250.00. In arriving at the assessed $300.00 per week the primary judge seemed to have relied in part on the 2019 income of Carlo which as mentioned was, in my view, irrelevant. The figure ultimately arrived at by the primary judge is higher than the numerical average of the distributions made to Carlo in the three prior years, but while this is significant, when regard is had to the

91 This was the evidence of Michael at T2-106 lines 8 to 24.
92 Lisa at T4-54 lines 1 to 21.

other matters below, it is not such as to not be outside the proper recognition of the value of the work provided by Carlo.

[139] Given the inability to further analyse the later years' performances, it is entirely understandable that there be a reluctance to draw relevant conclusions from them.

[140] As to the 2019 year, there was a significant drop in revenue and no other explanation for why that may be so other than Carlo's injury appears from the material. In that year there are no elevated allowances for depreciation or wages. That is some support for the view that a fit and healthy Carlo was necessary to the viability of the business: R [72].

[141] If one were to look past the distributions to Carlo, to the trading profits each year, in the four years prior to the accident the trustee on average made a profit (ignoring the carry forward loss) of approximately $76,500. Consistently with the primary judge's finding the financial viability of the farm was attributable to both Carlo and Lisa. This provides some support for saying that in past years Carlo's labour had a value in excess of the amount determined by the primary judge per week.

[142] Taking these matters into account and recognising the nature of the exercise is not one of precise calculation at all,[93] the figure employed by the primary judge cannot be said to be such as to not be outside the proper recognition of the value of the work capacity provided by Carlo.

[143] In my view Ground D is not made out.

Ground E - Discount of Future Economic Loss

[144] The final ground of appeal concerns the discount for contingencies which the primary judge applied in his assessment of the component of lost earning capacity represented by future earnings.

Primary Judge's Reasons

[145] His Honour allowed a discount of 15 per cent. In arriving at this the primary judge reasoned at R [78]:

> "[Carlo] submitted that the assessment of damages for future loss of earning capacity should be based on a notional retirement age of 67 years and that the awarded damages should be discounted by 15% to allow for adverse contingencies. That discount (which is high) was indicated because of the risk that [Carlo's] right shoulder condition would continue to deteriorate requiring replacement surgery and a protracted recovery. The evidence of Dr Shaw and Dr Gervais suggest that the risk of the need for surgery was not a probability but in the circumstances the medical evidence persuades me that the risk justifies the discount as suggested."

The Evidence

[146] Carlo was born in January 1973 and so was 51 years of age at the time of the trial (and 52 at the time of judgment).

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93 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 640.

[147] He suffered from pre-existing osteoarthritis and degeneration in his right shoulder.

[148] Consultant Orthopaedic Surgeon Dr Trevor Gervais, in his Independent Medico-Legal Report (10 April 2024), recorded that prior to the present injury, Carlo had pre-existing issues with his right shoulder, having "sustained a rotator cuff tear to the right shoulder" in 2005.[94] He was reviewed by an orthopaedic surgeon but did not undergo surgery in respect of this injury. He continued to work and run his business. By 2015, Carlo had developed advanced degenerative change in the glenohumeral joint.[95]

[149] Dr Gervais opined that Carlo "has some global restriction due to his osteoarthritic change."[96] He assessed that the accumulation of his right shoulder rotator cuff injury and subsequent osteoarthritis in the glenohumeral joint,[97] gave rise to a 9 per cent upper extremity impairment, resulting in a 5 per cent whole person impairment.

[150] Carlo's modified work activities since the 2018 injury indicated a likely reduction in respect of the demands on his shoulder, such that he may not require surgery for a prolonged period.[98]

[151] Dr Gervais noted that the Carlo did not report significant discomfort in his right shoulder, notwithstanding his arthritis. Whether surgical intervention will become necessary was difficult to predict and depended on there being progressive pain. Dr Gervais concluded:[99]

> "Had the injury of 2018 not occurred, I would have expected that the shoulder pain would have eventually caused him limitation in his activities and made it difficult for him to perform heavy manual tasks. It would have been difficult to dig trenches and perform overhead activities such as pulling himself up into a tractor etc with progressive arthritic change. Had the injury of 2018 not occurred and restricted his ability to perform his farming tasks, I suspect that the shoulder issue would eventually have become sufficiently symptomatic that it would have limited his activities. This may well have occurred within a five to ten year period regardless of the injury that occurred in 2018."

[152] Dr Gervais continued that "[it is] my opinion that [his pre-existing condition] would have presented a difficulty for him to continue in his normal farming activities in the long term had the injury of 2018 not occurred."[100]

[153] Dr Mark Shaw stated that it is difficult to predict when the shoulder injury would progress to the point of requiring surgical intervention.[101] He explained that osteoarthritis is "unpredictable symptomatically."[102] Nonetheless, Dr Shaw concurred with Dr Gervais' five to ten year conclusion, observing that:[103]

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94 Report of Dr Gervais p 12.
95 Report of Dr Gervais p 5.
96 Report of Dr Gervais p 14.
97 Report of Dr Gervais p 14.
98 Report of Dr Gervais p 15.
99 Report of Dr Gervais p 18.
100 Report of Dr Gervais p 17.
101 File Note of Dr Shaw (29 April 2024). Dr Gervais also accepted in cross examination that the period is difficult to predict and that five to ten years was a "rough estimate": T4-50 lines 37 to 47.
102 File Note of Dr Shaw (29 April 2024).
103 File Note of Dr Shaw (26 April 2024) (ex 27). See also T2-121 lines 16 to 22.

> "It [was] entirely typical of what he would expect to see with the progress of such a degenerative process in shoulder."

[154] His opinion was based on the appearance of a then recent X-ray of the right shoulder which showed a lack of articular cartilage.[104]

[155] The evidence of these doctors would appear to refer to a period of five to 10 years from the date of the X-Rays (December 2023) rather than from the date of the injury.[105]

[156] On the other hand, if Carlo's pre-existing condition deteriorated to the point of requiring surgery, he might have been able to return to conducting his farm. But there was uncertainty about whether he should undertake such an operation as he aged.

[157] In 2016, a general practitioner assessed Carlo as "ready for right shoulder replacement."[106] He was referred to a specialised surgeon. Carlo did not undergo surgery to his right shoulder because he was only in his mid-forties.[107] Carlo himself gave evidence that he did not proceed because he was informed that he would "outlive" the replacement and (seemingly) might need to have it repeated.[108] Taking the passage of time to trial (and a further five to 10 years), this concern may be less pronounced. That said, Dr Gervais noted in his 2024 Report that a total shoulder replacement, being the only surgical treatment for significant degenerative changes in the glenohumeral joint, "would be best avoided in his age group if possible."[109] It is perhaps unclear but this possibly means not because he was then too young. Carlo was 51 years old at that time.

[158] In cross examination, however, Dr Gervais suggested that the "best option", if Carlo "got to the point where he required intervention" would be a "reverse shoulder replacement."[110] He was not questioned as to whether this would be undesirable at Carlo's age. The recovery time for such surgery is a period of six weeks in a sling and a subsequent 12 weeks of strengthening exercises.[111] Dr Gervais stated that Carlo would be able to return to work within a six month period post-surgery, depending on the work. One would expect a patient to regain a functional range of movement but they may experience restrictions in respect of "very heavy activities or impactful activities."[112]

[159] According to Dr Shaw, a shoulder replacement "is not a pain curing operation."[113] Some restraint is required when returning to work, such as avoiding heavy lifting or repetitive tasks. A shoulder replacement can also wear down quickly depending on the how active the patient is following the surgery. Dr Shaw opined that the "shoulder injury would not be career ending in terms of [Carlo's] work duties, like the subject back injury has been."[114]

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104 T2-122 lines 14 to 20. That X-Ray was taken on 3 December 2023.
105 Dr Shaw at T2-121 line 45 to T2-122 line 20 and T2-123 lines 7 to 10; Dr Gervais at T4-50 lines 37 to 47.
106 Report of Dr Gervais at p 5.
107 Report of Dr Gervais at p 9-10.
108 T2-6 lines 25 to 42.
109 Report of Dr Gervais at p 14-15.
110 T4-49 lines 1 to 12.
111 T4-50 lines 14 to 27.
112 T4-51 lines 1 to 13.
113 File Note of Dr Shaw (29 April 2024).
114 File Note of Dr Shaw (29 April 2024).

[160] Dr Roehrs, an occupational therapist, said that in his experience, manual workers who undergo shoulder replacement surgery are typically able to return to their previous occupation.[115] He believed that Carlo "would have a better outcome" following a surgery and would be able to carry out most of his work tasks in respect of harvesting cane.[116] As for cane farming, Dr Roehrs considered that Carlo would require some assistance and modifications, but could still, following a surgery, return to the majority of tasks.[117]

Conclusion

[161] There is no challenge to the primary judge's view that the expected work life of Carlo would (absent the injury) have been to age 67 (a period of 15 years). Between five and ten of those years, on the evidence provided, likely remain after late 2023 to pass before his condition would make continued work on the farm impractical without surgery. The outcome of that surgery was likely positive though with a significant recovery period.

[162] These are contingencies which are specific to Carlo. But they are not the only contingencies which might have occurred in any event and which would provide a foundation for discounting the lost future earnings. A discount of 15 per cent on future earnings, rather than being high (as the primary judge called it) to my mind seems modest.

[163] However, it cannot be said to be so modest as to reveal error as having yielded "an assessment beyond the limits of a sound discretionary judgment." Accordingly Ground E is not made out.

Outcome of Appeal

[164] For these reasons, in my view, the appeal fails and given that outcome, costs should follow the event. In the circumstances the appropriate orders in my view are:

1. The appeal is dismissed;
2. The appellant pay the respondents' costs of the appeal.

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115 T1-69 lines 15 to 18.
116 T1-69 lines 20 to 27.
117 T1-69 lines 29 to 26.