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RUS v COMCARE: THE RULES OF EVIDENCE IN THE AAT

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ABSTRACT

The *Rus v Comcare* cases arise from a claim for compensation by the widowed Ms Rus. The cases saw a highly contentious piece of evidence tendered. This evidence was hearsay of a lay opinion that answered the ultimate issue. The evidence was considered by the Administrative Appeals Tribunal ('AAT') and the Federal Court of Australia ('Court'). These considerations demonstrate the uncertainty of how the rules of evidence are applicable in tribunals. Specifically, the cases raise applicability of the rules against opinion and hearsay evidence. Further, the relevance of delay and the parol evidence rule to these cases is raised. The principles and policies governing these issues are analysed, which warranted minimal if any discussion in the cases, to assist practitioners in similar cases.

I INTRODUCTION

*Rus v Comcare*¹ and *Rus v Comcare (No 2)*² were heard by Bromberg J in the Court. These cases were appeals from the AAT judgment in a prior *Rus v Comcare*.³ The *Rus* cases involved a triumvirate of legal areas: administrative law, employment law, and evidence law.⁴ The *Rus* cases are important as they illustrate myriad evidential difficulties, and legal ambiguity, in AAT proceedings.

The general details of the case are as follows. The applicant was Christine Rus, with Comcare being the respondent. Comcare is a Commonwealth statutory authority, established under the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* ('SRC Act'). The SRC Act requires

¹ Graduating LLB/B.Comm (Finance) student at The University of Notre Dame Australia.

² [2017] FCA 239.

³ [2017] FCA 356.

⁴ [2016] AATA 18. "*Rus* cases" refers to all three *Rus v Comcare* judgments.

⁵ We will observe later that there were, potentially, implications for contractual interpretation as well.

Comcare to pay compensation to Commonwealth employees for employment-related injuries that cause death, incapacity for work or impairment. Christine Rus applied to the AAT for compensation under the SRC Act, on behalf of her deceased husband, Mr Rus. The AAT decision⁶ denied the application for compensation under the SRC Act, for failing to prove Mr Rus was a Commonwealth employee. The applicant appealed to the Federal Court of Australia, seeking judicial review. The issue on appeal was whether the AAT ignored relevant material by not admitting hearsay evidence of a lay opinion as evidence of an employment relationship.⁷ The Court ultimately ruled that the AAT had committed jurisdictional error by ignoring the relevant hearsay evidence.

Following this introduction, this note has three Parts. Part II outlines the law of evidence's applicability in the AAT. In Part III I give a traditional case note on the *Rus* cases. Part IV contains a deeper analysis of the *Rus* cases. This Part is divided into two sections. Section 1 analyses the important evidential issues overlooked in the *Rus* cases, while Section 2 evaluates the implications on the parol evidence rule that flow from the Court's *Rus* judgment. Part VI gives my concluding remarks on the *Rus* cases.

II EVIDENCE IN THE AAT

Evidence is relevant only if it would have rational bearing upon a question under consideration by the trier of fact.⁸ The AAT has articulated that evidence is relevant in its own context if it would "throw any light at all on the issues to be considered by the Tribunal in reviewing the merits of the decision".⁹

⁶ *Rus v Comcare* [2016] AATA 18.

⁷ *Rus v Comcare* [2017] FCA 239, [1].

⁸ J. R. S. Forbes, *Justice in Tribunals* (2014, 4th ed, Federation Press) 206.

⁹ *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [132].

The AAT, like tribunals generally, is not bound by the rules of evidence.¹⁰ The AAT can admit any evidence that is relevant, including unsworn evidence.¹¹ However, the rules of evidence are not completely disregarded in the AAT. Tribunals can be persuaded to follow these rules in making their determinations.¹² Tribunals often follow the rules of evidence to ensure fairness between the parties, and that only probative evidence is being admitted.¹³ A tribunal can also use the rules of evidence to guide them in *weighting* the admitted evidence.¹⁴ Case law has reiterated the foregoing propositions.

In the *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228, Evatt J held:

Some stress has been laid by the present respondents upon the provision that the tribunal is not ... bound by any rules of evidence. Neither it is. But this does not mean that all the rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the [other].¹⁵

Similarly, in *VCA v Australian Prudential Regulation Authority*, the AAT held:

The fact that we may inform ourselves on any matter in such manner as we think fit does not mean that we should do so without setting some boundaries. Section 33(1)(c) [of the AAT Act] provides that we are “*not bound by the rules of evidence*” but not being bound by them is a very different matter from not being able to have regard to them. We do have regard to them for they often provide clear guidance as to the manner in which the Tribunal should inform

¹⁰ Forbes, above n 7, 201.

¹¹ *Ibid*; *Administrative Appeals Tribunal Act 1975* (Cth) s 33 (‘AAT Act’).

¹² Forbes, above n 7, 203.

¹³ Terese Henning and John Blackwood, ‘The Rules of Evidence and the Right to Procedural Fairness in Proceedings in Four Tasmanian Quasi-Judicial Tribunals’, (2003) 10 *Australian Journal of Administrative Law*, 84, 86.

¹⁴ Forbes, above n 7, 203; *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [278].

¹⁵ *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 cited in Henning, above n 12, 86.

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itself. That guidance may be important in distinguishing between evidence that may be regarded as carrying sufficient weight to be relied on, and so safe, and that which is not. They have been developed in the civil and criminal courts to assist them in making findings of fact on the basis of logically probative evidence.¹⁶

However, it should be noted that whether the rules of evidence should be applied in any particular circumstance is unresolved by the case law.¹⁷

It should be noted that the AAT's freedom from the strict application of the rules of evidence is not license for the AAT to depart from the principles of natural justice.¹⁸ The AAT continues to be bound by the rules of natural justice irrespective of their freedom from the rules of evidence.

III RUS V COMCARE IN THE AAT

A The Factual Background

As noted above Christine Rus was the applicant. She was a dependent of the deceased Mr Rus.

Mr Rus had worked at the Australian Wool Board ('**AWB**') as a maintenance worker. The AWB was a statutory corporation created and regulated by the *Wool Industry Act 1962* (Cth) ('**WI Act**'), for the purpose of promoting and developing the Australian wool industry.¹⁹ Mr Rus died at the age of 63 in 2013. The cause of his death was mesothelioma, which was first treated in 2012.²⁰

¹⁶ *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [231] (citations omitted).

¹⁷ Henning, above n 12, 86.

¹⁸ Forbes, above n 7, 201.

¹⁹ *Wool Industry Act 1962* (Cth) ss 5, 24.

²⁰ *Rus v Comcare* [2017] FCA 239; *Rus v Comcare* [2016] AATA 18, [3].

While working at AWB warehouses, Mr Rus was required to maintain and repair the warehouses' walls and rooves. These were built from asbestos cement sheets. Mr Rus' work involved cutting asbestos sheets with a grinder,²¹ which released asbestos fibres into the air. Medical evidence indicated that Mr Rus' malignant mesothelioma was almost certainly due to asbestos exposure.²²

There was no evidence of any written contact between Mr Rus and the AWB.²³

B *Legislative Framework*

The SRC Act provides for workers' compensation for Commonwealth employees. Section 14 of the SRC Act provides, subject to Part II, that Comcare is liable to pay compensation for an injury suffered to Commonwealth employees if the injury results in death, incapacity for work or impairment. The SRC Act (s 17) provides further, for injuries that result in death of a Commonwealth employee, compensation is payable to the deceased employee's dependants. The SRC Act (s 17) is the basis for Christine Rus' standing in the *Rus* cases.

The interpretation of 'employee' is of central importance in this case. The SRC Act's definition of a Commonwealth "employee" limits the scope of the Act's application. The SRC Act s 5(1) relevantly provides:

(1) In this Act, unless the contrary intention appears:

...

employee means:

(a) a person who is employed by the Commonwealth or by a Commonwealth authority, whether the person is so employed under a law of the Commonwealth or of a Territory or under a contract of service or apprenticeship; or

²¹ *Rus v Comcare* [2016] AATA 18, [3].

²² *Rus v Comcare* [2016] AATA 18, [4].

²³ *Rus v Comcare* [2017] FCA 239, [23].

(b) a person who is employed by a licensed corporation.

The SRC Act uses the word “employed” throughout s 5, but that word is not defined in the Act. The inclusionary provisions (e.g. including Defence Force and Australian Federal Police members²⁴) did not assist in this case. Both parties accepted that the AWB was a Commonwealth authority.²⁵

Whether an employment relationship exists is a question of fact, to be decided by the trier of fact.²⁶

Not all workers are employees. Specifically, the law distinguishes employees (who are engaged in a “contract *of service*”) from independent contractors (who are engaged in a “contract *for services*”).²⁷

Employees are in a contract of a personal nature, which is descended from the old master and servant relationship. Employment incorporates notions of subservience to an employer.²⁸ By contrast, independent contractors provide services as an “independent operator in the marketplace”.²⁹

²⁴ *Safety, Rehabilitation and Compensation Act 1988* (Cth) s 5(2).

²⁵ *Rus v Comcare* [2017] FCA 239, [4]. The s 5 provisions concerning licensed corporations were not relevant to the case, but for completeness I explain them here. A licensed corporation is a private corporation that has their workers’ compensation liabilities self-insured under Part VII of the SRC Act. The SRC Act s 5(1A) provides a person is employed by a licensed corporation if they work pursuant to an employment contract and are ordinarily entitled by law to workers compensation for that work.

²⁶ *Williams v Macmahon Mining Services Pty Ltd* [2009] FMCA 511, [28]; *Skene v Workpac Pty Ltd* [2016] FCCA 3035, [69].

²⁷ Rosemary Owens, Joellen Riley, and Jill Murray, *The Law of Work* (2011, 2nd ed, Oxford University Press) 155.

²⁸ *Ibid* (emphasis added).

²⁹ *Ibid* (emphasis added).

The distinction is important for the *Rus* cases, as the AAT's *Rus* decision solely concerned whether Mr Rus was an employee or independent contractor.³⁰ We turn to the AAT's decision in detail now.

C Procedural History

The applicant's claim for compensation under the SRC Act was first heard by the AAT. The sole question (ultimate issue) for the AAT was whether Mr Rus was an employee of the AWB for the purposes of the SRC Act.³¹ The Tribunal outlined three hypotheses ('**hypotheses**') to answer the ultimate issue³²;

- a) Mr Rus was an employee;
- b) Mr Rus was an independent contractor; or
- c) Mr Rus was an employee of an independent contractor.

D Mr Rus' Statements

The applicant submitted evidence of out-of-court statements by Mr Rus, in an attempt to prove that Mr Rus was an employee. These statements were made orally in several conversations. The statements were evidenced by the applicant via affidavit and Mr Rus' Answers to Interrogatories.

The affidavit ('**son's affidavit**') was prepared by Mr Rus' son, Mr Dean Rus. The son's affidavit detailed conversations between Mr Dean Rus and Mr Rus. The son's affidavit referenced a 1995 (approximately.) conversation, in which Mr Rus stated he previously worked at the AWB premises around the corner from Jupps Motor Options on Brooklyn

³⁰ Independent contractors are not entitled to compensation under the SRC Act as they are not an employee.

³¹ *Rus v Comcare* [2016] AATA 18, [1].

³² *Rus v Comcare* [2016] AATA 18, [70]; *Rus v Comcare* [2017] FCA 239, [12].

Road (Brooklyn, Victoria).³³ Further, Mr Rus described his work at the premises. In the son's affidavit, Mr Rus relevantly stated: 'I used to do maintenance on the building there. I repaired the asbestos cement fibro sheets. I did not know the stuff was dangerous at the time.'³⁴

A later conversation in 2000 (approximately.) was also detailed in the son's affidavit. This conversation occurred between Mr Dean Rus' wife and Mr Rus. Per the affidavit, Mr Dean Rus' wife told Mr Rus that she was working at the former AWB premises on Brooklyn Road, to which Mr Rus replied³⁵:

I used to work for the Australian Wool Board. I drove past it recently and I saw that they have changed the asbestos cement cladding on the outside of the buildings from when I used to work there.

The second source of Mr Rus' statements was from Mr Rus' Answers to Interrogatories ('**interrogatory answers**'), in response to the Comcare interrogatory to Mr Rus. The answers stated that he was working *for* AWB (i.e. as an employee)³⁶

Mr Rus' statements were admitted as evidence of Mr Rus' understanding of his situation at the time, and that he did work on AWB premises. However, Mr Rus' statements were *not* considered by the AAT to be evidence of the capacity (i.e. employee or contractor) in which he worked at the AWB.³⁷

³³ *Rus v Comcare* [2016] AATA 18, [48].

³⁴ *Rus v Comcare* [2016] AATA 18, [48].

³⁵ *Rus v Comcare* [2016] AATA 18, [49].

³⁶ *Rus v Comcare* [2016] AATA 18, [63]; *Rus v Comcare* [2017] FCA 239, [8].

³⁷ *Rus v Comcare* [2016] AATA 18, [50], [63]. There is a possibility that such an analysis is incongruent with the common law of employment. This possibility will be explored later in this Note.

E The AAT's Decision

The AAT ultimately rejected the applicant's claim for compensation. The AAT ruled that Mr Rus was not an employee of AWB, and instead one of the other two hypotheses was correct (without deciding which).³⁸

IV RUS V COMCARE IN THE FEDERAL COURT

A Ground of Appeal and Answer

The applicant appealed the AAT's decision to the Court. The applicant claimed that the AAT committed jurisdictional error by ignoring relevant material. Specifically, the jurisdictional error claimed was the AAT's refusal to consider Mr Rus' statements in determining whether Mr Rus was an AWB employee.³⁹

The appeal was brought pursuant to s 44 of the AAT Act, which allows appeals to the Federal Court to review AAT decisions for errors of law. The Court proceeded on the basis that ignoring relevant material will constitute jurisdictional error where the ignorance demonstrates a failure to perform the statutory task of the decision-maker.⁴⁰ It was common ground that a jurisdictional error by the AAT was an appealable error.⁴¹ The Court relied on recent authority for the proposition that the appeal's success requires that the AAT's ignorance be adequately serious, or of consequence to the Tribunal's decision.⁴²

Comcare opposed the appeal by disputing the applicant's characterisation of the AAT's consideration of the evidence. Specifically, Comcare contended that the AAT did not *ignore*

³⁸ *Rus v Comcare* [2016] AATA 18, [70]-[73].

³⁹ *Rus v Comcare* [2017] FCA 239, [7].

⁴⁰ *Rus v Comcare* [2017] FCA 239, [27].

⁴¹ *Rus v Comcare* [2017] FCA 239, [16]; *Administrative Appeals Tribunal Act 1975* (Cth) s 44(1).

⁴² *Rus v Comcare* [2017] FCA 239, [27]-[28] citing *Minister for Immigration and Border Protection v MZYTZ* (2013) 230 FCR 431, [68]; *Buchwald v Minister for Immigration and Border Protection* (2016) 242 FCR 65.

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Mr Rus' statements in determining the ultimate issue. Instead, the AAT considered the evidence relevant but merely accorded it little or no weight.⁴³ Comcare's argument seemingly rests on the assumption that affording evidence little or no weight will *not* constitute jurisdictional error for failure to consider relevant material.

B Characterising the AAT's Consideration of Mr Rus' Statements

The first task of the Court was to determine how the AAT considered the evidence. This issue was dispensed with briefly.

The Court rejected Comcare's contention that the AAT considered Mr Rus' statements relevant to the ultimate issue, and merely afforded them little to no weight.⁴⁴ To the contrary, the Court ruled that the AAT considered Mr Rus' statements irrelevant to the ultimate issue.⁴⁵

In dicta, the Court implicitly rejected Comcare's assumption that admitting the evidence but according it no weight is not ignoring the evidence.⁴⁶

C Relevance of Mr Rus' Statements

As noted earlier, the Court's task on appeal was to determine whether Mr Rus' statements were relevant to determining whether Mr Rus was, on the balance of probabilities, an employee for the purposes of the SRC Act s 5.⁴⁷

⁴³ *Rus v Comcare* [2017] FCA 239, [9].

⁴⁴ *Rus v Comcare* [2017] FCA 239, [10].

⁴⁵ *Rus v Comcare* [2017] FCA 239, [10].

⁴⁶ *Rus v Comcare* [2017] FCA 239, [10].

⁴⁷ *Rus v Comcare* [2017] FCA 239, [12].

1 *Relevant Law*

The common law for determining whether an employee relationship exists was considered. First, the Court considered it well settled that determining an employment relationship would require considering the *totality of circumstances* giving rise to the relationship between Mr Rus and AWB.⁴⁸ The totality of the circumstances was deemed to include conduct prior and subsequent to the alleged employment relationship.⁴⁹ Second, the Court affirmed that determining whether an employment relationship exists, at common law, requires a multi-factorial test considering a range of circumstantial indicia.⁵⁰ The Court thus accepted the High Court's test from *Hollis v Vabu*.⁵¹ Per that case's test, indicia *includes* which party:

- was deducting tax from the alleged employee's income;
- providing the alleged employee's equipment; and
- dictating the alleged employee's work hours.⁵²

*The Law of Work*⁵³ provides an authoritative account of other important indicia. Specifically, other notable indicia listed include⁵⁴:

- the degree of control exercised over the alleged employee;
- an obligation on the alleged employee to complete the work personally; and
- *the parties own' characterisation of their relationship*.⁵⁵

Once the general principles were considered and determined, the Court moved on to considering the weight of statements or conduct by contractual parties in an alleged employment relationship. Four legal propositions were accepted by the Court on this topic.

⁴⁸ *Rus v Comcare* [2017] FCA 239, [13].

⁴⁹ *Rus v Comcare* [2017] FCA 239, [13].

⁵⁰ *Rus v Comcare* [2017] FCA 239, [16].

⁵¹ *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; *Rus v Comcare* [2017] FCA 239, [16].

⁵² *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.

⁵³ Owens, above n 26.

⁵⁴ *Ibid* 156.

⁵⁵ The significance of this indicium is discussed in Part V of this Note.

First, the Court cited and accepted the ‘fourth principle’ of Finn J in *Ex parte Fitzgerald*.⁵⁶ That principle provides that conversations and conduct of the alleged employee can be significantly relevant in determining if they are indeed an employee:

“Conversations and conduct at the time of the alleged engagement of the employee is of considerable significance... The beliefs of the employees as to the identity of their employer is admissible and is entitled to weight

Second, the Court accepted that it should attach weight to both *precontractual* and *post-contractual* statements without distinction.⁵⁷

Third, the parties’ actual (*subjective*) characterisation of their relationship *are relevant* to determining whether or not their relationship is an employment relationship.⁵⁸ However, there are limitations to such characterisations’ relevance, and so the Court extensively qualified the relevance of such evidence. The qualifications are as follows. First, such characterisations are only one of many indicia in the multi-factorial test.⁵⁹ Further, the Court ruled that characterisations cannot receive effect if they clearly contradict the terms/effect of the agreement as a whole.⁶⁰ Further, the Court adopted case law which instructed the Court to temper its reliance on opinion evidence, especially where other evidence of the relationship’s nature is available. Specifically, The Court understood that the probative value of subjective characterisations evidence was inverse to the strength of “direct” evidence. Further, the Court noted that it should not unduly rely on the private intentions of the parties in determining the nature of their relationship.⁶¹

⁵⁶ *Rus v Comcare* [2017] FCA 239, [13] citing *Re C & T Grinter Transport Services Pty Ltd (In Liquidation) & Grinter Transport Pty Ltd; Ex parte Fitzgerald* [2004] FCA 1148, [20].

⁵⁷ *Rus v Comcare* [2017] FCA 239, [17].

⁵⁸ *Rus v Comcare* [2017] FCA 239, [16].

⁵⁹ *Rus v Comcare* [2017] FCA 239, [16].

⁶⁰ *Rus v Comcare* [2017] FCA 239, [16].

⁶¹ *Rus v Comcare* [2017] FCA 239, [22].

Fourthly and finally, the Court accepted that conduct/statements and actual characterisations of the relationship are more probative where a contract was oral (in whole or part).⁶²

2 Reasoning and Decision

In light of the foregoing evidentiary principles and propositions, the Court considered what was the best evidence was available to the AAT in determining the nature of the relationship between Mr Rus and the AWB.⁶³

The lack of a written contract meant that no such document could be relied upon as evidence.⁶⁴ In such a circumstance, the Court ruled that it was proper for the AAT to consider the “next best evidence available”, which was Mr Rus’ statements.⁶⁵

Mr Rus’ statements were considered to be the next best evidence available to the AAT. Specifically, the Court considered the statements that Mr Rus worked “for” AWB were relevant to the ultimate issue. This is because these statements tended against finding that Mr Rus was a contractor, or an employee of a contractor (which were the only other two hypotheses identified by the AAT) and, further, tends for a finding that Mr Rus was an AWB employee.⁶⁶

Further, the Court concluded that Mr Rus’ explanations were *especially* relevant given that the alternate hypotheses had serious defects. These defects were substantial enough that an employment relationship (hypothesis (a)) “may have been regarded as the most likely

⁶² *Rus v Comcare* [2017] FCA 239, [18], [19].

⁶³ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2006) vol 7.

⁶⁴ However, the Court, with brevity, noted that the AAT would not be constricted to a written contract even if it existed. The Court considered first the AAT to be free from the PER: *Rus v Comcare* [2017] FCA 239, [23]. Interpretation and analysis of the Court’s conclusion on the PER is in Part V of this Note.

⁶⁵ *Rus v Comcare* [2017] FCA 239, [23]. Judicial opinion has been expressed to the effect that tribunals should avoid using hearsay if the fact its evidencing can be evidenced in a “better form”: Forbes, above n 8, 203.

⁶⁶ *Rus v Comcare* [2017] FCA 239, [23].

explanation” of why Mr Rus was working at AWB premises.⁶⁷ The defect with hypothesis (b) was the lack of evidence supporting Mr Rus carrying on his own business. Further, it was considered improbable that Mr Rus would do such a thing at his young age (15 or 16 at the material time). The effect with hypothesis (c) was rendered less probable by the AAT was the impossibility of identifying any contractor that was employing Mr Rus.

Based on the foregoing reasoning, the Court held that the AAT committed jurisdictional error by not considering Mr Rus’ statements as evidence tending for or against the existence of an employment relationship.⁶⁸ While the probative value of Mr Rus’ statements was deemed a matter of discretion for the AAT, the statements could not be ignored entirely if the AAT is to reach the requisite state of (non-) satisfaction.⁶⁹

The Court ruled to remit the case to the AAT, with directions⁷⁰, and instructed the parties to make submissions on the scope of the remittal.⁷¹ The Court’s preliminary view was that the remittal should be confined to the question of whether Mr Rus was an AWB employee.⁷² The Court did not make an order for costs in this judgment, and instead instructed that the parties agree or submit on the issue.⁷³

A second judgment was subsequently given on the scope of remittal and costs.⁷⁴ On costs, the Court ordered that Comcare pay the costs of the applicant.⁷⁵ On the issue of scope of remittal,

⁶⁷ *Rus v Comcare* [2017] FCA 239, [23].

⁶⁸ *Rus v Comcare* [2017] FCA 239, [24], [39].

⁶⁹ *Rus v Comcare* [2017] FCA 239, [24], [29].

⁷⁰ This power is granted to the Court via *Administrative Appeals Tribunal Act 1975* (Cth) s 44(5).

⁷¹ *Rus v Comcare* [2017] FCA 239, [39].

⁷² *Rus v Comcare* [2017] FCA 239, [40].

⁷³ *Rus v Comcare* [2017] FCA 239, [40].

⁷⁴ *Rus v Comcare (No 2)* [2017] FCA 356. The parties agreed that the remittal should be limited to reconsideration of the original question: whether Mr Rus was an employee of AWB. However, Comcare submitted it required an opportunity to adduce new evidence to the AAT, but did not give a reason why this was necessary. The applicant objected to Comcar’s submission. The Court rejected Comcare’s submission, on the basis that additional evidence was not necessary to remedy a failure to consider relevant material. Further, the Court expressed concern that adducing additional evidence would be uneconomical, and cause unfairness to the applicant: at [5]-[9].

the Court ordered remittal without additional evidence *unless cause be shown*.⁷⁶ Further, the remittal was limited to the same ultimate issue.⁷⁷

3 Case Distinguished from *Arends*

The Court explicitly distinguished this case from the Full Court of the Federal Court of Australia's judgment in *Re Australian Industrial Relations Commission; Ex parte Commonwealth*⁷⁸ ('*Arends*').⁷⁹

The relevant issue in *Arends* was whether Mr Arends was employed "by authority of a law of the Commonwealth". The Full Court held that Mr Arend's opinions could not assist in establishing whether he was employed "by authority of a law of the Commonwealth". In this context, the Full Court held that Mr Arends "own belief as to his status is not relevant".⁸⁰

Comcare cited *Arends* as precedent that Mr Rus' characterisation was irrelevant in determining whether Mr Rus was employed by AWB. However, the Court rejected that *Arends* supported Comcare's case. This was because the Court concluded that the opinion in *Arends* was fundamentally different to that in the present case.

V ANALYSING RUS v COMCARE

A reality of administrative law is that evidential principles and policy are infrequently analysed extensively in administrative law judgments. To illustrate, Henning and Blackwood

⁷⁵ *Rus v Comcare (No 2)* [2017] FCA 356, [3].

⁷⁶ *Rus v Comcare (No 2)* [2017] FCA 356, [3].

⁷⁷ *Rus v Comcare (No 2)* [2017] FCA 356, [5]-[11].

⁷⁸ (2005) 145 FCR 277.

⁷⁹ *Rus v Comcare* [2017] FCA 239, [25].

⁸⁰ *Rus v Comcare* [2017] FCA 239, [25].

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found that four Tasmanian administrative tribunals⁸¹ almost never articulated reasons for applying or refusing to apply the rules of evidence.⁸²

This reality is reflected in the *Rus* cases. Specifically, the *Rus* cases contain little discussion of the rules of evidence or the reasons for applying or not applying them. I attempt to remedy this lack of analysis, in the hope that it can shed light on the relevant law and policy for practitioners in similar cases.

In this Part, I first address the legal principles and policies that were omitted from discussion in the *Rus* cases. Specifically, I discuss the principles and policies governing:

- A) opinion evidence;
- B) hearsay evidence; and
- C) delayed evidence.

Secondly, I address the legal ambiguity that the Court introduces in its discussion of the parol evidence rule. The specific legal ambiguity that I refer to is the ambiguity of whether the parol evidence rule is applicable in the AAT.

A Opinion Evidence

Witnesses are often keen to give their opinions in legal proceedings.⁸³ Because the presentation of opinion evidence is less restricted in the AAT (compared to judicial forums),⁸⁴ practitioners in similar cases will encounter opinion evidence. Thus, practitioners would be wise to know how the AAT treats opinion evidence, and *what considerations* will affect its exercise of discretion to admit or reject such evidence.

⁸¹ The tribunals were the Medical Council of Tasmania, the Guardianship and Administration Board of Tasmania, the Anti-Discrimination Tribunal of Tasmania, and the Resource Management and Planning Appeals Tribunal of Tasmania: Henning, above n 12, 84.

⁸² Ibid 103.

⁸³ Andrew Hemming, Miko Kumar and Elisabeth Peden, *Evidence: Commentary and Materials* (2013, 8th ed, Thomson Reuters) 538.

⁸⁴ Ibid.

Mr Rus' statements represented his *opinion* on the existence of an employment relationship with the AWB.⁸⁵ Specifically, Mr Rus, by expressing that he worked “*for*” the AWB,⁸⁶ expressed his opinion that he was an employee of AWB.

The rules of evidence govern opinions such as this. The general rule (from the rules of evidence) is that ‘evidence of an opinion’ is admissible only for narrow purposes, and, inadmissible for evidencing the fact to which the opinion relates. This rule is found in the *Evidence Act 1995* (Cth) (**‘Evidence Act’**) s 76(1).⁸⁷ Further, the Act stipulates the narrow purposes for which opinions are admissible:

- s 77: opinions can be admitted for purposes other than proving a fact (e.g. evidences a person’s perception of a past event);⁸⁸
- s 78: *lay opinions* can only be admitted if necessary to obtain an adequate account or understanding of the person's perception of the matter or event⁸⁹, and that opinion is based on their personal perception.⁹⁰

Recall that whether an employment relationship exists is a question of fact⁹¹ and in this case the ultimate issue was whether Mr Rus was an employee of AWB or not. Further, Mr Rus was a lay person rather than an expert in the field to which his opinion relates.⁹² Thus, Mr Rus’ opinion confronts several evidential issues concerning opinion evidence, namely:

⁸⁵ *Rus v Comcare* [2017] FCA 239, [23].

⁸⁶ *Rus v Comcare* [2016] AATA 18, [48].

⁸⁷ The s 76(1) exclusionary rule is broad by using the terms “evidence of an opinion”. Specifically, the rule encompasses evidence that “is substantively an opinion (an inference from “factual” data) and evidence in the form of an opinion”: Stephen Odgers, *Uniform Evidence Law* (2014, 11th ed, Thomson Reuters), 346.

⁸⁸ *Evidence Act 1995* (Cth) s 77.

⁸⁹ *Ibid* s 78(a).

⁹⁰ *Ibid* s 78(b).

⁹¹ *Williams v Macmahon Mining Services Pty Ltd* [2009] FMCA 511, [28].

⁹² Being an expert would allow Mr Rus’ statements containing his opinions to be admitted as proof of the fact to which they relate (his employment status) if certain criteria are met per *Evidence Act 1995* (Cth) s 79. This possibility is not explored.

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- a) This is a lay opinion, and
- b) This opinion answers the ultimate issue.

I address these issues in turn.

1 *Lay Opinions*

Mr Rus' opinion is a particular sort: a *lay opinion*. A lay opinion is an opinion or inference that the average person could draw from facts in the circumstances.⁹³

Lay opinions are traditionally excluded by the common law. This exclusion is on the basis that such opinions are merely expressions of a personal view or attitude which is, more often than not, uninformed speculation of no assistance to the trier of fact.⁹⁴ The common law position is modified by the Evidence Act s 78, which allows lay opinions for the aforementioned limited purpose.

Does Mr Rus' statements status as a lay opinion reduce its probative value? In this case, the AAT's considered Mr Rus' statements to be evidence of his understanding of the relationship with AWB. However, the AAT rejected the proposition that the understanding itself assisted in answering the ultimate issue.⁹⁵ This treatment is consistent with the prohibition on lay opinions being used as evidence except in accordance with the s 78 exception. Implicit in the AAT's reasoning is the general premise that a party's understanding of a relationship does not tend towards the finding that there was an employment relationship. However, recall that a party's characterisation of their relationship as an employment relationship is *an indicium of an employment relationship*.⁹⁶ The reasoning of the AAT is in direct conflict with the established multi-factorial test of employment relationships. The common law provides that such an understanding is evidence of an employment relationship, but the AAT did not consider it so. The AAT completely omitted discussions of the indicia of an employment relationship, seemingly deciding the case in their absence. If the proper approach was to

⁹³ Catherine Arnold, 'Expert and Lay Opinion Evidence', (1990) 6(3) *Australian Bar Review*, 219, 221.

⁹⁴ *Ibid* 219.

⁹⁵ *Rus v Comcare* [2016] AATA 18, [50], [63].

⁹⁶ Owens, above n 26, 156.

consider Mr Rus' characterisation as an indicium of employment, then the probative value of similar evidence would *not* be diminished by reason of it being a lay opinion.

2 *The Ultimate Issue Rule*

The answer to whether or not an opinion/understanding is itself evidence of an employment relationship does not change the reality that the lay opinion answers to the ultimate issue. Thus, the common law *ultimate issue rule* becomes relevant.⁹⁷ The ultimate issue rule forbids a witness from giving an opinion on an ultimate issue, that is, to “swear to the issue”.⁹⁸ The classic rule has been clarified as being restricted to ultimate issues that “involves the application of a legal standard” (e.g. whether the defendant was negligent, whether a testator had capacity, whether a risk was reasonably foreseeable, whether a publication was obscene).⁹⁹ This rule applies to all witnesses.¹⁰⁰

The traditional justification for the ultimate issue rule is that admitting evidence on the ultimate issue would usurp the trier of fact's role.¹⁰¹

The general application of the rule is well illustrated in the Refugee Review Tribunal's ('RRT') V96/04781 case.¹⁰² The Applicant was a young male citizen from Turkey who applied for a protection visa in December 1995. His application was refused and appealed to the RRT. The applicant was advised by a solicitor who accompanied him at the hearing, and evidence was given on his behalf by an expert witness. Vrachnas J indicated the definite role of the Tribunal as the trier of fact:

While the Tribunal understands that the expert witness may wish to advocate on behalf of a particular applicant, many of his conclusions are the personal opinions of an advocate rather

⁹⁷ *Thomas v The Queen (No 2)* (1960) WAR 129. I explain momentarily how the common law rule is relevant in the AAT.

⁹⁸ Arnold, above n 92, 228.

⁹⁹ Ibid; Australian Law Reform Commission, above n 62, vol 9, [9.105] citing *R W Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129, 130–131.

¹⁰⁰ Arnold, above n 92, 228.

¹⁰¹ Ibid; Australian Law Reform Commission, above n 62, vol 9, [9.106]; *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [275].

¹⁰² [1996] RRTA 3553 cited in Henning, above n 12, 95.

than the dispassionate views of an expert witness and they stray into findings of fact which are the responsibility of the Tribunal after assessing all of the available evidence.

Despite the abolition of the common law rule in the Commonwealth jurisdiction by the Evidence Act, the AAT has continued to apply it. The rule has been applied for the purpose of determining whether the opinion should be admitted.

The application of the rule for purpose by the AAT is demonstrated in *VCA v Australian Prudential Regulation Authority*.¹⁰³ In this case, expert opinions on corporate management and corporate governance were not admitted due to being irrelevant.¹⁰⁴ However, the AAT noted that regardless it would have applied the ultimate issue rule to *refuse admission* of the evidence, explicitly noting that it was not bound by the Evidence Act (s 80(a)).¹⁰⁵

What is the relevance of the ultimate issue rule to *Rus* and cases like it? The AAT's application of the rule would limit the admissibility of opinion evidence like Mr Rus' statements. Specifically, the rule would prohibit tendering an opinion on employment status when that itself is the ultimate issue.

Whether the rule would actually be applied in such a case is ambiguous. The ambiguity arises because the traditional justification identified earlier is most valid where there is *expert* opinion, and especially expert *legal* opinion.¹⁰⁶ There is a real concern that, when a tribunal is presented with such opinions, they may inadvertently defer their fact-finding and/or decisions on questions of law to the experts, respectively.¹⁰⁷ Conversely, the traditional justification is less valid for lay opinions such as Mr Rus' as the AAT is arguably unlikely to be at risk of

¹⁰³ [2008] AATA 580; See also *VBN v Australian Prudential Regulation Authority* (2006) 92 ALD 259; *Re Proctor and Commissioner of Taxation* (2005) 87 ALD 247.

¹⁰⁴ *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [273].

¹⁰⁵ *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [275]-[276].

¹⁰⁶ Odgers, above n 86, 397. An expert legal opinion concerns the identification of the relevant law and its proper application to the facts of the particular case: *VCA v Australian Prudential Regulation Authority* [2008] AATA 580, [275]-[276].

¹⁰⁷ Common law jurisdictions are generally wary of allowing experts to give opinions on the law in proceedings. Such evidence is typically only allowed where the subject of the opinion is *foreign* law, which the trier of law is unfamiliar with: *Fidel v Felecia* [2015] DIFC CA 002, [50]-[59]; *Ure v Commonwealth* [2015] FCA 241, [83].

deferring to the opinion to a lay person. The inapplicability of the traditional justification in a case such as this thus weighs in favour of not applying the ultimate issue rule.

B Hearsay Evidence

The common law hearsay rule prevents out-of-court statements of fact being admitted as evidence of the stated fact.¹⁰⁸ J. R. S. Forbes articulates the rule as preventing “the repetition of an out-of-court statement as proof of the facts asserted in it”.¹⁰⁹

The common law’s strict hearsay rule is abolished by the Evidence Act, and replaces it with a weaker hearsay rule. Specifically, the Evidence Act (s 60(1)) provides that out-of-court representations¹¹⁰ are admissible for the forbidden purpose, *if they are also relevant for a non-forbidden purpose*. Articulated differently, the Evidence Act excludes hearsay evidence being used for the forbidden purpose if it is relevant *only* for the forbidden purpose.¹¹¹

Case law recognises that the AAT can admit hearsay evidence (i.e. the out-of-court assertions) and use it in their determination¹¹², as the AAT is not bound by the statutory hearsay rule.¹¹³ Though, if evidence is hearsay, its weight is negatively affected.¹¹⁴

¹⁰⁸ *Evidence Act 1995* (Cth) s 59(1); See also *Nicholls v The Queen* (2005) 219 CLR 196, 230.

¹⁰⁹ Forbes, above n 7, 212. This purpose of evidencing an asserted fact is the “forbidden purpose”.

¹¹⁰ The Evidence Act’s hearsay rule encompasses the exclusion of all “representations”, it makes no difference whether the witness testifies to a representation of their own or someone else’s. A representation has been interpreted to include an opinion as well as a representation of fact. Thus, evidence of a previously represented opinion “may be caught by both the hearsay and opinion rules”: See Odgers, above n 86, 250.

¹¹¹ Odgers, above n 104, 258.

¹¹² Forbes, above n 7, 213.

¹¹³ *Ibid.*

¹¹⁴ *Ibid* 203, 213.

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Mr Rus could not testify in person at the proceedings, as he died prior to the hearings. As such, his opinion that he worked *for* AWB (found in the son's affidavit, and in the interrogatory answers) is hearsay.

How was this hearsay evidence treated? Interestingly, the AAT's treatment of Mr Rus' statements was consistent with the *common law* hearsay rule. This is because Mr Rus' statements were admitted *only* for a non-forbidden purpose (evidencing his understanding of his former relationship with AWB).¹¹⁵ The common law rule was applied at the expense of the statutory rule. The Evidence Act (s 60(1)) was not invoked to further consider the evidence for the forbidden purpose.

This treatment is consistent with the intention behind s 60(1).¹¹⁶ The intention for enacting of s 60(1) was to allow prior (in)consistent statements, and expert opinion's factual basis, to be admitted for the forbidden purpose.¹¹⁷ The policy reasons that motivated the enactment of s 60(1) simply do not arise in *Rus*.

The inapplicability of the policy behind s 60(1), in these circumstances, means that the AAT is likely to treat similar evidence in similar cases in accordance with the common law rule.

C Delay

There is typically a long delay between exposure to asbestos and claims for compensation, as asbestos diseases often take decades to manifest. This happened to Mr Rus, with asbestos exposure in 1965 resulting in a 2012 mesothelioma diagnosis in 2012.

Delay in putting speech to writing is considered a serious detriment to the probative value of the written form. Delay can cause the written record of memories to be inaccurate as

¹¹⁵ *Rus v Comcare* [2016] AATA 18, [50].

¹¹⁶ Australian Law Reform Commission, above n 62, vol 7.

¹¹⁷ Odgers, above n 86, 258.

memories fade and become tainted (e.g. by insertion of new memories into old¹¹⁸). This risk is especially prevalent for memories of conversations.¹¹⁹

The probative value of Mr Rus' statements is thus diminished, due to the risk that delay taints the recollections *in* and *of* the conversations. There are two major delays that can be identified concerning the son's affidavit. First, there was a major delay between the 1965 work and the conversations describing it. This delay conceivably creates a risk that events and *perceptions* from 1965 were incorrectly remembered and improperly recollected at the time of the conversations. Second, there was a long delay between the oral conversations and the creation of the son's affidavit. The relevant conversations occurred in 1995 (approximately) and 2000 (approximately.) and the son's affidavit would have been prepared in 2012 at the very earliest. This means the delay between these conversations and the preparation of the son's affidavit was significant.

An implication of the foregoing analysis is that similar affidavit evidence in similar cases would too have its probative value diminished by extensive delay.

D *The Parol Evidence Rule*

The parol evidence rule ('**PER**') "excludes the use of extrinsic evidence in determining the meaning or legal effect of words used" in a contractual document.¹²⁰ The PER is alternatively expressed as: extrinsic evidence of the drafter's intended meaning is not admissible.¹²¹

¹¹⁸ David Heslin, *The Instability of Memory: How Your Brain Edits Your Recollections* (5 February 2014) The Conversation <<https://theconversation.com/the-instability-of-memory-how-your-brain-edits-your-recollections-22737>>.

¹¹⁹ Laura Stafford, Cynthia S. Burggraf, and William F. Sharkey, 'Conversational Memory: The Effects of Time, Recall, Mode, and Memory Expectations on Remembrances of Natural Conversation' (1987) 14(2) *Human Communication Research*, 203, 205 (citations omitted): "General models of memory indicate that long-term memory will be poor due to such processes as decay and interference. Moreover, because decay and interference are enhanced by complex stimuli, these processes would probably play an even greater role in memory for natural conversations".

¹²⁰ LexisNexis, *Halsbury's Laws of Australia*, vol 110 (at Service 465) [110-2250].

¹²¹ LexisNexis, *Carter on Contracts*, vol 3 (at Service 44) [13-001].

The weight of authority suggests that the PER is indeed a substantive rule of contract law¹²², and thus not a rule of evidence. This is the *Carter on Contracts*¹²³ (**'Carter'**) perception of the PER.¹²⁴

The Court quickly and vaguely concluded that the PER is not binding upon the AAT: “the Tribunal was not constrained by the parole evidence rule nor, in any event, was there evidence of there being a written contract”.¹²⁵ Put differently, the AAT did not need to consider the PER, even if there was a written contract. There was no elaboration on or clarification of this conclusion, nor did the Court specify exactly what it understood to be the correct scope or formulation of the PER.

The Court’s judgment, if the Court considered the Carter formulation to be correct, implies that that the PER does not bind the AAT. A further implication is that a resulting disunity in contractual interpretation arises, because the PER would not be binding in the AAT despite being part of the common law of Australia (and thus binding in federal courts).

To avoid the foregoing implications, the PER must be characterised as part of evidence law, which the weight of authority disagrees with. Such characterisation of the PER is consistent with the position of H. K. Lücke on the issue.¹²⁶ Specifically, Lücke opined that the PER was in “the sphere” of evidence law.¹²⁷ This avoids the foregoing implications because if the PER is conceived as being within the realm of the law of evidence, then the PER can be ignored in the AAT without damaging the uniformity of contract law.

The vagueness in the Court’s consideration of the PER leaves open the possibility of legal conjecture and confusion, as the possibility arises that this case could be cited as authority for

¹²² Ibid; Australian Law Reform Commission, above n 62, vol 1 [1.25].

¹²³ LexisNexis, above n 120.

¹²⁴ Odgers agrees, the “rule is part of the substantive law” of contract, instead of being a rule of evidence: See Odgers, above n 86, 231 citing *Owens v Lofthouse* [2007] FCA 1968, [62]. The ALRC report on uniform evidence law omitted the PER from its scope, as the PER was considered a rule of substantive law: See Australian Law Reform Commission, above n 62, vol 1, [1.25].

¹²⁵ *Rus v Comcare* [2017] FCA 239, [23].

¹²⁶ H. K. Lücke, 'Contracts in Writing' (1966) 40 *Australian Law Journal*, 265, 265.

¹²⁷ Ibid.

the inapplicability of the PER in the AAT, and, for the PER being part of evidence law. Omitting mention of the PER, which may have been reasonable, (it was irrelevant as there was no written contract)¹²⁸ could have avoided these implications.

This vagueness on the law of evidence in tribunal proceedings is, unfortunately, consistent with the broader trend in our judicial and administrative institutions, with which I introduced this commentary.¹²⁹ The vagueness has not been varied via the statutory slip rule as of writing.¹³⁰

VI CONCLUDING REMARKS

The Court's decision to allow the appeal is significant. First, the Court's judgment is a testament to how far tribunals can stray from the rules of evidence. Time will tell the admissibility and weight of similar evidence in future, as there will be future cases with similar claims and evidence (including the AAT's reconsideration of *Rus* itself). Further, The Court's brief reference to the PER created ambiguity on whether the law of contractual interpretation is uniform in the federal jurisdiction. It remains to be seen if the Court's judgment will be revisited, perhaps to clarify the ambiguity it has generated.

¹²⁸ *Rus v Comcare* [2017] FCA 239, [23].

¹²⁹ Henning, above n 12, 84.

¹³⁰ *Federal Court Rules 2011* rr 39.05(e), (h). This rule allows the Court to vary a judgment on several grounds. Relevantly, two of the grounds are that the judgment fails to reflect the judgment of the court, and, that the judgment contains an error.