IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P38 of 2015

BETWEEN:

FAIR WORK OMBUDSMAN
Appellant

and

QUEST SOUTH PERTH HOLDINGS PTY LTD
(ACN 109 989 531)
First Respondent

CONTRACTING SOLUTIONS PTY LTD
(ACN 099 388 575)
Second Respondent

PAUL KONSTEK
Third Respondent

APPELLANT'S SUBMISSIONS

PART I – Certification for publication on the internet

1. The Appellant, the Fair Work Ombudsman (**FWO**), certifies that this submission is in a form suitable for publication on the internet.

PART II – Statement of issue

2. Can an employer avoid the sham contracting provision in s.357 of the *Fair Work Act 2009* (Cth) (**FW Act**) by introducing a third party (such as an incorporated entity, which, as in this case, was a labour hire company) into the contractual arrangements between the employer and the person who is, in truth, the employee?

PART III – Certification in respect of s.78B of the *Judiciary Act 1903*

3. The FWO certifies that the FWO has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act 1903* (Cth) and has determined that no notice is required.

Date: 18 September 2015

Filed on behalf of the Appellant
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PART IV – Citation of the reasons for judgment below

4. *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No. 2)* [2013] FCA 582 (McKerracher J).

5. *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No. 3)* [2013] FCA 734 (McKerracher J).

6. *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346; [2015] FCAFC 37 (North, Barker and Bromberg JJ) (**Appeal Judgment**).

PART V – Statement of the relevant facts

7. Quest South Perth Holdings Pty Ltd (**Quest**) operated a business providing serviced apartments.[1]

8. Two housekeepers, Margaret Best (**Best**) and Carol Roden (**Roden**), were employed by Quest to provide cleaning services.[2]

9. Quest purported to *"convert"* the employees into independent contractors through a triangular contracting arrangement wherein:

   (a) Contracting Solutions Pty Ltd (**Contracting Solutions**) provided the services of Best and Roden as housekeepers to Quest pursuant to a contract between Contracting Solutions and Quest;[3] and

   (b) Best and Roden were engaged by Contracting Solutions as independent contractors under contracts for services.[4]

10. Quest represented to Best and Roden that they were performing work for Quest as independent contractors of Contracting Solutions under a contract for services, not as employees of Quest.[5]

11. After the *"conversion"*, Best and Roden continued to perform precisely the same work at Quest in exactly the same way as they had always done.[6]

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[1] Appeal Judgment at [7] (North and Bromberg JJ).
[2] Appeal Judgment at [7] (North and Bromberg JJ).
[3] Appeal Judgment at [18] (North and Bromberg JJ).
[4] Appeal Judgment at [21], [25] and [31] (North and Bromberg JJ).
[5] Appeal Judgment at [240] (North and Bromberg JJ) and at [335] (Barker J).
[6] Appeal Judgment at [48] (North and Bromberg JJ) and at [333] (Barker J).

12. Best and Roden never became independent contractors[7] and were, in truth, employees of Quest[8] under an implied contract of employment between Quest and each of Best and Roden.[9]

PART VI – The Appellant's argument

Overview

13. The Full Court of the Federal Court of Australia (**Appeal Court**) construed s.357 of the FW Act in such a way that an employer could avoid the sham contracting provision by introducing a third party, such as a labour hire company (as in this case), into the contractual arrangement between the employer and the person who was, in truth, the employee.[10]

14. On the Appeal Court's construction:

    (a) if an employer says to an employee, *"you work here under a contract for services made with me"*, a contravention is made out;[11] but

    (b) if an employer says to an employee, *"you work here under a contract for services made with another company"* (whether it be a labour hire company, a related company of the employer or a company established by the employee), no contravention is made out.

15. The construction adopted by the Appeal Court was not raised by parties either at first instance or on appeal.[12]

16. The Appeal Court's decision is the first in which s.357(1) of the FW Act has been construed in this way.[13]

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[7] Appeal Judgment at [200] (North and Bromberg JJ).

[8] Appeal Judgment at [230] (North and Bromberg JJ) and at [309] (Barker J).

[9] Appeal Judgment at [222] (North and Bromberg JJ) and at [331] (Barker J).

[10] Appeal Judgment at [75]-[77] and [100] (North and Bromberg JJ) and [307] (Barker J).

[11] Subject to a defence being made out under s.357(2) of the FW Act.

[12] The possibility of this construction was first raised by the Appeal Court during oral submissions of the FWO and not to the degree expected so as to demonstrate that it was a live issue on the appeal (Appeal Judgment at [5] (North and Bromberg JJ) and [289] (Barker J); transcript of the oral argument before the Appeal Court at 7.15-.40 and 22.25-24.40). The possibility of this construction was not raised with any Respondent on appeal.

[13] There are 30 decisions in which s.357 of the FW Act (or its predecessor provisions, ss.900 and 901 of the *Workplace Relations Act 1996* (Cth)) has been considered. Of those 30 decisions, 6 involved either incorporation by the employee or labour hire arrangements. Save for the decision in this case, in the other 5 decisions the impact of a third party to the contracting arrangements was either:

- raised but not determined: *Darlaston v Risetop Construction Pty Ltd & Ors* [2011] FMCA 220 (in which the employer admitted that it had contravened s.900 of the WR Act. In determining the

17. The Appeal Court erred in its construction of s.357(1) of the FW Act. On its proper construction, s.357(1) has a simple operation. An employer cannot misrepresent to an employee performing work (or offered work) the **true type of contract** under which that person performs or will perform the work for it.

18. Thus, if the person who performs work is, in truth, the employee of the employer, and hence works under a contract of employment,[14] the employer is prohibited from representing to the employee that he or she performs work under *"a contract for services"* (irrespective if it is asserted that this contract is with another entity and not the employer). By making such a representation, the employer is misrepresenting the true contract under which the employee works.

19. The Appeal Court's narrow construction of s.357(1) is:

    (a) not supported by the text of the sub-section, nor the balance of the provision;

    (b) contrary to the provision's obvious purpose, in that it renders the provision, and potentially other sham arrangement provisions found in the same Division, easy to avoid;

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appropriate penalty, Barnes FM at [83] intimated that the incorporation of employees would have taken them outside the ambit of s. 900 of the WR Act, although it appears the reasoning was that they would no longer be considered employees, rather than there would not be privity of contract; *Barron v Technological Resources Pty Ltd* [2012] FMCA 818 (a strike out application brought on the basis (amongst others) that there was no privity of contract between the alleged employer and the worker, who contracted with the alleged employer through his own company. Burnett FM refused the application on the basis that the Applicant had more than a fanciful prospect of success on the issue: see [21], [23] and [24]);

- not considered: *Fair Work Ombudsman v Lovers of Property Pty Ltd & Ors* [2013] FCCA 2269 (where the impact of the labour hire arrangement was not specifically considered: see [3], [4], [6] and [17] (Jarrett J)); *Fair Work Ombudsman v Contracting Solutions Australia Pty Ltd* [2013] FCA 7 (where the parties agreed that two labour hire providers were employers, see [39], [44], [53] and [64] (Lander J)); *Fair Work Ombudsman v Raying Holding Pty Ltd & Anor* [2015] FCCA 36 (where the labour hire provider was found, in default of a response, to be an employer, see [1] and [27] (Cameron J)).

For the construction of s.357 of the FW Act in other decisions not involving third party contracting arrangements see: *Director of the Fair Work Building Industry Inspectorate v Bavco Pty Ltd & Ors (No.2)* [2014] FCCA 2712 at [40] (Manousaridis J); *The Director of The Fair Work Building Industry Inspectorate v Linkhill Pty Ltd (No.7)* [2013] FCCA 1097 at [298]-[302] (O'Sullivan J; not addressed on appeal: *Linkhill Pty Ltd v Director, Office of the Fair Work Building Industry Inspectorate* [2015] FCAFC 99).

[14] Even if no formal document exists and the contract of employment needs to be implied, as is common in sham arrangements, and which was found to have occurred in this case: Appeal Judgment at [222] (North and Bromberg JJ) and at [331] (Barker J).

(c) inconsistent with the remaining provisions of Division 6 of the FW Act regulating sham arrangements; and

(d) not corroborated by the extrinsic material.

Each of these issues is addressed in turn below.

The text of s.357(1) is unqualified

20. The task of construction must begin with the text of the provision itself.[15] There are three reasons why the language of the sub-section does not support the Appeal Court's restrictive construction.

21. First, the wording of s.357(1) of the FW Act does not distinguish between a "*contract for services*" made directly between an employer and employee, or via a triangular contracting arrangement. The Appeal Court has read the sub-section, however, as if the words *"a contract for services"* were followed by the words *"between the employer and the individual"*.

22. There is no justification for reading in these qualifying words to the expression *"a contract for services"* where they were not included by the legislature.[16] The sub-section identifies the parties to *"the"* contract of employment, to which the sub-section refers, as *"the individual [who] is, or would be, employed"* and *"the employer"*. In contrast, the parties to the *"contract for services"* are unidentified and not confined by the section.[17] The words of the sub-section simply refer to *"a"* contract for services *"under which"* the employee purportedly performs work as an independent contractor.

23. Secondly, on the Appeal Court's approach, not all words of the sub-section have meaning and effect.[18] The sub-section would have the same

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[15] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 31 [4] (French CJ) and 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

[16] A court may imply words into a provision only to avoid a construction that would lead to an incongruous result, defeat the objects of the Act or be capricious or irrational (*Parramore v Duggan* (1995) 183 CLR 633 at 644.4 (Toohey J; Brennan, Deane, Dawson and McHugh JJ agreeing). None of these considerations justify the implication of words into s. 357 of the FW Act.

[17] Contrast s.342(1), items 3, 4 and 6 and s.350(2) of the FW Act, where the expression used is: *"a person who has entered into a contract for services with an independent contractor"* or similar formulation.

[18] Where a court must strive to give every word of a provision meaning: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71] (McHugh, Gummow, Kirby and Hayne JJ) citing *The Commonwealth v Baume* (1905) 2 CLR 405 at 414 (Griffiths CJ); *Saeed v*

construction if there were a full stop immediately after the words *"a contract for services"*. The balance of the sub-section has no work to do.

24. When consideration is given to the words of the balance of the sub-section, however, it is clear that the application of the provision does not turn on nice contractual questions as to whether the same parties have privity to the purported contract for services and the true contract of employment. Its focus is on whether there has been a misrepresentation by an employer to an individual about the type of contract under which that person performs or will perform the **work**. The contract for services with which the provision is concerned is one *"under which the individual performs, or would perform, work as an independent contractor"*. It is the nature of the work arrangements made under the purported contract for services, rather than the parties to it, which is relevant for the purposes of the provision.

25. Thirdly, as a matter of construction, the representation with which the provision is concerned should be given a meaning consistent with the usually broad meaning of the term *"represent"*.[19] Justices North and Bromberg, however, imposed a requirement of *"mischaracterisation"* upon it. Their Honours held that it is not enough that an employer's representation implicitly deny the existence of the true contract of employment – it must *"mischaracterise the contract as a contract for services made between the employer and employee"*.[20]

26. This *"mischaracterisation"* requirement is not supported by the text of the sub-section. The provision prohibits an employer representing to a person who is, in truth, an employee under a contract of employment that the applicable contract under which he or she performs work is a contract for services. There is nothing in the language of the sub-section to suggest that the provision has no operation where the representation refers to *"a contract*

Minister for Immigration & Citizenship (2010) 241 CLR 252 at 266 [39] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[19] *Given v Pryor* (1979) 39 FLR 437 at 440.9-441.3 (Franki J), citing *Halsbury's Laws of England* (3rd ed.), vol. 26, par. 1515, in which a representation was described as an *"affirmation, denial, description or otherwise"* which *"may be oral or in writing or arise by implication from words or conduct"*; cited most recently in *Australian Competition and Consumer Commission v Safety Compliance Pty Ltd* (in liq) [2015] FCA 211 at [139] (Farrell J).

[20] Appeal Judgment at [77] (North and Bromberg JJ).

for services under which the individual performs, or would perform, work as an independent contractor" but is with a third party.

27. To explain the *"mischaracterisation"* requirement, North and Bromberg JJ sought to rely on the fact that s.357(1) is concerned with misrepresentations about "*the*" contract of employment between the employer and employee.[21] Their Honours reasoned that where the parties to the employment contract and contract for services are the same there is one contractual relationship[22] (in contrast to where the parties differ where there are two).[23] The underlying assumption appears to be that, where the parties are identical, the contract for services and contract of employment are one and the same. In effect, an employer mischaracterises the contract of employment simply by giving it the wrong label.

28. There are two conceptual difficulties with this reasoning. First, there will only ever be one true contractual relationship, irrespective of whether the purported contract for services is made directly between the employer and the employee, or through a triangular contracting arrangement. For s.357 to operate, the true contract must be a contract of employment. The purported contract for services must be found to be a sham, to have not ever come into existence, or otherwise be found to be ineffective, as in this case.[24]

29. Secondly, the ineffective contract for services will never be identical to the true contract of employment, even if the parties to it are the same. Once the contract is identified as one of employment, terms will be implied by law.[25] Most likely, the true contract of employment will bear little relationship to the purported arrangement sought to be established under the sham contract for services. To the extent the terms of the contract for services are inconsistent with the true relationship of employment they will have no

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[21] Appeal Judgment at [80] (North and Bromberg JJ).

[22] Appeal Judgment at [79] (North and Bromberg JJ). Note also [80] and [100].

[23] Appeal Judgment at [80] (North and Bromberg JJ).

[24] Appeal Judgment at [212]-[214] (North and Bromberg JJ).

[25] The existence of an employment relationship will give rise to various terms implied by law: by way of example, reasonable notice of termination in the absence of an express term (*Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422.9-423.1 and 429.3 (Brennan CJ, Dawson and Toohey JJ)) and an employee's obligation of fidelity (*Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 700 [25] and [26] (Gleeson CJ, Gaudron and Gummow JJ) and 706 [51(3)] (Kirby J)). See also *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 190 [30] (French CJ, Bell and Keane JJ).

effect.[26] The Court will have to look elsewhere to imply the terms of the contract of employment,[27] or its existence, as in this case.[28]

30. For these reasons, the *"mischaracterisation"* requirement rests on a false premise. There is no textual basis for confining the representation with which s.357 is concerned to one which must *"mischaracterise the contract as a contract for services made between the employer and employee".*[29]

The text of s.357(2) supports a broader construction of s.357(1)

31. Justice Barker, after acknowledging that the construction ultimately preferred by the Appeal Court was not supported by the text in s.357(1),[30] relied upon s.357(2) in arriving at his conclusion as to the scope of the provision.[31] Justice Barker was of the view that the reference to *"the"* contract in s.357(2) suggested that there must be *"a contractual relationship between the employer and the individual that is either a contract of employment or a contract for services."*[32] For this reason s.357(2) (and by extension s.357(1)) did not cover a third party contract for services.[33]

32. The use of the definite article before the first reference to *"contract"* in s.357(2) does not warrant this conclusion. The reference to *"the"* contract is clearly a reference to the **true** contract of employment. Sub-section (2) only has application if sub-section (1) has been activated. It follows that the contractual relationship between the employer and the individual is

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[26] For instance, had the Contractor Application executed by Roden and Best been made directly to Quest rather than Contracting Solutions, each of the terms of the "*Agreement to Contract*" would have been inconsistent in different ways with a contract of employment and the statutory (and any Award) entitlements that Roden and Best were entitled to as employees, which cannot be displaced by contract. The terms are set out at Appeal Judgment [41] (North and Bromberg JJ). For the relevant statutory entitlements for annual leave, sick leave and other minimum entitlements, see s.61 of the FW Act; for long service leave, see s.8 of the *Long Service Leave Act 1958* (WA); and for work related injuries, see s. 18 of the *Workers Compensation and Injury Management Act 1981* (WA).

[27] Terms will be implied to give the contract business efficacy: in relation to formal written contracts see *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283.1 (Viscount Dilhorne, Lord Simon of Glaisdale and Lord Keith of Kinkel); *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 185 [21] (French CJ, Bell and Keane JJ); and in relation to other contracts see *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 422.4-.8 (Brennan CJ, Dawson and Toohey JJ).

[28] Appeal Judgment at [222] (North and Bromberg JJ) and at [331] (Barker J).

[29] Appeal Judgment at [77] (North and Bromberg JJ).

[30] Appeal Judgment at [293]-[294] (Barker J).

[31] Appeal Judgment at [303]-[306] (Barker J).

[32] Appeal Judgment at [304] (Barker J).

[33] Appeal Judgment at [306] (Barker J).

necessarily one of employment. The alternative contractual relationship posited by Barker J (being a contract for services between the employer and individual) is not possible.

33. Contrary to the conclusion of Barker J, the language of s.357(2) supports the application of s.357(1) to all sham contracts for service, and not only those made directly between an employer and employee.

34. There is nothing in the drafting of s.357(2) to suggest that the operation of the provision turns on the parties to the contract for services, as a matter of privity of contract. The sub-section, like s.357(1), is focussed on the employer's misdescription of the **type** of contract under which the employee performs work for it. Section 357(2) confirms that sub-section (1) is triggered if the employer misrepresents the true type of contract under which a person **works** (or will perform work) as:

(a) *"a contract for services"* (the sham or ineffective contract); and hence not

(b) *"a contract of employment"* (the true contract).

The purpose of s.357(1) is to prevent sham contracting generally

35. A consideration of the FW Act as a whole[34] demonstrates that the purpose of the provision is to prevent sham arrangements that disguise the true status of employees, and thereby deprive them of their statutory and award rights and protections. This objective is not confined to only those sham arrangements made directly between an employer and an employee, but applies to sham arrangements more generally.

36. In addition to the plain meaning of the wording of the provision addressed above:

(a) the heading to s.357 is *"Misrepresenting employment as independent contracting arrangement"*. [35] This heading is directed to misrepresentations about the type of contract under which a worker performs work. It is not concerned with whether the parties to the true

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[34] Where the purpose of a provision resides in the text and structure of the Act: *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [25] (French CJ and Hayne J).

[35] Where the heading forms part of the FW Act: s.13(1) of the *Acts Interpretation Act 1901* (Cth).

contract of employment are identical to the purported parties to the sham or ineffective contract for services;

(b) section 357 is found in Division 6 of Part 3-1 of Chapter 3 of the FW Act. Part 3-1 provides for general workplace protections for employees.[36] Division 6 is headed *"Sham arrangements"*. [37] This heading encapsulates sham contractual arrangements generally, and is not constrained by the contractual parties to them;[38]

(c) the focus of each of the three provisions in Division 6 (including s.357) is on preventing an employer from endeavouring, in different ways, to engage an employee to perform work as an independent contractor. Read together, the application of the three provisions is not limited to contracts for services made between an employer and employee, as addressed further below; and

(d) the object of the FW Act, as set out in s.3, is to provide a balanced framework for workplace relations that promotes national economic prosperity and social inclusion for all Australians. One of the ways in which the FW Act seeks to achieve this object is by *"ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions"*. [39] This is a safety net for all Australian employees, which guarantees them minimum statutory and award entitlements that cannot be displaced by contract. [40] It is these entitlements that sham arrangements seek to avoid, and that the provisions in Division 6 are designed to protect.

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[36] The heading of the part is *"General Protections"*. The purpose of the part includes the protection of employees' workplace rights: see ss.6(2)(a) and 336(1)(a) of the FW Act. Workplace rights include the minimum statutory entitlements for employees mandated by the FW Act or other workplace laws and instruments: see ss.12 *"workplace law"* and 341(1)(a) of the FW Act.

[37] A division heading is part of the Act and provides the context within which the substantive provisions should be construed: see s.13(1) of the *Acts Interpretation Act 1901* and *Concrete Constructions (NSW) v Nelson* (1990) 169 CLR 594 at 601.7 (Mason CJ, Deane, Dawson and Gaudron JJ).

[38] Further, as Barker J correctly observed at [302], the heading *"Sham arrangements"* suggests that *"the substance of a transaction or dealing will always trump the form that it takes"*.

[39] Section 3(b) of the FW Act.

[40] Section 61 of the FW Act.

37. The objective of s.357, in deterring sham arrangements generally, was recognised by North and Bromberg JJ.[41] Their Honours acknowledged that sham arrangements involving triangular contracting situations are the very type of case that the section would be expected to seek to prevent.[42]

38. On the Appeal Court's construction, however, the section misses its target. Employers that create more elaborate sham arrangements, such as those that involve a third party, are not exposed to a contravention. The provision is left with a limited operation in relation to more rudimentary sham arrangements where no third party is involved.

10 39. The consequence of the Appeal Court's construction is that the provision is easy to avoid. A common feature of a sham arrangement is the introduction of a third party to disguise the true employment relationship.[43] A third party may be introduced into a sham arrangement in a variety of ways, such as by:

(a) a labour hire arrangement (as in this case);

(b) having the employee incorporate; or

(c) having the employee contract under a purported contract for services with a related entity to the employer.

Each of these arrangements would circumvent the application of s.357 on the Appeal Court's construction.

20 40. As a matter of ordinary statutory construction, the meaning of s.357 should be informed by the purpose of the provision and its context within the other provisions of the FW Act.[44] Furthermore, having regard to the fact that s.357 is beneficial and remedial in purpose, it should be construed to give the fullest remedy of the situation, with which it is intended to deal, that is

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[41] Appeal Judgment at [95] (North and Bromberg JJ).

[42] Appeal Judgment at [96] (North and Bromberg JJ).

[43] This is a matter expressly referred to, in respect of predecessor provisions to s.357 of the FW Act, in the Regulation Impact Statement incorporated into the Explanatory Memorandum to the *Independent Contractors Bill 2006* (Cth). See Australia, House of Representatives, *Independent Contractors Bill 2006*, Explanatory Memorandum at p.3.4.

[44] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at 31 [4] (French CJ) and 46-47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

available from its wording.[45] The narrow construction adopted by the Appeal Court, however, does not achieve this.

Sections 358 and 359 support the FWO's construction

41. The use of the phrase *"contract for services"* in ss.358 and 359 of the FW Act supports a construction of the same phrase in s.357 that is not restricted to contracts for services between an employer and employee. Applying the ordinary rules of statutory construction, the phrase *"contract for services"* in s.357 of the FW Act should be construed in the same way in ss.358 and 359. It is presumed that a word or phrase has the same meaning throughout an Act.[46]

42. The phrase *"contract for services"* in ss.358 and 359 of the FW Act is not confined to a contract for services made directly with the employer. The only requirement in either provision is that the purported contract for services relate to the performance of the same or substantially the **same work**. Section 358 prohibits an employer from dismissing or threatening to dismiss an employee in order to engage the individual to do the same or substantially the same work under a *"contract for services"*. Section 359 is directed at preventing an employer making a false statement to a past or present employee in order to persuade or influence an individual to enter into *"a contract for services"* to do the same or substantially the same work.

43. The focus of both ss.358 and 359 is the type of contract under which a person performs work for the employer, and not whether the contract for services is made directly with the employer or involves a third party.

44. Read together, the provisions in Division 6 of the FW Act do not support the Appeal Court's construction of s.357. If the phrase *"contract for services"* in s.357 is given the same ordinary meaning that it has in ss.358 and 359, it should not be contingent on the parties to it. Conversely, if the Appeal

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[45] *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652 at 659.9-660.1 (Brennan CJ) and 675.2 (Dawson, Toohey, Gaudron and Gummow JJ), citing *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638.4 (Mason, Brennan, Deane and Dawson JJ). Where the dominant purpose of a provision is remedial or beneficial in nature, its effect should not be cut down by recourse to rules of strict construction of penal provisions: *Waugh v Kippen* (1986) 160 CLR 156 at 164.3-.9 (Gibbs CJ, Mason, Wilson and Dawson JJ).

[46] See *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611 at 618.6 (Mason J, with Barwick CJ and Jacobs J agreeing).

Court's narrower use of the phrase in s.357 were applied to the remaining provisions in Division 6, their application would be restricted to independent contracting arrangements made directly between an employer and employee. This would limit the effectiveness of all of the sham arrangement provisions in the FW Act, by reason of the ease in which they could be circumvented, contrary to the obvious intention of the Act.[47]

45. Justices North and Bromberg were comforted in their narrow construction of s.357 by the fact that triangular contracting arrangements may in any event be caught by s.359.[48] Their reliance on s.359 was misplaced for two reasons.

46. First, North and Bromberg JJ did not construe the expression *"a contract for services"* in s.359 in the same manner as the expression in s.357. They found that a contravention of s.359 could occur despite a contract for services in a particular case involving a third party.[49] There is no explanation given by their Honours as to why the same expression, *"a contract for services"*, would not be given the same meaning in s.357 in accordance with the ordinary rules of statutory construction.

47. Secondly, ss.357 and 359 operate in different circumstances. Section 359 will not provide protection against all sham arrangements that s.357 otherwise might and, hence, the existence of s.359 does not warrant a narrower construction of s.357. In order to establish a contravention of s.359, in contrast to s.357, it will be necessary to establish the following elements:

(a) the person, who is in truth an employee of the employer, must be currently employed at the time the false statement is made (in contrast to s.357(1), where this is not necessary);

(b) at the time the statement is made by the employer the employer must know the statement to be false (in contrast to s.357(2), where an incorrect representation is actionable unless the employer establishes a defence under sub-section (2)); and

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[47] For example, if the Appeal Court's construction was applied to s.358, an employer who dismissed an employee in order to engage them to do the same work under a contract for services with a related third party would not contravene the section but would contravene the section if the contract for services was with the employer directly.

[48] Appeal Judgment at [98] (North and Bromberg JJ).

[49] Appeal Judgment at [98] (North and Bromberg JJ).

(c) the statement must be directed towards persuading or influencing an employee to enter into a contract for services (in contrast to s.357(1), where the misrepresentation is as to the type of contract the employee performs work under).

The extrinsic material

48. Justices North and Bromberg surveyed the predecessor provisions to s.357 of the FW Act and its statutory history.[50] Thereafter, their Honours, with respect, correctly concluded that:

(a) the mischief to which Division 6 is directed is the attempted avoidance by an employer of the legal entitlements due to an employee through arrangements which falsely disguise the employee as an independent contractor;[51] and

(b) the avoidance of sham arrangements includes those arrangements achieved by the use of *"triangular contracting involving labour hire agencies"*.[52]

49. To the extent the extrinsic material in relation to s.357 of the FW Act is of assistance in the task of construction, it supports the FWO's construction. An examination of the predecessor provisions to s.357 and the relevant statutory history is set out in Annexure A to these submissions.

Applying s.357 of the FW Act in this case

50. By reason of the matters above, the appeal should be allowed. All members of the Appeal Court acknowledged that if the FWO's construction of s.357 were preferred, a contravention by Quest of this provision would have been made out on appeal.[53] As such, it is respectfully submitted that a declaration as proposed in Part VIII of these submissions is appropriate to be made.

PART VII – The applicable statutory provisions

51. This appeal is concerned with s.357 of the FW Act. Section 357 of the FW Act is set out in Annexure B to these submissions together with the remaining

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[50] Appeal Judgment at [82]-[96] (North and Bromberg JJ).

[51] Appeal Judgment at [95] (North and Bromberg JJ).

[52] Appeal Judgment at [96] (North and Bromberg JJ).

[53] Appeal Judgment at [240] (North and Bromberg JJ) and at [336] (Barker J).

two provisions of Division 6 of Part 3-1 of the FW Act. Division 6 formed part of the FW Act when it first commenced on 1 July 2009. This division has never been amended and still remains in operation.

PART VIII – Form of order sought

52. (1) The appeal be allowed.

(2) Paragraph 1 of the orders of the Full Court of the Federal Court of Australia made on 17 March 2015 be set aside and, in lieu thereof, an order be made that the appeal from the primary judge, McKerracher J, be allowed.

(3) A declaration that Quest South Perth Holdings Pty Ltd (**Quest**) contravened s.357 of the *Fair Work Act 2009* (Cth) (**FW Act**) by representing to Margaret Best that the contract of employment under which she was in fact employed by Quest was a contract for services under which she performed work as an independent contractor.

(4) A declaration that Quest contravened s.357 of the FW Act by representing to Carol Roden that the contract of employment under which she was in fact employed by Quest was a contract for services under which she performed work as an independent contractor.

(5) The proceeding be remitted to the primary judge for further hearing to determine any penalties to be imposed against Quest pursuant to s.546(1) of the FW Act in respect of its contraventions of s.357 of the FW Act.

PART IX – Estimate of hours required for the Appellant's oral argument

53. The estimate for the presentation of the FWO's oral argument is 1.25 hours.

DATED: 18 September 2015

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ANNEXURE A: EXTRINSIC MATERIALS

Use of extrinsic materials

54. It is the FWO's primary submission that its construction of s.357 of the FW Act, on the application of the ordinary rules of statutory construction, reflects the plain meaning of the provision and, therefore, recourse to extrinsic materials is not necessary. Where the ordinary meaning of a provision is not in doubt, the common law does not permit extrinsic materials to alter it.[54] Hence, reference to extrinsic material at common law, as well as under s.15AB(1)(a) of the *Acts Interpretation Act 1901* (Cth) (**Acts Interpretation Act**), is confined to confirming the ordinary meaning of the statutory provision taking into account its context in the Act and the purpose underlying the Act.

55. If, contrary to the FWO's primary submission, the Court considers that s.357 is ambiguous, it may give consideration to extrinsic material under s.15AB(1)(b)(i) of the Acts Interpretation Act or at common law.[55] Alternatively, if the Court considers that the ordinary meaning of s.357 reflects the Appeal Court's construction, the Court may consider extrinsic material by reason of s.15AB(1)(b)(ii) of the Acts Interpretation Act because the construction leads to a result that is unreasonable.

56. Should the Court have recourse to the legislative history of s.357 and its predecessor provisions, addressed in more detail below, this extrinsic material supports the meaning of the provision contended for by the FWO. The legislative history demonstrates that the objective underlying s.357 of the FW Act (and other sham contracting provisions, including predecessor provisions) is to provide a safeguard for all Australian employees from employers seeking to avoid their legal obligations.

Legislative history of the sham arrangement provisions of the WR Act

57. The first provisions regulating sham contracting arrangements were introduced into the *Workplace Relations Act 1996* (Cth) (**WR Act**) by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) (**WRLA (IC) Act**) on 1 March 2007.[56]

58. The WRLA (IC) Act was enacted contemporaneously with the *Independent Contractors Act 2006* (Cth) (**IC Act**), and together the two Acts provided a package of reforms relating to independent contractor arrangements in Australia. The purpose of these two Acts was set out in their Regulation Impact Statement, which is contained in the Explanatory Memorandum to

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[54] *Catlow v Accident Compensation Commission (Vic)* (1989) 167 CLR 543 at 550.1-.3 (Brennan and Gaudron JJ), cited in *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 265 [33] to [34] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[55] *Catlow v Accident Compensation Commission (Vic)* (1989) 167 CLR 543 at 550.1-.3 (Brennan and Gaudron JJ), cited in *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252 at 265 [33] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[56] The provisions were contained in Schedule 1 of the WRLA (IC) Act, which came into force at the time Part 2 of the *Independent Contractors Act 2006* (Cth) commenced: s.2(1) of the WRL (IC) Act. The commencement date for Part 2 of the *Independent Contractors Act 2006* (Cth) was fixed by a proclamation made on 15 February 2007.

the *Independent Contractors Bill 2006* (Cth) (**IC Bill**),[57] and incorporated by reference into the Explanatory Memorandum to the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (Cth) (**WRLA (IC) Bill**).[58]

59. According to the Regulation Impact Statement, the objective of the IC Act was to reduce the regulation by the States of independent contractors, in order to encourage independent contracting as a legitimate form of work.[59] The WRLA (IC) Act was to be enacted at the same time in order to provide a safeguard against employers seeking to avoid their legal obligations to genuine employees by disguising them as independent contractors in the context of this new environment of deregulation.[60]

60. The WRLA (IC) Act established a new Part 22 for insertion into the WR Act, entitled *"Sham Arrangements"*.[61] A *"sham arrangement"*, according to the Regulation Impact Statement, *"is an arrangement through which an employer seeks to cloak a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements due to employees."*[62]

61. At that time, the only remedies available for employees in this scenario were the provisions of the WR Act, which provided for the recovery of minimum statutory entitlements and associated penalties.[63] The Regulation Impact Statement identified that penalties (such as those introduced into the WR Act by the new Part 22) aimed specifically at employers who have disguised genuine employment relationships would provide *"a definitive protection for the employees affected, and would send a clear message to employers that sham arrangements are unlawful"*.[64]

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[57] Australia, House of Representatives, *Independent Contractors Bill 2006*, Regulation Impact Statement incorporated in the Explanatory Memorandum at pp.3-28.

[58] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum at p.3.

[59] Australia, House of Representatives, *Independent Contractors Bill 2006*, Explanatory Memorandum at p.10.7-.9. See also 6.1-.4; Second Reading Speech (*Independent Contractors Bill 2006*), House of Representatives, *Parliamentary Debates* (Hansard), 22 June 2006, p.5.7.

[60] Australia, House of Representatives, *Independent Contractors Bill 2006*, Regulation Impact Statement incorporated in the Explanatory Memorandum at page 10.9, which observes that the reduction in the regulation of independent contractors *"could be achieved by removing deeming provisions in State laws, while at the same time ensuring that employees are protected from sham contract arrangements by unscrupulous employers"*. See also pp.6.5 and 9.7; Second Reading Speech (*Independent Contractors Bill 2006*), House of Representatives, *Parliamentary Debates* (Hansard), 22 June 2006, pp.6.9 and 7.5-.7.

[61] Schedule 1 of the WRLA (IC) Act.

[62] Australia, House of Representatives, *Independent Contractors Bill 2006*, Regulation Impact Statement incorporated in the Explanatory Memorandum at p.9.8.

[63] Australia, House of Representatives, *Independent Contractors Bill 2006*, Regulation Impact Statement incorporated in the Explanatory Memorandum at p.10.3.

[64] Australia, House of Representatives, *Independent Contractors Bill 2006*, Regulation Impact Statement incorporated in the Explanatory Memorandum at p.10.3. Further, the Regulation Impact Statement at p.10.2 recognises that: *"[e]mployees in disguised employment relationships should have appropriate remedies available to them as they are not, in reality, independent contractors."* See also pp. 20.3-.5, 20.9 and 23.2.

62. As made clear by the Regulation Impact Statement, the objective underlying the introduction of regulation of sham independent contracting arrangements by the WRLA (IC) Act was not confined to any particular type of sham arrangement – let alone confined to only arrangements made directly between an employer and employee.

63. The Regulation Impact Statement recognised expressly that independent contractors' work arrangements may take a variety of forms, *"for example, they may have a direct relationship with another enterprise or work through an intermediary (such as a labour hire firm)"*.[65]

64. In its explanation of the purpose underlying Division 22, **the Regulation Impact Statement (and the Explanatory Memorandum to the WRLA (IC) Bill more generally) made no distinction between the different forms of independent contracting arrangements**. The objective was simply to protect genuine employees from sham contracting arrangements.

65. This objective is confirmed in the Second Reading Speech for the IC Bill. In this speech, the Minister for Employment and Workplace Relations reiterated that the package of reforms contained in the IC Bill and the WRLA (IC) Bill was intended to both:

(a) ensure *"genuine independent contractors"* are not by *"prescriptive regulation in state industrial relations systems" "effectively turn[ed] ... into employees regardless of their wishes"*; and

(b) *"ensure that unprincipled employers will not be allowed to avoid their legal obligations to employees by using independent contracting as a mask"*.[66]

Legislative history of s.357 of the FW Act

66. The WR Act was replaced by the FW Act, which introduced numerous reforms to the federal workplace relations laws in Australia. The FW Act contained new provisions directed towards sham arrangements in Division 6 of Part 3-1, which came into operation on 1 July 2009.[67]

67. The objective of the new provisions regulating sham arrangements remained the same. According to the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) (**FW Bill**), they were intended to provide *"protection against ... sham arrangements (which disguise employment arrangements as independent contractor arrangements)"*.[68]

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[65] Australia, House of Representatives, *Independent Contractors Bill 2006*, Regulation Impact Statement incorporated in the Explanatory Memorandum at p.3.4.

[66] Second Reading Speech (*Independent Contractors Bill 2006*), House of Representatives, *Parliamentary Debates* (Hansard), 22 June 2006, p.8.7. The Second Reading Speech of the WRLA (IC) Bill stated, albeit briefly, that the amendments to the WR Act implemented the Government's commitment to protecting independent contractors: Second Reading Speech (*Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*), House of Representatives, *Parliamentary Debates* (Hansard), 22 June 2006, p.10.3.

[67] Section 2(3) of the FW Act. The commencement date was fixed by a proclamation made on 29 June 2009.

[68] Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at p. ii (.8). The sham arrangement provisions are not specifically addressed in the Second Reading

68. **Again, no distinction was drawn in the Explanatory Memorandum to the FW Bill between the need to safeguard employees from sham arrangements made directly between an employer and employee, and more sophisticated sham arrangements involving third parties.** Consistent with this, the Explanatory Memorandum to the FW Bill describes Division 6 as providing *"civil penalties for sham arrangements with respect to employment and independent contracting* ***relationships***"[69] (in contrast to the Appeal Court's focus on whether the actual parties to the purported contract for services and the true contract of employment are identical). Clause 357 is described simply as prohibiting *"an employer misrepresenting an employment or proposed employment relationship as an independent contracting relationship".*[70]

The predecessor provisions

69. Sections 900 and 901 of the WR Act were two of the provisions in Part 22 introduced by the WRLA (IC) Act. Like s.357 of the FW Act, they prohibited the misrepresentation of an employment relationship as an independent contracting arrangement.

70. The wording of s.900, which dealt with **extant** employment arrangements, prohibited a person who in truth is an employer and hence a party to a contract of employment with its employee, from representing to the employee that he or she is performing work under a contract for services as an independent contractor. The wording of s.901, which dealt with **proposed** employment arrangements, prohibited a person who has offered to an individual what is in truth a contract of employment, from representing to the potential employee that he or she will be performing work under a contract for services as an independent contractor.

71. Neither provision required that an existing or potential employer misrepresent an employment contract between it and its employee as a contract for services made directly between them.[71]

Speech in respect of the *Fair Work Bill 2008*. See Second Reading Speech (*Fair Work Bill 2008*), House of Representatives, *Parliamentary Debates* (Hansard), 25 November 2008, at p.11194.

[69] Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at p.233 [1446] (emphasis added).

[70] Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at p.233 [1447]. See also p.212 [1335] and p.233 [1448]-[1455].

[71] Also see Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum at p.5 [4] which describes the operation of s.900 of the WR Act as allowing *"a civil penalty to be imposed by a court on persons who misrepresent an employment relationship as an independent contracting* ***arrangement.***" (emphasis added). The Explanatory Memorandum at p.5 [7] also states that the defence under s.900(2) of the WR Act would apply *"when [an employer] made the representation that there was an independent contracting* ***relationship****, they believed the contract was for independent contracting and could not have reasonably been expected to know that the contract was one of employment."* (emphasis added) See also pp.5 [2] and 6 [11] and [12]; *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Supplementary Explanatory Memorandum at p.3 [3] and [5] and Australia, House of Representatives, *Independent Contractors Bill 2006*, Explanatory Memorandum at p.25.3-.5, which each refer to an "*employment relationship*" and the broad unqualified concept of "*an independent contracting arrangement*".

Section 357 of the FW Act

72. Section 357 of the FW Act addresses both extant employment (formerly addressed by s.900 of the WR Act) and proposed employment (formerly addressed by s.901 of the WR Act). The Explanatory Memorandum indicates that s.357 was intended to "*broadly*" cover the effect of its predecessor provisions.[72] The wording of s.357 of the FW Act is quite different, however, from the earlier provisions.

73. The differences in the wording between the current s.357 of the FW Act and the predecessor provisions mean that the earlier provisions do not provide any real assistance in understanding how the words in s.357 are used.[73]

Conclusion

74. The Explanatory Memoranda to both s.357 of the FW Bill and the predecessor provisions make clear that the purpose of these provisions is to deter employers disguising an employment relationship by the use of sham contracting arrangements, whether they involve a third party or not.

75. This purpose is met by the FWO's preferred construction. In contrast, this purpose is not met, and is in fact easily avoided, by the construction adopted by the Appeal Court. Such a construction would leave genuine employees exposed to the risk of sham arrangements.

76. Having regard to the matters above, to the extent the extrinsic material is of assistance in the task of construction, it supports the FWO's position.

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[72] Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum at p.233 [1447].

[73] Noting reference to precursor statutory provisions should not be made if to do so creates an uncertainty that is not apparent on the face of the later provision under consideration: *Miles v Commissioner of Patents* (2013) 306 ALR 349 at 369 [74] (Gordon J) (whose approach was confirmed on appeal: *Miles v Commissioner of Patents* (2014) 313 ALR 339 at [53]-[54] (Bennett, Greenwood and Middleton JJ)).

ANNEXURE B

DIVISION 6 - SHAM ARRANGEMENTS

357 Misrepresenting employment as independent contracting arrangement

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

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

(2) **[Exception if employer unaware]** Subsection (1) does not apply if the employer proves that, when the representation was made, the employer:

(a) did not know; and

(b) was not reckless as to whether;

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

358 Dismissing to engage as independent contractor

An employer must not dismiss, or threaten to dismiss, an individual who:

(a) is an employee of the employer; and

(b) performs particular work for the employer;

in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.

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

359 Misrepresentation to engage as independent contractor

A person (the ***employer***) that employs, or has at any time employed, an individual to perform particular work must not make a statement that the employer knows is false in order to persuade or influence the individual to enter into a contract for services under which the individual will perform, as an independent contractor, the same, or substantially the same, work for the employer.

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