IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY

No. P38 of 2015

On appeal from the Full Federal Court of Australia

BETWEEN:

FAIR WORK OMBUDSMAN
Appellant

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and

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

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

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PAUL KONSTEK
Third Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: Publication

1. The second respondent, Contracting Solutions Pty Ltd (**Contracting Solutions**), certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

1. The question before the Court is:

> Whether the Full Court of the Federal Court of Australia (**Full Court**) erred in preferring the construction of s357 of the *Fair Work Act 2009*

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(Cth) (**FW Act**) as identified in paragraph [75][1], to the construction of the appellant, the Fair Work Ombudsman (**FWO**), identified at paragraph [76][2]; and accordingly concluding that the sub-section is concerned with "*a representation made by an employer that its contract with its employee is not an employment contract but is a contract for services*"[3].

2. The only ground advanced by the FWO in its Notice of Appeal relates to the asserted error of law in the findings by the Full Court at [75]-[77]; [100] and [307][4] concerning the construction and effect of s357 of the FW Act.

3. However, the statement of issue at paragraph [2] of the FWO's submissions (**AS**) involves an inaccurate gloss on the true issue arising from the Full Court's reasons.

4. The FWO has incorrectly framed the issue so as to assume the existence of a contravention by the employer; it does so by casting the question in terms of whether s357 of the FW Act can be *avoided* when a third party is involved.

5. The framing of the question by the FWO this way is apt to lead to expectation bias in the approach to the question of the true construction of s357 of the FW Act. That is because it impermissibly assumes that there has been a contravention of some unspecified prohibition on undefined 'sham arrangements' by the FW Act, which is then sought to be avoided by a particular construction of s357 of the FW Act.

6. If the Full Court's construction was correct, then no liability on the part of the first respondent, Quest South Perth Holdings Pty Ltd (**Quest**), arises and it is incorrect to speak of "avoidance". There is no 'sham arrangement' within the meaning of

[1] (2015) 228 FCR 346 at [75] per North and Bromberg JJ.
[2] (2015) 228 FCR 346 at [76] per North and Bromberg JJ.
[3] (2015) 228 FCR 346 at [75] per North and Bromberg JJ.
[4] Paragraphs [75] to [77] and [305] of (2015) 228 FCR 346 (referenced in the Notice of Appeal) are simply some of the steps (and not all) which led to the Full Court's conclusion on the construction of s357 of the FW Act; together with the endorsement of that construction by Barker J at [305]. No particular error is identified by the Notice of Appeal with any of those paragraphs.

Division 6 of Part 3-1 of the FW Act unless there is an established contravention of ss357, 358, or 359 or any of them.

7. The ultimate conclusion of the Full Court was clearly described in paragraph [100] of the joint judgment of North and Bromberg JJ, which conclusion was adopted by Barker J following separate consideration, at paragraph [305]. That conclusion was as follows:

> We have concluded that to be actionable under s 357(1) of the FW Act, a representation as to an extant or prospective employment contract made or to be made between an employer and its employee or prospective employee must misrepresent the nature of *that* contract as a contract for services made between them.

8. The issue arising from the Notice of Appeal is simply whether the Full Court's construction of s357 of FW was erroneous.

9. No issue arises in the appeal as to the liability of Contracting Solutions or the third respondent, Paul Konstek (**Konstek**); and no orders are sought against them, regardless of the outcome of the appeal in respect of Quest.

Part III: s78B of the Judiciary Act

10. Contracting Solutions has considered whether any notice should issue in compliance with s78B of the *Judiciary Act 1903* (Cth) and has determined that no such notice is required.

Part IV: Material Facts

11. Contracting Solutions accepts the FWO's statement of relevant facts set out in the AS, subject to an issue about the characterisation of the terms of the representation at paragraph AS [10][5].

[5] Although not relevant to the appeal, it may be noted that paragraph AS [9] does not fully or accurately reflect the findings of the Full Court at paragraph [18] upon which it is said to be based in

12. Paragraph AS [10] (which purports to rely on paragraph [240] of the judgment) is incorrect and incomplete.

13. The relevant findings of the Full Court as to the representation were at [30][6] where it was said that:

> We find that at the initial meeting attended by Best and Roden, Quest represented to them that upon accepting Contracting Solutions' proposal, they would continue to perform work at Quest but would do so as independent contractors of Contracting Solutions and not as employees of Quest.[7]

14. And at secondly at [240] where the Full Court found that:

> We are satisfied that from 2 November 2009, and as the employer of Best and Roden, Quest represented to Best and Roden that they were performing work *at Quest* [not 'for Quest'] as independent contractors of Contracting Solutions.

15. No challenge is made to the finding by the Full Court as to the terms of the central representation. The FWO's case proceeds on the acceptance that the relevant representation by Quest identified that the purported independent contractor relationships would be between Contracting Solutions and Margaret Best (**Best**) and Carol Roden (**Roden**) respectively[8]. There was never any assertion that Quest made a representation that Best and Roden would be in a contract of services with it.

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footnote 4 of the AS. The relevant findings as to events are at paragraphs [8] to [18] of (2015) 228 FCR 346 per North and Bromberg JJ.

[6] This finding follows a note at [29] per North and Bromberg JJ to the effect that the FWO had pleaded Quest's representation at paragraph [11] of the FWO's Amended Statement of Claim and that the trial judge had made no express finding as to the content of the representation. The content of the representation is repeated at [239] and [240] per North and Bromberg JJ.

[7] Barker J agreed with this finding as to the content of the relevant representation at [335].

[8] It may be noted that the representation pleaded by the FWO in paragraph [11] of the FWO's Amended Statement of Claim was silent as to the identity of the other party to the purported independent contractor relationship - see (2015) 228 FCR 346 at [247]-[248] per North and Bromberg JJ.

16. The representation as found was not a representation about any actual or proposed contracts of employment between Quest and the two individuals.

17. There is no question that Quest was advised of a structure and contractual arrangements to be put in place by Contracting Solutions which were intended to be compliant with the system described by the Full Court of the Federal Court of Australia in *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104[9].

18. In the proceedings before the Full Court, Contracting Solutions contended that Best and Roden were independent contractors engaged by it[10]. That contention was rejected by the Full Court. In light of its finding that no effective independent contractor relationship between Contracting Solutions and Best and Roden came into effect, the Full Court said:

> If, on the other hand, those contracts were (in part or in whole) non-existent or ineffective and failed to explain why Best and Roden provided their work to Quest, there is room for surmising that another contract or contracts existed to explain the transactional exchange of work for pay which the undisputed evidence demonstrated.[11]

19. It was in these circumstances that the Full Court found an implied contract of employment between Quest and each of Best and Roden[12].

20. No finding was made that Quest was engaged in an exercise whereby 'it cloaked a work relationship to falsely appear as an independent contracting arrangement in order to avoid responsibility for legal entitlements to employees'[13] or to otherwise disguise its employment relationship.

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[9] See further (2015) 228 FCR 346 at [65] per North and Bromberg JJ.
[10] (2015) 228 FCR 346 at [172] per North and Bromberg JJ.
[11] (2015) 228 FCR 346 at [188] per North and Bromberg JJ.
[12] (2015) 228 FCR 346 at [219] and [230] per North and Bromberg JJ.
[13] See Australia, House of Representatives, *Independent Contractors Bill 2006* Explanatory Memorandum at page 9.9.

21. The Full Court also found at [32] that:

> Whilst at trial the Ombudsman contended that employees were threatened that if they did not "convert" they would lose their job with Quest, the primary judge found no such threat was made to either Roden or Best[14].

22. It may be noted that the FWO's claims against Contracting Solutions and Konstek would have failed even if the FWO's construction of s357 of the FW Act were accepted because of the Full Court's finding in relation to the accessorial liability of Contracting Solutions[15] (as opposed to the position of Quest[16]) that:

> Neither the Ombudsman's pleading nor the contentions made in support of its case that Contracting Solutions and Konstek were accessories, ever expressly engaged with the need to establish that Contracting Solutions and Konstek had knowledge of Quest's state of mind.

23. In this appeal, no challenge is made to the Full Court's findings that the FWO failed to discharge the onus and establish that Contracting Solutions and Konstek had knowledge of the essential elements of any contravention of s357(1) of the FW Act by Quest[17].

Part V: Applicable Statutes

24. The FWO's statement of applicable statutes and regulations set out at AS [51] and Annexure B of the AS is accepted by Contracting Solutions, subject to the addition of the following relevant provisions which are annexed at Annexure A: ss s6, 336, and 361 of the FW Act.

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[14] Their Honours noted that this finding was not challenged on appeal.
[15] (2015) 228 FCR 346 at [266] per North and Bromberg JJ; and at [339] per Barker J.
[16] See (2015) 228 FCR 346 at [240] per North and Bromberg JJ where if the FWO's construction was adopted then Quest would not have made out the defence because of the reverse onus.
[17] (2015) 228 FCR 346 at [273] and [274] per North and Bromberg JJ; and at [339] per Barker J.

Part VI: Statement of Argument

The Full Court's Reasons and the competing constructions of s357

25. The Full Court was presented with two competing constructions of s357 of the FW Act.

26. No issue is taken by the FWO with the way in which the Full Court characterised the two competing constructions:

    26.1. The FWO's construction of s357 of the FW Act was described at [76] as follows:

    > On the Ombudsman's construction, an actionable representation is not confined by s 357(1) to a mischaracterisation of the contract between the employer and employee. It includes a representation that the employee is an independent contractor, including an independent contractor whose contract is with a third party, when in fact that person is the employee of the representor. Under this construction, the subject matter of the representation is not confined to the nature of the contract which exists between the employer and employee but extends to a misrepresentation as to the employee's status more generally.

    ("**the Employee's Status Construction**").

    26.2. The alternative construction of s 357 was described at [75] as follows:

    > In our view, the subject matter to which an actionable representation under s 357(1) must be directed, is the nature of the contract between the representee (the employee) and the representor (the employer). Addressing that subject matter, the representation will be prohibited by s 357(1) and thus actionable under that provision, when the contract between the employer and its employee is represented to be a contract for services made between those parties.

    ("**the Nature of the Contract Construction**").

27. The Full Court preferred the Nature of the Contract Construction for a number of reasons, including a consideration of:

    27.1. the text of s357 of the FW Act[18];

    27.2. consideration of the legislative scheme as a whole, including its objects; and

    27.3. the legislative history including the relevant extrinsic material[19].

28. It was also significant to the Full Court that the construction it adopted did not preclude the beneficial purposes of Division 6 of Part 3-1 of the FW Act, including the presence of other remedial provisions[20].

29. Ultimately the approach of the Full Court was simply (and correctly) stated by Barker J at [305] as follows:

> On this basis the sole question in a s 357(1) contravention proceeding is whether the contract between the employer and the individual is a contract of employment, rather than a contract for services as represented by the employer.

***The text of s357 (1)* – AS [31] to [34]**

30. As the Full Court correctly appreciated, the use of the definite article and a full reading of the all of the words in s357(1) clearly support the Nature of the Contract Construction.

31. When s357 is read with the alternative tenses removed and sequenced into its components, it reads as follows:

    31.1. A person (the employer) ...

    31.2. that proposes to employ an individual

[18] (2015) 228 FCR 346 at [80] per North and Bromberg JJ; [295] and [304-306] per Barker J.
[19] (2015) 228 FCR 346 at [82] to [96] per North and Bromberg JJ; [295] per Barker J.
[20] (2015) 228 FCR 346 at [98] and [99] per North and Bromberg JJ; as to the purpose and objects of the FW Act see [297] to [301] per Barker J.

31.3. must not represent to the individual that:

(a) *the contract of employment* under which the individual would be employed *by the employer*

is a

(b) *contract for services* under which the individual would perform work as an independent contractor.

32. It is clear that the text of s357 and its structure is concerned with prohibiting a representation about the legal character of one particular contract - that is the proposed contract of employment.

33. The text of s357 does not admit of the possibility that the representation could be about a different contract with a third party that is not the representor or a representation about the status of the representee at large.

34. Contrary to the FWO's submissions at AS[21], the Nature of the Contract Construction does not require the addition of the words 'between the employer and the individual' following the words 'a contract for services'. That is because the section never contemplates that there will actually be two contracts - it only ever contemplates one contract. That contract is necessarily between the employer and the individual, as the part of the phrase at [31.3(a)] above makes clear.

35. The phrase at [31.3(b)] above is simply an identification of the mis-description of the true contract identified in [31.3(a)] above. There was obviously no need to repeat the identity of the parties because it is clear in the part of the phrase at [31.3(a)] above.

36. As may be seen from the breakdown of s 357 (1) at [31] above, the Nature of the Contract Construction gives effect to each and every word of the sub-section, contrary to the FWO's submission at AS[23].

37. The FWO's submission at AS[24] reveals a misconception of the section. The FWO submits that "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*'" (emphasis in original). The problem with this submission is that there is never any 'contract for services under which the individual would perform work as an independent contractor'. The very nature of s357(1) is concerned with a situation where there is *not* any contract for services. The section is never concerned with the prospect of two contracts. It is binary – the contract for services must always be an illusion for s357 to have any effect.

38. The misconception by the FWO is to make the starting point of the analysis the non-existent 'contract for services' rather than the contract of employment between the employer and the individual. This misconception is evident at AS[24], which states that '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'.

39. The FWO appears to accept that there can only be one contract with which s357 of the FW Act is concerned at AS[28], yet seems to depart from that approach at AS[29] in submitting that the 'ineffective contract for services will never be identical to the true contract of employment'. The difficulty with this submission is that there is no 'ineffective contract for services' – by its nature it does not and cannot exist.

40. Nor is it of assistance to speak of a difference in parties (AS[29]) as between the contract of employment (which does exist); and the parties to a fictional contract for services that does not exist.

41. The section simply cannot be concerned with the existence of a non-existent contract which may or may not have different parties to the extant contract of employment between the employer and the individual.

42. Accordingly, the core of s357(1) is the description *by the employer* of *the contract of employment* between the *employer and the individual* as something which it is

not. Contrary to AS [25], the plurality[21] was correct in appreciating that the section was concerned with a mischaracterisation of that contract by the employer.

43. The Full Court was correct to read the text of s357 of the FW Act as:

    43.1. directed to a representation made by an employer that its contract with its employee is not an employment contract but is a contract for services"[22]; and

    43.2. requiring that "a representation as to...a prospective employment contract...to be made between an employer and its ...prospective employee must misrepresent the nature of *that* contract as a contract for services made between them"[23];

and in concluding that '[t]he use of the definite article "the" in this context, before the phrase "contract of employment..." strongly suggests that...there is proposed to be a contractual relationship between the employer and the individual that is either a contract of employment or a contract for services'[24].

44. Such readings of the text are, with respect, simple, accurate and correct.

Statutory Context and Framework

Stated Objects within the FW Act and the Nature of Part 3-1 of the FW Act

45. For the reasons which follow, it will be seen that the Full Court was correct to find that the Nature of the Contract Construction is not inconsistent with the purpose and structure of the FW Act. This is not a case where the literal or grammatical construction conflicts with the purpose of the statute or the canons of statutory construction[25].

[21] (2015) 228 FCR 346 at [77] per North and Bromberg JJ.
[22] (2015) 228 FCR 346 at [75] per North and Bromberg JJ.
[23] (2015) 228 FCR 346 at [100] per North and Bromberg JJ.
[24] (2015) 228 FCR 346 at [304] per Barker J.
[25] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 [78].

46. The FWO invokes (at AS[35]) the decision of this Court in *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 389 [25] to suggest that 'the purpose of *a provision* resides in the text and structure of the Act'. It is more correct to say that the 'determination of the purpose of...particular provisions in a statute may be based upon an express statement of purpose in the statute itself, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose of *a statute* resides in its text and structure...The duty of a court is to give the words of a statutory provision the meaning that the legislature *is taken to have intended* them to have[26]' (later emphasis in the original).

47. The FWO accepts that the object of the FW Act is to strike a balanced framework for workplace relations[27].

48. However, the FWO's submission at AS[35] overstates the ascertainable purpose of the 'FW Act as a whole' by suggesting it has a purpose as particular as 'prevent[ing] sham arrangements that disguise the *true status* of employees'. There is nothing in the structure of the FW Act or the extrinsic materials that discloses such a particular purpose.

49. Likewise, the FWO incorrectly, at [AS36(c)], reads into the purpose of Division 6 of Part 3-1 of the FW Act an objective of '*preventing an employer from endeavouring, in different ways, to engage an employee to perform work as an independent contractor*'. No such purpose is disclosed. It could never be a contravention of the FW Act for an employer and employee to genuinely agree to a new relationship by which the former employee became an independent contractor of the employer by their own free will.

50. Contrary to the purpose asserted by the FWO, the very legislative package introducing what is now Division 6 of Part 3-1 of the FW Act was predicated on

[26] This should be read together with the earlier restatement in (2012) 248 CLR 368 at 388 [23] of the reasons of the plurality in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46-47 [47] that the '....task of statutory construction must begin with a consideration of the text itself...".
[27] AS[36(d)].

promoting the freedom of contract[28] and protecting the ability of people to choose to be independent contractors, subject to the specific protections introduced to the FW Act aimed at ensuring such choices were free and not procured by misrepresentation, deception or coercion.

51. The structure and purpose of the FW Act and Division 6 of Part 3-1[29] are consistent with section 357 having the purpose of preventing employers from misrepresenting the nature of the contracts entered into between themselves and particular individuals as being contracts for services rather than contracts of service. This is consistent with preserving freedom of choice in the dealings between two parties to an agreement.

52. The plurality correctly understood the purpose of Division 6 of Part 3-1 of the FW Act at paragraphs [95] and [96] of their Honours' reasons. That is, the mischief which is addressed by the provisions is the attempted avoidance of legal entitlements due to an employee through arrangements which disguise an employee as an independent contractor.

53. That approach is consistent with a legislative scheme that protects freedom of contract between parties while prohibiting interference with that freedom by deception by one of the parties. Such a purpose is not consistent with reading s357, as the FWO would, to hold a person liable for making a mistaken statement about a contract between other parties to which he, she or it was not a party.

54. As to section 336 of the FW Act, which provides for the objects of Part 3-1 of the FW Act, Barker J was entirely correct in concluding that the section provided little guidance in relation to the proper construction of s357[30].

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[28] The *Independent Contractors Bill 2006* (Cth) that introduced the *Independent Contractors Act 2006* (Cth) provided at s3(1)(a) and (b) that the principal objects are *"to protect the freedom of independent contractors to enter into services contracts"; and "to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial"*: see also Second Reading Speech (*Independent Contractors Bill 2006*), House of Representatives, *Parliamentary Debates* (Hansard), 22 June 2006 at p5-6.
[29] And its predecessor in Part 22 of the *Workplace Relations Act* 1996 (Cth) as inserted by the *Workplace Relations Legislation Amendment (Independent Contractors) Act* 2006 (Cth).
[30] (2015) 228 FCR 346 at [301] per Barker J.

The Legislative Structure of Division 6 of Part 3-1

55. The correct approach to the use of headings in construing statutes was helpfully explained by a Full Court of the Federal Court of Australia in *Tran v Commonwealth* (2010) 187 FCR 54 at [63] to [64] as follows:

> Headings in a statute can be taken into account in determining the meaning of a provision where the provision is ambiguous and may sometimes be of service in determining the scope of a provision. However, if the section is clear and unambiguous, a title or heading must give way, and full effect must be given to the enactment: see *Silk Bros* (1943) 67 CLR at 16 per Latham CJ, Rich and McTiernan JJ concurring. A heading does not, control the permissible scope of the substantive provisions of an Act, and cannot properly be used to impose an unnaturally constricted meaning upon the words of those substantive provisions, as Mason CJ, Deane, Dawson, and Gaudron JJ pointed out in *Concrete Constructions (NSW) Pty Limited v Nelson* [1990] HCA 17; (1990) 169 CLR 594 at 601. They said that a heading of a Part of an Act constitutes part of the context within which the substantive provisions of the Part must be construed and should be taken into consideration in determining the meaning of those provisions in case of ambiguity. Thus, they concluded that the meaning of "misleading" in s 52 of the *Trade Practices Act* was apt to be elucidated by reference to the headings of Pt V and Div 1 of that Act, in which s 52 appeared, as Mason J, with the agreement of Barwick CJ, Gibbs, Stephen and Jacobs JJ had explained previously in *Reg v Credit Tribunal; Ex parte General Motors Acceptance Corporation* [1977] HCA 34; (1997) 137 CLR 545 at 561 where he said:
>
>> "'Misleading' is a word which is capable of expressing various shades of meaning, sometimes signifying that which is subjectively misleading and at other times that which is objectively misleading. Its meaning therefore is apt to be influenced, indeed decisively influenced, by the context in which it is found. Here the setting in which s. 52 (1) appears is shown by the headings 'Part V --Consumer Protection" and "Division 1 --Unfair Practices'."
>
> The heading to a division in an Act is not irrelevant to the process of ascertaining what the purpose of a substantive provision was or how it should

> be construed. While the heading to a division is part of an Act, the words in the heading cannot of themselves create rights or liabilities or have an operative effect that expands or limits what may or may not be done. Nonetheless, the heading may provide a context in which the sections that it precedes may be understood. Naturally, not all headings will be of particular assistance, especially in construing provisions in Acts that have been amended many times since a particular heading had been inserted in a part of the Act in which subsequent amendments had been made.

56. The divisional heading 'Sham Arrangements' in Division 6 of Part 3-1 of the FW Act is consistent with the Nature of the Contract Construction because it focuses on eliminating the deceit of one party to a contractual arrangement by the other party to that contractual arrangement. It is not a licence at large to extend liability to a person because they have incorrectly described the nature of a contractual relationship between two other parties.

57. In these circumstances, the Full Court's construction is in no way undermined by the heading to Division 6 of Part 3-1 of the FW Act. Barker J was clearly correct to say that the heading did not advance the debate about construction terribly far[31].

Role of sections s358 and s359 in the construction of s357 (AS [41] to [47]).

58. It is plainly incorrect to assert, as the FWO does in the first sentence of AS[42], that s358 is '*not confined to a contract for services made directly with the employer*'. Section 358 only contemplates the employer (say, A) threatening or dismissing the employee (say B) in order for A to engage B as an independent contractor doing the same work. The section does not contemplate any person other than A engaging B - there is no way that A can engage B other than by contracting with him or her.

59. The scope of s358 is limited in the same way as the scope of s357, and in stark contrast to different approach in s 359 of the FW Act.

[31] (2015) 228 FCR 346 at [302] per Barker J.

60. Section 359 of the FW Act is noticeably broader in scope than sections 357 and 358, and is not restricted to arrangements between the employer and the employee. However, s 359 is correspondingly narrowed by a requirement to establish that the relevant statement was known to be false by the representor together with a motivation to procure a particular outcome.

61. The submission in AS[41] that the meaning of 'contract for services' is the same in each of ss357, 358 and 359 of the FW Act fails to have to have regard to the very carefully structured statutory regime and the different circumstances to which each provision is directed.

62. Far from there being an homogenous and vague notion of 'sham contracts', Division 6 of Part 3-1 of the FW Act is properly discerning in relation the extent of its reach by reference to three particular types of circumstance identified in each of sections 357, 358 and 359 of the FW Act.

63. The focus by the FWO at AS[41] to [46] on the words 'contract for services' in s357 of the FW Act again mistakes the context in which those words appear in s357. That is, s357 never contemplates that there is a real and existent 'contract for services'- it is simply directing attention to the subject matter of this misrepresentation about *the contract of employment*. There is no 'contract for services', it folly to search for one for the purposes of s357 of the FW Act.

The legislative history AS [35]-[40]; *and Extrinsic Materials* AS Annexure A

64. The plurality was correct at [81], [84] and [92] in discerning that the legislative history (as seen from the text of the predecessor provisions and the relevant Explanatory Memoranda) was completely supportive of the conclusion that they had reached in relation to the text of the current provision.

65. Barker J was also correct to find that the legislative package introduced by the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*

(Cth) (**WRLA (IC) Bill**) and the Explanatory Memorandum to that bill[32] and the *Fair Work Bill 2008* (Cth)[33] supported the construction adopted by the Full Court[34].

66. Even accepting the legislative history described in paragraphs [57] to [65] of Annexure A to the AS, there is nothing in that material which is suggestive of a preference for the FWO's construction over that adopted by the Full Court.

67. The same may be said of the of the legislative history recited in paragraphs [66] to [71] of the AS of the introduction of s357 and Division 6 into Part 3-1 of the FW Act via the *Independent Contractors Bill 2006* (Cth) and the predecessor equivalent provisions in Part 22 of the *Workplace Relations Act 2006* (Cth) (**WR Act**).

68. In particular, the plurality was correct[35] in appreciating that the Explanatory Memorandum to the WRLA (IC) Bill [36] for the introduction of former ss900 and 901 of the WR Act is entirely inconsistent with the FWO's position.

69. The Explanatory Memorandum to the WRLA (IC) Bill describing proposed s900 of the WR Act[37] states:

> Subsection 900 (1) would describe the circumstances under which a person will be liable to a civil penalty for misrepresenting an employment relationship as being an independent contracting arrangement. **The person would need to have entered into a contract with an individual and have made a representation to that individual that the contract was a contract for services under which the individual would perform work as an independent contractor.** The person will have contravened this section if, at

[32] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum.
[33] Australia, House of Representatives, *Fair Work Bill 2008*, Explanatory Memorandum.
[34] (2015) 228 FCR 346 at [295] per Barker J.
[35] (2015) 228 FCR 346 at [92] per North and Bromberg JJ.
[36] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum.
[37] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum at p5[5]. The same explanation was given in the Explanatory Memorandum in relation to proposed employment in s901 at p6[12].

the time the representation was made, the contract was one of employment unless they can prove the matters in proposed section 900 (2).

(emphasis added)

70. Although ss900 and 901 of the WR Act were replaced by s357 of the FW Act, which consolidated them, there is no suggestion that those amendments were designed to extend the reach of the civil remedy provisions[38].

71. There is also the significance of the presence of an effective reversal of onus provision, found originally in s900(2) of the WR Act (and currently mirrored in s357(2) of the FW Act). In relation to the introduction of this provision, the Explanatory Memorandum to the WRLA (IC) Bill [39] explained its basis as follows:

> The onus to prove the defence in subsection 900(2) would rest with the person who made the representation. This is a reversal of the burden of proof; the burden of proof normally rests with the person making the civil remedy application. The reason for this reversal is that the matter in s900(2) would be peculiarly within the knowledge of the defendant and would be significantly easier for the defendant to disprove than for the person making the application to prove.

72. Contrary to this feature, if the FWO's construction is correct, the legislation would have effect in relation to the misdescription by a person, who happens to be an employer, of a legal relationship between the representee and a third party, as to which the representor may have no knowledge.

73. The language used in the Explanatory Memorandum to the WRLA (IC) Bill[40], including the words 'peculiarly within the knowledge of the defendant' provide obvious support for the conclusion that ss900 and 901 of the WR Act were

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[38] (2015) 228 FCR 346 at [84] per North and Bromberg JJ.
[39] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum at p5[7].
[40] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum.

directed to representations made by a person who had direct knowledge of the true nature of the relationship because he is a party to it.

74. Further, the FWO's construction makes a person liable for an error in a description of a legal relationship between two other parties where that error may only have arisen because of failures of which the representor could not be aware. The present case demonstrates the point. The matters giving rise to the ineffectiveness of the independent contractor arrangements between Best, Roden and Contracting Solutions were not matters to which Quest was privy - it not being a party to those arrangements.

75. An error in a description in a legal relationship between two other parties is obviously also something that can occur in circumstances where the separate relationship is far removed from anything that could be remotely described as a sham. If a perfectly legitimate arrangement between a labour hire company and an individual turns out to be ineffective (as in this case) the fact that it has been unintentionally misdescribed by a person, ultimately found to be an employer, would on the FWO's case give rise to liability even though such an arrangement could not be described in any way as a 'sham'. This is why the question said to be posed for this Court is not same as the question addressed by the Full Court below. The FWO's question set out in the AS inappropriately presupposes the existence of sham and does not engage with the legislative requirements to establish liability.

76. The plurality was also correct[41] in appreciating that the Explanatory Memorandum to the WRLA (IC) Bill[42], dealing with proposed s901 of the WR Act was consistent with their Honours' construction.

77. The circumstances where an external labour hire company (unrelated to the employer) is in control of the arrangements which determine whether the individuals are employees or not, is a different situation to one in which an

[41] (2015) 228 FCR 346 at [85] per North and Bromberg JJ.
[42] Australia, House of Representatives, *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006*, Explanatory Memorandum.

employer controls the means by which the relationship between *it* and the individuals can be disguised and in respect of which it would have peculiar knowledge.

Conclusion

78. The appeal should be dismissed.

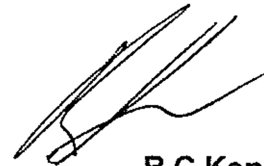
Part VII: Notices of Contention or Cross Appeal

79. Contracting Solutions does not propose to rely on any Notice of Contention or any Cross Appeal.

Part VIII: Time Estimate

80. Contracting Solutions estimates that the time for presentation of its oral argument is between 1 and 1 and an half hours.

Dated



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ANNEXURE A

6 Rights and responsibilities of employees, employers, organisations etc. (Chapter 3)

(1) Chapter 3 sets out rights and responsibilities of national system employees, national system employers, organisations and others (such as independent contractors and industrial associations).

(2) Part 3-1 provides general workplace protections. It:

(a) protects workplace rights; and

(b) protects freedom of association and involvement in lawful industrial activities; and

(c) provides other protections, including protection from discrimination.

(3) Part 3-2 deals with unfair dismissal of national system employees, and the granting of remedies when that happens.

(4) Part 3-3 deals mainly with industrial action by national system employees and national system employers and sets out when industrial action is protected industrial action. No action lies under any law in force in a State or Territory in relation to protected industrial action except in certain circumstances.

(5) Part 3-4 is about the rights of officials of organisations who hold entry permits to enter premises for purposes related to their representative role under this Act and under State or Territory OHS laws. In exercising those rights, permit holders must comply with the requirements set out in the Part.

(6) Part 3-5 allows a national system employer to stand down a national system employee without pay in certain circumstances.

(7) Part 3-6 deals with other rights and responsibilities of national system employers in relation to:

(a) termination of employment; and

(b) keeping records and giving payslips.

336 Objects of this Part

(1) The objects of this Part are as follows:

(a) to protect workplace rights;

(b) to protect freedom of association by ensuring that persons are:

(i) free to become, or not become, members of industrial associations; and

(ii) free to be represented, or not represented, by industrial associations; and

(iii) free to participate, or not participate, in lawful industrial activities;

(c) to provide protection from workplace discrimination;

(d) to provide effective relief for persons who have been discriminated against, victimised or otherwise adversely affected as a result of contraventions of this Part.

(2) The protections referred to in subsection (1) are provided to a person (whether an employee, an employer or otherwise).

361 Reason for action to be presumed unless proved otherwise

(1) If:

(a) in an application in relation to a contravention of this Part, it is alleged that a person took, or is taking, action for a particular reason or with a particular intent; and

(b) taking that action for that reason or with that intent would constitute a contravention of this Part;

it is presumed that the action was, or is being, taken for that reason or with that intent, unless the person proves otherwise.

(2) Subsection (1) does not apply in relation to orders for an interim injunction.