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 REPLY

PART I – Certification for publication on the internet

1. This submission is in a form suitable for publication on the internet.

PART II – Reply

The text of s.357(1) is unqualified

2. The first submission made by the Appellant (**FWO**) regarding the text of s.357(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) is that the construction of the Full Court of the Federal Court of Australia (**Appeal Court**) requires the sub-section to be read as if the words *"a contract for services"* were followed by the words *"between the employer and the individual"* (FWO's submissions (**AS**) [21]-[22]). The response of the Second Respondent (**Contracting Solutions**) begins with the fiction that the Appeal Court chose between two competing constructions,[1] and proceeds to characterise

[1] Contracting Solutions' submissions (**RS**) [25]. The Appeal Court raised the construction issue. FWO's construction was presented briefly in response but the issue was not developed in depth because it did not appear to be a live issue below. Contracting Solutions did not put any construction of s.357(1)

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Filed on behalf of the Appellant
Prepared by Justin L. Bourke QC and Jenny Firkin of Counsel
CLAYTON UTZ Lawyers
Contact: Saul Harben / Matthew Kelleher (Reference: 14793/17362/80120545.003)
Telephone: (08) 9426 8000 **Facsimile:** (08) 9481 3095
Email: sharben@claytonutz.com / mkelleher@claytonutz.com
Address for service: Level 27 QV.1, 250 St Georges Terrace, Perth, WA 6000

the FWO's construction as *"the Employee Status Construction"* and the Appeal Court's construction as *"the Nature of the Contract Construction"* (RS [26]). Once the Appeal Court's construction is depicted in this way, so the argument goes, further words to define the parties to the represented contract for services are not necessary, because it is simply a *"mis-description"* of the contract of employment between the employer and employee (RS [34]-[35]).

3. Contracting Solutions' demarcation between the two constructions is an artificial one. The FWO's construction is no less concerned with the nature of the contract between the employer and employee than the Appeal Court's construction. Under both the Appeal Court's and FWO's constructions, only one contract exists in relation to the work performed by the individual (employee): the employment contract.

4. Furthermore, under both constructions, a representation about an employee's status as an independent contractor equates to a representation that the underlying contract, pursuant to which the employee performs the work, is a contract for services and not a contract of employment.[2] The only true point of distinction is that, on the Appeal Court's construction, the represented contract for services must be said to be made *"between the employer and the individual"*, which the text of the sub-section does not require.

5. The FWO's second submission is that, on the Appeal Court's construction, the words of s.357(1) that describe the contract for services as one *"under which the individual performs, or would perform, work as an independent contractor"* would have no work to do (AS [23]-[24]). These words make clear that it is a misrepresentation about the **type of contract** under which the individual performs **work** that is determinative (being a contract for services when in truth it is an employment contract) rather than the parties to the asserted contract for services. Contracting Solutions contends that the

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forward at all either on appeal or before the primary judge. See AS fn 12 (which has not been disputed). Copies of the relevant transcript before the Appeal Court will be made available in Court if required to be reviewed by the Court on the day of the appeal.

[2] This is accepted by the plurality insofar as the employer and employee are parties to the represented contract for services: *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346; [2015] FCAFC 37 (**Appeal Judgment**) at [79], AB197 (North and Bromberg JJ).

Appeal Court's construction gives effect to this phrase (RS [36]), but nowhere in its submissions does it say *how*.[3]

6. The FWO's third submission is that the plurality imposed a requirement that the representation *"mischaracterise the contract [of employment] as a contract for services made between the employer and employee"*.[4] This requirement rests on the false premise that if the employer and employee are not parties to the represented contract for services, there are two contractual relationships, not one (AS [25]-[30]). Contracting Solutions' concession that there can only ever be one contract (the contract of employment) undermines the reasoning of the plurality that underpins the mischaracterisation requirement (RS [39]-[42]).[5]

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

7. The plurality concluded that the purpose of the provisions in Division 6 is to prevent arrangements that falsely disguise the true status of employees, and thereby deprive them of their legal entitlements.[6] The plurality acknowledged that this objective extends to any arrangement that accomplishes this result, including triangular arrangements, and is not confined to those made directly between an employer and an employee.[7]

8. Contracting Solutions provides no answer to the FWO's submission that the Appeal Court's construction captures only a sub-set of the mischief to which the provision is directed (namely, asserted contracts for services that do not concern any additional party), and is easily avoided (AS [38]-[40]; RS [28]).[8] Instead it develops a new argument as to the purpose of s.357. Contracting

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[3] The thrust of Contracting Solutions' submissions on this point (and others throughout its submissions) centre on the proposition that the *"contract for services"* referred to in the sub-section is non-existent (RS [37]-[38]). The FWO agrees (AS [28]). The meaning of the term *"contract for services"* is critical, nevertheless, to the parameters of the representation prohibited by the section.

[4] Appeal Judgment at [77], AB197 (North and Bromberg JJ).

[5] This concession also undermines the reasoning of Barker J in respect of the language of s.357(2): see Appeal Judgment at [304]-[307], AB259-260 (Barker J). See also AS [31]-[34].

[6] Appeal Judgment at [95], AB201 (North and Bromberg JJ). Justice Barker made no specific finding about the purpose of the provisions in the Division: Appeal Judgment at [298]-[302], AB258-259 (Barker J).

[7] Appeal Judgment at [96], AB202 (North and Bromberg JJ).

[8] Under the Appeal Court's construction, an employer simply has to introduce a third party into the arrangement, such as by the use of a related company, the use of a labour hire company or by the individual employee being required to work via an incorporated entity. In fact, an employer could avoid liability by representing that a third party was involved in the purported independent contracting arrangement when in fact the entity does not even exist. These various modes of avoidance are not addressed by Contracting Solutions.

Solutions contends that that the provisions in Division 6 are designed to provide *"specific protections"* [9] against *"misrepresentation, deception or coercion"* by an employer in relation to the contract under which the employee performs work (RS [50]). It is said that the section is not intended to operate in respect of *"a mistaken statement"* or unintentional mis-description in circumstances where the employer has *"no knowledge"* and *"could not be aware"* that the representation was incorrect (RS [53], [56], [72] and [75]).[10]

9. The emotive terms of Contracting Solutions' new argument ignore the words of s.357(2), which provides a defence to s.357(1) where an employer did not know and was not reckless as to whether there was a contract of employment between it and the employee. On either the Appeal Court's or the FWO's construction:

   (a) a deliberate misrepresentation, deception or coercion (with the various legal connotations that these terms invoke) is not required; and

   (b) an employer will not be liable for mis-describing a contract of employment where it *"could not be aware"* it was incorrect.

10. Consequently, the Appeal Court's construction does not achieve the reformulated purpose that Contracting Solutions now seeks to agitate. An employee who unintentionally mis-describes the contract between it and its employee as a contract for services is still liable under the Appeal Court's construction if it has been reckless. Conversely, an employer who deceitfully misrepresents to an employee that he or she is performing work for it as an independent contractor of a third party is not caught by the section.

Sections 358 and 359 support the FWO's construction

11. Contracting Solutions concedes that on the Appeal Court's construction the phrase *"contract for services"* is used inconsistently across ss.357, 358 and

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[9] It contends that the purpose of the provisions in Division 6 was to promote persons' freedom of contract as independent contractors, subject to *"specific protections"* for employees. This conflates the purpose of the *Independent Contractors Act 2006* (Cth) (which was to reduce the regulation by the States of independent contractors) and the purpose of the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) (which was 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). See AS [59].

[10] It is unclear how Contracting Solutions intends to rely on s.361 of the FW Act (see RS [24]). All parties below proceeded, correctly, on the basis that this provision had no relevance to s.357.

359 of the FW Act (RS [58]-[63]). It seeks to justify this departure from the ordinary rules of statutory construction by contending that the context of the provisions makes it clear s.358 is confined to contracts for services between an employer and employee (like s.357), and s.359 is not (RS [59]).

12. The basis on which Contracting Solutions seeks to distinguish s.358 from s.359 is unsafe. Contracting Solutions assumes that the term "*engage*" in s.358 is synonymous with the term "*contract*", and therefore the parties to the purported contract for services must be the employer and employee (RS [58]). The sub-headings of ss.358 and 359 are, respectively, "*Dismissing to **engage** as independent contractor*" and "*Misrepresentation to **engage** as independent contractor*" (emphasis added). Given the common use of the term "*engage*" in both sub-headings, the use of the term "*engage*" does not, without more, justify a different construction of the phrase "*contract for services*" in ss.358 and 359.

The extrinsic material

13. Contracting Solutions wrongly contends that the Appeal Court appreciated that the extrinsic material was "*completely supportive*" of its construction, and "*entirely inconsistent*" with the FWO's construction (RS [64], [65], [68] and [76]). Justices North and Bromberg in fact acknowledge that their construction does not meet the apparent purpose of the provision, as identified by the extrinsic materials, in respect of triangular arrangements.[11] Justice Barker did not rely on the extrinsic material at all.[12]

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JUSTIN L. BOURKE QC
Telephone: (03) 9225 8317
Fax: (03) 9225 8968 (C/- Lennon's List)
Email: jlbourke@vicbar.com.au

JENNY FIRKIN
Telephone: (03) 9225 7529
Fax: (03) 9225 7728 (C/- Dever's List)
Email: jenny_firkin@vicbar.com.au

[11] Appeal Judgment at [95]-[99], AB201-203 (North and Bromberg JJ).
[12] In so far as Barker J asserts that the plurality placed emphasis on the extrinsic material, he was plainly incorrect: Appeal Judgment at [295], AB258 (Barker J).