FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37

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| Citation: | Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd [2015] FCAFC 37 |
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| Appeal from: | Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd (No 2) [2013] FCA 582 |
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| Parties: | **FAIR WORK OMBUDSMAN v QUEST SOUTH PERTH HOLDINGS PTY LTD (ACN 109 989 531), CONTRACTING SOLUTIONS PTY LTD (ACN 099 388 575) and PAUL KONSTEK** |
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| File number: | WAD 314 of 2013 |
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| Judge: | **NORTH, BARKER AND BROMBERG JJ** |
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| Date of judgment: | 17 March 2015 |
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| Catchwords: | **INDUSTRIAL LAW** – appeal from dismissal of application for declarations of breach of s 357 *Fair Work Act 2009* (Cth) – construction of s 357 FW Act – nature of representations proscribed by s 357 FW Act – where employees purportedly “converted” from employees of operating company to independent contractors of third party labour-hirer – whether representation by operating company that employees would be (or are) independent contractors of labour-hirer and not employees of operating company is a misrepresentation of “the contract of employment” and actionable under s 357(1) FW Act – not actionable – appeal dismissed.**INDUSTRIAL LAW** – whether workers independent contractors of labour-hirer or employees of operating company – whether workers carrying on business – application of indicia of carrying on business – workers not carrying on business – application of multifactorial test as to whether workers employees – workers employees –whether contracts existed between labour-hirer and workers and if so whether effective – whether contracts between labour-hirer and operating company effective – no effective contracts between labour-hirer and workers, or between labour-hirer and operating company – circumstances in which it is necessary and permissible to imply a contract of employment – nature of contract to be implied – contract of employment implied between operating company and workers.**INDUSTRIAL LAW** – accessorial liability – s 550 FW Act – nature of accessorial liability under FW Act – whether knowledge of essential elements necessary for accessorial liability – knowledge of essential elements necessary – identification of essential elements of contravention of s 357 FW Act – whether onus of demonstrating knowledge of essential elements discharged – onus not discharged – accessorial liability not established.  |
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| Legislation: | *Acts Interpretation Act 1901* (Cth) s 13(2)(d)*Fair Work Act 2009* (Cth) ss 3, 3(a), 12, 336(2), 340(1), 357, 357(1), 357(2), 358, 359, 550, 550(1), 550(2), 570(1), Div 6 Pt 3-1*Federal Court of Australia Act 1976* (Cth) ss 27, 28*Independent Contractors Act 2006* (Cth)*Trade Practices Act 1974* (Cth) s 75B*Workplace Relations Act 1996* (Cth) ss 900–903, 900(1), 901(1), 903, Part 22 *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth)*Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (Cth)Explanatory Memorandum, Fair Work Bill 2008 (Cth)Explanatory Memorandum, Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (Cth)Explanatory Memorandum, Independent Contractors Bill 2006 (Cth) |
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| Cases cited: | *Damevski v Giudice* [2003] FCAFC 252; (2003) 133 FCR 438*Re Odco Pty Ltd v Building Workers’ Industrial Union of Australia* [1989] FCA 336*Building Workers’ Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104*Informax International Pty Ltd v Clarius Group Ltd* (2012) 207 FCR 298*AB v State of Western Australia* (2011) 244 CLR 390*Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212*Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* (2000) 101 IR 143*National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90*Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697*Waugh v Kippen* (1986) 160 CLR 156*Wainohu v New South Wales* (2011) 243 CLR 181*Pettitt v Dunkley* [1971] 1 NSWLR 376*Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816*R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited* (1952) 85 CLR 138*Hollis v Vabu Pty Ltd* [2001] HCA 44; (2001) 207 CLR 21*ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69*Dalgety Farmers Ltd t/as Grazcos v Bruce* (1995) 12 NSWCCR 36*Autoclenz Ltd v Belcher* [2011] 4 All ER 745*Raftland Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (2008) 238 CLR 516*Snook v London and West Riding Investments Ltd* [1967] 2 QB 786*Curtis v The Perth and Fremantle Bottle Exchange Co Limited* [1914] HCA 21; (1914) 18 CLR 17*Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd* [1968] AC 1130*Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385*Massey v Crown Life Insurance Co* [1978] 2 All ER 576*Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597*Rowe v Capital Territory Health Commission* (1982) 2 IR 27*Brook Street Bureau (UK) Ltd v Dacas* [2004] IRLR 358*Cable & Wireless plc v Muscat* [2006] IRLR 354*James v London Borough of Greenwich* [2008] EWCA Civ 35*Homecare Direct Shopping Pty Ltd v Gray* [2008] VSCA 111*Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165*Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110*Golden Plains Fodder Australia Pty Ltd v Millard* (2007) 99 SASR 461*Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55*Textile Footwear & Clothing Union of Australia v Bellechic Pty Ltd* [1998] FCA 1465*Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153*Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309*Wilton v Cole & Allied Operations Pty Ltd* (2007) 161 FCR 300*Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95*Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174*The Aramis* (1989) 1 Lloyd’s Rep 213*James v London Borough of Greenwich* [2007] IRLR 168*Tilson v Alstom Transport* [2010] EWCA Civ 1308*Construction, Forestry, Mining and Energy Union v Victoria* (2013) 302 ALR 1*Marshall v Whittaker’s Building Supply Co* (1963) 109 CLR 210*Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161*Stevens v Brodribb Sawmilling* *Company Proprietary Limited* (1986) 160 CLR 16*On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82*ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532*ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146*London Australia Investment Company Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1977) 138 CLR 106*Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606*McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377*Chanter v Hopkins* (1838) 4 M&W 399*Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220*Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 1 IR 212*North East Equity Pty Ltd (ACN 009 248 819) v Proud Nominees Pty Ltd (ACN 074 270 938)* (2010) 269 ALR 262*Construction, Forestry, Mining and Energy Union v Clarke* (2007) 164 IR 299*Yorke v Lucas* (1985) 158 CLR 661*Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* (2013) 232 IR 290*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355Creighton B and Stewart A, *Labour Law*, (5th ed, The Federation Press, 2010)Davies ACL, “Sensible Thinking About Sham Transactions”(2009) 38 ILJ 318Irving M, *The Contract of Employment* (LexisNexis Butterworths, 2012)Owens R, Riley J and Murray J, *The Law of Work*, (2nd ed, Oxford University Press, 2011)Roles C and Stewart A, “The Reach of Labour Regulation: Tackling Sham Contracting” (2012) 25 AJLL 258Sappideen C, O’Grady P, Riley J, and Warburton G, *Macken’s Law of Employment* (7th ed, Lawbook Co., 2011)Stewart A,“Redefining Employment? Meeting the Challenge of Contract and Agency Labour” (2002) 15 AJLL 235International Labour Organisation, “The Employment Relationship” (Report V(1) to the International Labour Conference, 95th Session, 2006)  |
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| Date of hearing: | 25 February 2014 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 340 |
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| Counsel for the Appellant: | Mr IM Neil SC |
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| Solicitor for the Appellant: | Clayton Utz Lawyers |
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| Counsel for the Second and Third Respondents: | Mr RE Lindsay |
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| Solicitor for the Second and Third Respondents: | Ashurst Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | WAD 314 of 2013 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | FAIR WORK OMBUDSMAN Appellant |
| AND: | QUEST SOUTH PERTH HOLDINGS PTY LTD (ACN 109 989 531)First RespondentCONTRACTING SOLUTIONS PTY LTD (ACN 099 388 575)Second RespondentPAUL KONSTEKThird Respondent |

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| JUDGES: | NORTH, BARKER AND BROMBERG JJ |
| DATE OF ORDER: | 17 MARCH 2015 |
| WHERE MADE: | PERTH |

THE COURT ORDERS THAT:

1. The appeal is dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| JUDGES: | NORTH, BARKER AND BROMBERG JJ |
| DATE: | 17 March 2015 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

**NORTH AND BROMBERG JJ**:

1. It is unlawful for an employer to represent to a person who is in fact its employee that the contract made with that person is a contract for services under which the person performs work as an independent contractor. It is also unlawful for a prospective employer to make a representation of that kind about a proposed contract of employment. Those prohibitions are the subject of s 357(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) contained in a Division of that Act headed “Sham arrangements”.
2. At trial, the appellant (**Ombudsman**), claimed that the first respondent (**Quest**), an operator of a business providing serviced apartments, contravened s 357(1) by making representations to two housekeepers employed by it to the effect that they would be (and later that they were) not its employees but independent contractors performing work at its premises. The Ombudsman alleged that the second respondent (**Contracting Solutions**), an operator of a labour-hire business, and the third respondent (**Konstek**), an agent of Contracting Solutions, were involved in Quest’s contraventions of s 357(1) and liable as accessories. The primary judge dismissed those claims.
3. The Ombudsman alleged that the primary judge erred for reasons including that the primary judge misconceived the claims it made. The Ombudsman sought a reconsideration of those claims.
4. A wide range of issues were raised by the appeal. Some of those were not raised before the primary judge at all and others were not agitated before the primary judge as helpfully as they might have been. The issues we need to consider include:
	* + - 1. The proper construction of s 357(1) (see [67]-[99]);
				2. Whether the representations made by Quest were representations of the kind that s 357(1) proscribes (see [100]-[103]);
				3. Whether the housekeepers were employees of Quest or independent contractors engaged by Contracting Solutions (see [132]-[234]);
				4. Whether Quest misrepresented that the housekeepers were independent contractors (see [235]-[242]);
				5. Whether Quest misrepresented that the housekeepers would be independent contractors (see [243]-[249]); and
				6. Whether either or both of Contracting Solutions and Konstek were involved in any contravention of s 357(1) by Quest (see [250]-[274]).
5. We have at [104]-[128] set out the reasons why, with respect to the primary judge, we have concluded that his Honour erred. However, by reference to an issue which was first raised on the appeal, we have determined that the appeal should be dismissed. We have come to that view because we consider that the representations made by Quest were not proscribed by, and thus not actionable under, s 357(1). In case we are wrong, we have considered and determined each of the issues identified at (iii)-(vi) above and done so on the basis of the alternate construction of s 357(1) for which the Ombudsman contended.

# facts

1. The manner in which the primary judge resolved to dismiss the Ombudsman’s claims resulted in the primary judge not making most of the factual findings we will here record. Those factual findings are a combination of the unchallenged factual findings made by the primary judge together with many findings that we have been required to make in order to resolve the issues raised by this appeal.
2. In 2009, Quest carried on a business providing serviced apartment accommodation at some 40 apartments at “Quest on Arlington” in South Perth, Western Australia (**Quest’s business**). From mid-2009 until about November 2010, Quest employed Ashvin Luchmaya (**Luchmaya**) as the Manager of that business. Quest also employed various employees including receptionists and housekeepers (employed as casuals) to clean its serviced apartments (**housekeepers**). Quest paid its housekeepers at an hourly rate which differed depending upon what day of the week work was performed. Amongst the housekeepers were Margaret Best (**Best**) and Carol Roden (**Roden**). Both Best and Roden were first employed by Quest in 2007.
3. In mid to late 2009, Luchmaya contacted a representative of Contracting Solutions. Luchmaya indicated Quest’s interest in putting in place “the ODCO system” at Quest’s business. Contracting Solutions held a license with Odco Contracting Systems Australia Pty Ltd. The Licence Agreement provided Contracting Solutions with a licence to operate as an “ODCO Contracting Licensee” and utilise certain business procedures and systems in furtherance of what the licence described as Contracting Solutions’ desire to carry on a “contract labour hire business”.
4. Konstek was a contractor to Contracting Solutions. With the assistance of his partner Steven Buiks (**Buiks**), he acted for and on behalf of Contracting Solutions in all its relevant dealings with Quest.
5. Various meetings occurred between representatives of Quest (primarily Luchmaya) and Contracting Solutions (primarily Konstek) in September and early October 2009 with a view to Quest engaging Contracting Solutions to implement its contracting system for housekeeping and reception staff working at Quest’s business. Correspondence was exchanged. Quest provided Konstek with details of the hours worked by its housekeepers and receptionists and the rates paid to them. At that time Quest paid its housekeepers an hourly rate of $17.97 for work performed Monday-Friday; $21.56 for work performed on weekends; and $32.34 for work performed on public holidays. Contracting Solutions provided indicative figures as to what Quest could expect to be charged per hour for housekeepers and reception staff if it utilised Contracting Solutions’ system. The hourly rate identified as the rate that would be paid to contractors providing housekeeping services was a flat rate of $19.26 per hour payable irrespective of when the work was performed. That rate was higher than the ordinary time rate then paid by Quest to housekeepers for work on Monday-Friday but lower than the applicable rate paid for weekend or public holiday work. Contracting Solutions was of the view that Quest was paying its housekeepers less than the minimum award rate required by law. It indicated that its charge would be based upon contractors being paid a rate equivalent to the ordinary time award rate which would be payable as a “flat rate” applicable whenever work was performed. The correspondence identified that Contracting Solutions would charge 19.85% on top of the flat hourly rate to be paid to a contractor as well as a 1% charge for public liability insurance.
6. In the correspondence, Quest was told by Contracting Solutions that:

With our system we will convert all the current staff and also continue to sign up all the new staff upon your request.

The benefits of utilising Contracting Solutions services and our ODCO license means you are not bound by Industrial legislation or awards etc. This allows you the business owner to develop flexible working arrangements with your workers and not be governed by IR law. Our system gives you true flexibility.

1. In further correspondence from Contracting Solutions in early October 2009, Quest was informed that the “key difference” with the Contracting Solutions system was that Quest would not have to pay penalty rates to its employees.
2. A meeting occurred between Contracting Solutions and Quest on 8 October 2009. Quest was provided with a copy of a draft “Hiring Agreement” and a proposal prepared by Konstek and headed “The ODCO System of Independent Contracting – Contracting Solutions” (**the Proposal**). The Proposal described Contracting Solutions’ main objective as being “to provide businesses with a superior system of worker engagement and workforce management which assists them to attract, retain and reward their workforce”. The Proposal described “The ODCO System” in the following terms:

THE ODCO SYSTEM

Contracting Solutions is an agency licensed under the ODCO system to engage workers as independent contractors who are on-hired to work with a specific client. (See http://www.odco.com.au).

In simple terms: workers sourced by you are registered as ODCO independent contractors and are on-hired to work exclusively with your business. By using this system, you retain 100% control over how and when contractors work without breaching legislation such as the Australian Tax Office 80/20 rule and Personal Services Income ruling.

The ODCO model is akin to a system of labour-hire, however, commercial contracts (*rather than “contracts of employment”)* govern the *‘tri-partite’* relationship between Contracting Solutions, the client and the contractor.

Our system of contracting is not only useful for contractors. Offering the ODCO system to existing employees assists businesses to attract, retain and reward their workforce with remuneration packages that legally can’t be offered via employment and industrial relations legislation.

Contracting Solutions removes the uncertainty and risk associated with direct contractor engagement and direct employment. Workers engaged as ODCO independent contractors operate outside state and federal industrial relations systems and gain validity through the Independent Contractors’ Act 2007 and Federal and High Court decisions. (*see: (1) The High Court Judgment Accident Compensation Commission v Odco Pty Ltd F.C. 90/040 of 22 October 1990 and (2) Odco P/L v Building Workers’ Union of Aus (1989) No VG 151of 1988)*

These judgements have been challenged on occasion, however, when administered correctly have always been found to be a legal method of contractor engagement. Contracting Solutions has a 100% success rate in this area which is further strengthened by its partnership with Workplace Relations & Management Consultants, the largest privately owned industrial relations firm in Western Australia.

Contracting Solutions contractors:

* are bona fide independent contractors;
* will not be deemed employees;
* are not subject to industrial relations legislation, awards or other employment entitlements;
* will have no contractual connection to your business;
* are recognised by the ATO as contractors who are not required to obtain an ABN, register for GST or submit BAS Statements regardless of how much they earn;
* are subject to the Australian Superannuation Guarantee Levy and must have their contributions paid into a superannuation fund.

(errors in original)

1. The Proposal made a number of further representations relevant to the issues raised on the appeal:
* Contracting Solutions contractors are engaged under a commercial contract which has been tried and tested in the High Court of Australia;
* Contracting Solutions will perform all payroll functions and develop a tailored electronic timesheet for Quest to record the number of hours (or units) worked by each contractor weekly, fortnightly or monthly. Quest will only need to input the number of hours (or units) worked by each contractor into the timesheet which is then to be provided to Contracting Solutions for processing;
* Following each “pay run”, Contracting Solutions will issue Quest an “all inclusive” invoice based on the relevant timesheet. Those invoices will include all statutory costs (for contractors) plus Contracting Solutions’ management fees;
* Contracting Solutions will issue contractors with “remittance slips” (later referred to as “payslips”) and end of financial year payment summaries;
* Contracting Solutions will withhold PAYG tax for contractors;
* Contracting Solutions will hold the workers’ compensation insurance policy for contractors and manage all claims and assist with worker rehabilitation;
* Quest and Contracting Solutions will jointly be responsible for OHS obligations and must assist any injured contractors in their return to work;
* Contracting Solutions’ charges to Quest will include workers’ compensation insurance; and
* Contracting Solutions will ensure that the following “contractor statutory requirements” are met for all contractors:
* public liability insurance;
* workers’ compensation insurance;
* superannuation contributions;
* payroll tax;
* PAYG tax withholding; and
* industrial relations and common law obligations.
1. The document also asserted that as a result of a ruling by the Australian Taxation Office, ODCO contractors were not required to possess an ABN, register for GST, or submit quarterly BAS statements and that contractors also had no need to invoice either Quest or Contracting Solutions.
2. The Proposal asserted that Quest would be able to operate with peace of mind as to the legitimacy of “your workers” and offer the most competitive remuneration packages which would help Quest to attract, retain and reward “your staff”. It asserted that Quest would no longer need to worry about a range of issues including “confusion about legitimacy of contractors (i.e. contractor vs employee)”. It stated that engaging the services of Contracting Solutions would relieve Quest from the burden of worker administration and remove the risk associated with direct worker engagement.
3. As the primary judge found at [227], there was no suggestion in the discussions between Konstek and Luchmaya that the arrangements to be made should be other than those contained in the Proposal. The discussions were directed to ensuring that those of Quest’s existing staff who were “converted” from employees into independent contractors were to continue to work at Quest’s business doing the same job in the same manner as they had done before. The only practical change was that they would receive their changed income from Contracting Solutions rather than from Quest.
4. In October 2009, Quest entered into an agreement with Contracting Solutions described as a “Hiring Agreement” (**Hiring Agreement**). By the terms of that agreement, Quest engaged Contracting Solutions to provide “the administrational management of Contractors” as requested by Quest. The agreement described Contracting Solutions as “a service company … which supplies self-employed contractors to business & industry.” It further described Contracting Solutions’ services as managing “all tasks related to Contractor engagement and administration of payroll, workers compensation, superannuation, payroll tax and PAYG payments for all Contractors operating through Contracting Solutions”. In that context, the Hiring Agreement noted that “Contractors operating through Contracting Solutions are yours [Quest’s] to direct … ”. The Hiring Agreement further contained Quest’s acknowledgment that Contracting Solutions “is not performing the services required of Contractors, but are [sic] instead the supplier of Contractors, at the Client’s request, to perform the work that it has requested”.
5. Other terms of the Hiring Agreement dealt with the fee that it was agreed Contracting Solutions would charge for its services. The fee was referred to as a “management fee” and was said to be calculated as a percentage payable on “Contractor gross remuneration inclusive of superannuation contributions”. The Hiring Agreement also provided that, other than by prior agreement, Contracting Solutions was not obliged to process contractor payments until Contracting Solutions’ invoice for the relevant payment period had been paid by Quest’s business.
6. The Hiring Agreement was signed on behalf of Quest by Derek Haayema (**Haayema**), who was a shareholder and a director of Quest and was, for a brief period of time in 2006, a manager at Quest.
7. It was common ground that the process by which existing employees of Quest would be “converted” into independent contractors working at Quest was agreed to be, and was in fact, managed by Contracting Solutions on behalf of Quest. The object of that exercise, as understood by both Konstek and Luchmaya, was to have the existing housekeepers and reception employees of Quest continue to perform the same work for Quest as they were then performing but as independent contractors under Contracting Solutions’ system and not as employees. For that purpose, a number of meetings occurred between either or both of Konstek and Buiks (on behalf of both Contracting Solutions and Quest) and housekeepers and reception employees of Quest including Roden and Best.
8. The evidence given about these meetings by various of the witnesses who attended (principally Konstek, Buiks, Roden and Best) was somewhat inconsistent as to how many meetings there were, when they occurred, and what precisely was said. The detail is not crucial but a basic outline of what occurred is important and can be gleaned from the evidence without the need to resolve any significant inconsistency.
9. It is likely that the first of the meetings occurred in late October 2009 and was attended by Konstek, Buiks, Roden, Best and two or three other housekeepers employed by Quest. It lasted some 30 to 40 minutes. Other initial meetings also occurred with other groups of employees. Follow up meetings then occurred some two weeks later. The principal purpose of the follow-up meetings was to obtain completed application forms provided at the earlier meetings.
10. Luchmaya attended at the start of the initial meetings. He introduced one or both of Konstek and Buiks to the employees and then left. Either at that time or earlier, Luchmaya encouraged Roden and Best, and other employees, to take up the arrangements to be offered to them. Employees were told by Luchmaya that to do so would be of benefit to them and to Quest.
11. At the initial meetings with existing employees, employees were given a “sign up pack” which included, amongst other things, a document of some 28 pages entitled “Contractor Guide” (**Contractor Guide**) and an application form (**Contractor Application**). Employees were “walked through” the Contractor Guide. A number of representations were made to the employees urging them to sign up and stressing the asserted benefits of “converting” to being what Konstek, Buiks and the material distributed described as “independent contractors” or “self-employed contractors”. As part of what he acknowledged to be a sales pitch to the employees, Konstek stressed what was asserted as the “higher rate of pay” that would be paid to the employees as independent contractors. They were told that they would get $20 an hour, 1% of which would pay for public liability insurance.
12. Employees were told that “converting” to becoming “independent contractors” would benefit them and benefit Quest and its business. Those matters were emphasised. The employees were also told that if there was insufficient work for them at Quest, Contracting Solutions would try to find them work elsewhere.
13. Nothing was said to the employees about the advantages of remaining an employee (including access to penalty rates, overtime rates, unfair dismissal protections and, for permanent employees, access to holiday and sick leave) or any disadvantages of being an independent contractor. Konstek and Buiks acknowledged that their purpose was to sell to the employees the benefits of becoming “independent contractors”. The more employees that signed up, the more that Konstek and Buiks would be remunerated.
14. For reasons we will explain, an important consideration in the resolution of this appeal is the content of the representation made by Quest at this initial meeting about the nature of the contractual arrangements pursuant to which Best and Roden would perform work should they take up the proposal being offered to them. There is no issue that the representation was made by Quest through Contracting Solutions acting as its agent.
15. The alleged content of this central representation was set out at paragraph 11 of the Ombudsman’s Amended Statement of Claim. However, the primary judge does not appear to have made any finding as to the pleaded representation. But, his Honour made an assumption that the representation pleaded at paragraph 11 was made (at [255]).
16. It will be necessary for us to make a finding as to the content of this central representation. The finding we make is based on our assessment of what would have been conveyed to persons such as Best and Roden by what was said to them, taking into account the circumstances in which it was said including that Contracting Solutions was proposing that they become independent contractors of Contracting Solutions. 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.
17. After the initial meeting, Best had a number of discussions with others as to whether she would sign up. She did not want “to change to working under the contract.” However, on 30 October 2009 she signed the Contractor Application and handed it in. Roden attended a follow up meeting or two and signed up thereafter. Unlike Best, who asserted that she was told she would lose her job if she did not sign up, Roden’s evidence was that although she had been told that she would not lose her job if she refused to sign up, she was apprehensive as to whether that would truly be so. She felt that if she did not sign she may lose her job.
18. 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. His Honour found that whilst neither Roden nor Best desired to change any aspect of her employment with Quest, each was induced to do so by the representations made to her by Contracting Solutions at the instance of Quest (at [204]). Neither was expressly or impliedly told she would have no job with Quest unless she signed the Contractor Application, but the primary judge accepted that both Best and Roden believed that they had no or little option but to sign the Contractor Application if they wanted to continue working at Quest (at [239]). None of those findings has been challenged.
19. The Contractor Application which each of Best and Roden completed began with an “Introduction” in which the applicant is congratulated and told that he or she is “one step closer to becoming an Independent Contractor with Contracting Solutions”. The introduction emphasises that the Contractor Application must be approved by Contracting Solutions “prior to [the applicant] engaging and commencing work through this Agency”. The applicant is then asked to complete the application which is organised into various sections.
20. Personal details and contact information are required to be entered followed by the details of the applicant’s bank account. That is followed by a section dealing with insurance in which the applicant is informed that holding public liability insurance is mandatory. Either proof of the existence of such coverage was required, or the applicant must opt to participate in the “blanket policy” held by Contracting Solutions at a cost of 1% of “your remuneration”.
21. The applicant is then informed about the optional income protection insurance available through Contracting Solutions. The applicant is told that Contracting Solutions conforms with the requirements of the “SGAA (Superannuation Guarantee Act Australia),” a likely reference tothe *Superannuation Guarantee (Administration) Act 1992* (Cth). Conforming to the requirements of that Act is said to be compulsory “for all Independent Contractors operating through this Agency”. The applicant is requested to authorise “this Agency” to either remit superannuation payable to a superannuation fund operated on behalf of Contracting Solutions or to the applicant’s chosen fund.
22. In a section dealing with taxation, the applicant is told that “all individuals working under labour hire arrangements will have income tax withheld under the [Australian Taxation Office’s] PAYG [Pay As You Go] system”. The applicant is instructed to complete a “Tax File Number (TFN) Declaration” and is told that, in lieu thereof, Contracting Solutions will deduct tax at a rate of 46.5%.
23. Details of the applicant’s work history are then required to be included. Under a heading “Your Medical History”, the applicant is told that occupational safety and health laws throughout Australia state “that we have a duty of care to ensure you are able to perform your duties in a fit and proper manner”. A number of questions are then posed about the applicant’s medical history which the applicant is required to answer. The same statement about the duty of care of Contracting Solutions is made in the section “Your Workers Compensation History”. A series of questions is asked about any workers’ compensation claims made or workers’ compensation payments or Centrelink benefits received by the applicant. The applicant is then asked to complete a declaration which substantially deals with workers’ compensation issues. The declaration requires the applicant to advise of any illnesses, injury or workers’ compensation claim payments made between submitting the application and the commencement “of an assignment”.
24. The applicant is then asked to acknowledge that he or she has viewed Contracting Solutions’ “Safety Induction Video”. A series of safety-related questions is posed for the applicant to answer.
25. That is followed by a heading “Independent Contractor Questionnaire”. The applicant is told that a series of questions needs to be completed in order “[t]o ensure that we have clearly communicated the unique way of working as an Independent Contractor through this Agency”. Some nine questions follow. They deal with the applicant’s knowledge of the way in which the Contracting Solutions system operates in relation to the making of payments, insurance, taxation, superannuation, injury reporting and occupational health and safety.
26. The final question asks the applicant to identify the legal status of a worker engaged “through our Agency”. Three options are given – an employee of the “Client”; an employee of “our Agency”; or “an Independent Contractor”. In answer to that question both Best and Roden stated “Independent Contractor”. In the case of Best, the form suggests that she first answered “employee of our Agency” but then changed that to “Independent Contractor”. There were no questions which sought information from Best or Roden about the nature of her business or intended business as an independent contractor. Nor was there any screening or other process utilised in which that information may have been provided or the suitability of Best and Roden to be independent contractors running their own business assessed.
27. The next section is headed “Your Agreement to Contract” and asks the applicant to agree to what is described as “the following Conditions of Contract” (**the Agreement to Contract**). To be completed, the Agreement to Contract requires the applicant’s signature and that of a representative of Contracting Solutions. Its terms are as follows:
28. I acknowledge and agree that there is no relationship of employer/employee with Contracting Solutions (CS) and that CS does not guarantee me any work. I am self-employed and as such I am not bound to accept any work through CS.
29. I hereby agree to work for an agreed amount per hour for actual on-site hours, or job price to be agreed.
30. I instruct CS to make deductions in respect of the Pay As You Go (PAYG) system of taxation.
31. I hereby agree to have no claims on CS in respect of Holiday Pay, Long Service Leave, Sick Pay or any similar payment.
32. I hereby agree that CS has no responsibility or liability to me, except that I am guaranteed to be paid for actual on-site hours worked or agreed job price for work done.
33. It is agreed that I must carry out all work that I agree to do through the Agency of Contracting Solutions in a proper manner and Contracting Solutions is hereby guaranteed against faulty work. All faulty work must be made good at no cost to Contracting Solutions. I agree to cover the work (where necessary) for Public Liability, Accident Insurance, Long Service and Holiday Pay, and have no claims in respect of the above.
34. I hereby agree to supply my own equipment including safety equipment (where necessary) for Public Liability, Accident Insurance, Long Service and Holiday Pay, and have no claims on CS in respect of the above.
35. On 17 November 2009, the Office Manager at Contracting Solutions instructed Kasey Jaeger (**Jaeger**), who held the position of Client Manager at Contracting Solutions, that all Quest workers had to be processed and entered into the payroll system, regardless of whether they had completed the Agreement to Contract or not.
36. Roden first received a payment and payslip from Contracting Solutions on 18 November 2009 for the period 2-15 November 2009. Roden continued to work at Quest in 2010. It appears from her evidence and that of Dinesh Bheeroo (a supervisor who worked at Quest), that Roden was still working at Quest in around November 2010 when Quest decided that it would stop using Contracting Solutions and pay its housekeepers directly. That change occurred soon after Luchmaya departed and a new owner took over the Quest business. The last day worked by Roden for which she received payment from Contracting Solutions, was 14 November 2010.
37. Best also first received a payment and payslip from Contracting Solutions on 18 November 2009 for work performed from 2-15 November 2009. She continued to work at Quest and receive payment from Contracting Solutions until she was injured in an accident at home on or about 28 November 2009.
38. The work of Roden and Best after their “conversion” continued to be the cleaning of Quest’s apartments. They were not supervised whilst cleaning but their work was checked by management. They worked to the same roster system as before. A roster was prepared by Quest and located on a noticeboard at Quest. On arrival for a rostered shift, they received instructions as to which apartments to clean from job sheets provided by Quest. They filled out timesheets, as they had done before, recording their starting and finishing times. They continued to report to Luchmaya or his successor on any issue or problem concerning their work. Best continued to work to the same hours of work as those she had prior to the “conversion”. Roden continued her regular pattern of working Mondays, Wednesdays‑Fridays and Saturdays. If Roden needed a day off, she contacted Luchmaya. If Best wanted to change her rostered shift, she contacted the office staff at Quest.
39. After the “conversion”, neither Roden nor Best provided any uniform or any equipment but continued to wear the uniform provided by, and use the equipment supplied by, Quest.
40. The only change noticed by Best was that the timesheets were no longer headed “Quest”. There was no heading on the timesheets. The other change was that both Roden and Best received their pay and payslips from Contracting Solutions.
41. The primary judge found (at [213]) that Contracting Solutions did not discuss with Quest when the workers would be required to work or even knew when they would be working. The workers just worked as required by Quest with nothing changing in any practical sense. The unchallenged finding of the primary judge (at [240]) was that:

It is also quite clear on the evidence that thereafter Ms Best and Ms Roden performed precisely the same work at Quest South Perth in exactly the same way as they had always done.

1. In the year or so that Roden received payments and payslips from Contracting Solutions, she had no other contact with Contracting Solutions of any particular significance. In the first month or so she saw Konstek in passing and said hello to him. On one occasion, she contacted Konstek because she had a question about her taxation. She was referred to an accountant. On a second occasion, she had a query about transferring her superannuation entitlements.
2. In the period between when Best signed the Contractor Application and last worked at Quest, Best did not see or have any contact with anyone from Contracting Solutions.
3. When Best reported her injury and her inability to work to Luchmaya in late November 2009, there was a confrontation in which Luchmaya told Best that he did not accept she could not work. When on 7 January 2010, she rang Quest and advised she had been certified as fit to return to work, Luchmaya told her there was no work for her at that time. Ultimately, she was told by Quest that there was no job for her.
4. In order to obtain unemployment benefits, Best requested that Quest verify to Centrelink that she had not resigned her job. She was told by Quest that for that purpose she should approach Contracting Solutions “because they were your employer”. Best then went to the offices of Contracting Solutions and had a conversation with Jaeger. She was told by Jaeger that Contracting Solutions would contact its clients who may require cleaning services to see if alternative work for Best was available.
5. This was the last contact Best had with Contracting Solutions. Whilst there is an issue as to whether Best received a message left by Jaeger on Best’s mobile phone, there is no issue that Jaeger tried to contact Best to advise her of an available position with a client of Contracting Solutions.
6. It is doubtful although somewhat unclear as to whether Contracting Solutions supplied any workers to Quest who had not been former employees of Quest and participated in the “conversion” process. There is evidence of one request having been made by Quest for a housekeeping supervisor on 25 November 2009. However, Robert Hutchinson (**Hutchinson**), the CEO of the group of companies which included Contracting Solutions, accepted that Contracting Solutions had not supplied any housekeepers who were not former employees of Quest. Best’s evidence was that a few days after she was told she was no longer required, she saw an advertisement in the newspaper for housekeepers at Quest. The advertisement included the Quest logo, and did not say anything about Contracting Solutions. That evidence suggests that Quest replaced Best through its own efforts.

# section 357 and the competing claims at the trial

1. By its Amended Statement of Claim, the Ombudsman claimed that in the process of the “conversion” and in relation to conduct directed at a receptionist employed by Quest, Jessica Buttrum-Virco (**Buttrum-Virco**), Quest contravened s 358 of the FW Act and Luchmaya was accessorily liable in relation to that contravention. It also claimed that Quest contravened s 357 of the FW Act and that Contracting Solutions and Konstek were involved as accessories. The findings made by the primary judge in relation to the claims of contraventions of s 358 are not the subject of the appeal and need not be dealt with in any detail.
2. In relation to s 357 of the FW Act, the Ombudsman claimed that two different categories of contravention occurred in relation to representations made to Buttrum-Virco, Roden and Best. As no issue arises on the appeal as to the representations made to Buttrum-Virco, those representations need not be further addressed. The two categories of representations pleaded by the Ombudsman reflect the fact that s 357(1) deals with representations made about a proposed contract as well as representations made about an extant contract, as we later explain.
3. In relation to a representation about a proposed contract, the Ombudsman pleaded at paragraph 11 of its Amended Statement of Claim that on various occasions in November 2009, Quest represented to Roden and Best that:

… if they underwent the Conversion, they would thereafter be engaged under a contract for services under which they would perform work for Quest as an independent contractor.

1. As to the representation about an extant contract, the Ombudsman pleaded at paragraph 12 of its Amended Statement of Claim that from November 2009, Quest and Contracting Solutions represented to Roden and Best during the course of their engagement that:

… once they had undergone the Conversion, they were engaged under a contract for services under which they would perform work for Quest as an independent contractor.

1. The ongoing nature of that representation was pleaded as a matter to be implied from the fact that neither Quest nor Contracting Solutions withdrew or qualified the representation made in November 2009 (the paragraph 11 representation) and further implied by conduct, being that Roden and Best had undergone the “conversion” and were paid by Quest and Contracting Solutions as though they were engaged under a contract for services under which they performed work for Quest as independent contractors.
2. The misrepresentational nature of both kinds of representations relied upon by the Ombudsman were then pleaded at paragraph 13 of the Amended Statement of Claim as follows:

Notwithstanding the representations referred to in paragraphs 11, 11A and 12, after Buttrum-Virco, Roden and Best had undergone the Conversion in or about November 2009, they were in fact thereafter employed by Quest under a contract of employment.

1. At the trial and to substantiate the misrepresentational nature of the representations pleaded, the Ombudsman contended that the process by which Best and Roden were purportedly “converted” from employees to independent contractors was, in truth, a “sham”, and was legally ineffective. The allegation of a “sham” was made in the broad sense of a disguised arrangement and not in the common law sense which we later detail. The Ombudsman disputed that as a result of the “conversion”, Best and Roden had become independent contractors engaged by Contracting Solutions to provide services to Quest. The Ombudsman contended that after the “conversion”, Best and Roden continued to perform work for Quest in precisely the same way they had always done, with the only exception being that they were paid by Contracting Solutions. In relation to the making of those payments, the Ombudsman contended that Contracting Solutions was merely acting as the agent of Quest.
2. The Ombudsman accepted that the employment of each of Best and Roden by Quest terminated upon Best and Roden completing and submitting the Contractor Application. Primarily for the purposes of the Ombudsman’s s 358 case, those terminations were characterised as constructive dismissals brought about involuntarily.
3. It was the Ombudsman’s case that after those dismissals, and given that the contractual arrangements made between Contracting Solutions and each of Best and Roden were a “sham” and legally ineffectual, the fact that Best and Roden continued to perform work for Quest in the same way as they had always done was to be explained by the re‑making of a contract of employment between Quest and each of Best and Roden. Those contracts of employment, the Ombudsman contended, were to be implied from the conduct of Best, Roden and Quest. In that respect, the Ombudsman relied upon the facts of and the reasoning in *Damevski v Giudice* (2003) 133 FCR 438.
4. Quest and Luchmaya did not appear at the trial. Contracting Solutions and Konstek appeared and contested the Ombudsman’s application including by denying that Quest had contravened s 357(1). At both the trial and on the appeal they were represented by the same Counsel and made joint submissions. For ease of reference we will refer to their joint submissions as Contracting Solutions’ submissions.
5. Contracting Solutions contended that the “conversion” had resulted in a legally effective contract between Contracting Solutions and each of Best and Roden. Pursuant to it and the Hiring Agreement, Best and Roden provided services to Quest as independent contractors engaged by Contracting Solutions. Contracting Solutions denied the existence, post the “conversion”, of any employment contracts between Quest and Best or Quest and Roden. Contracting Solutions asserted that Best and Roden had contractual relationships with Contracting Solutions and none at all with Quest. It pointed in particular to the facts that Contracting Solutions had the responsibility for paying Best and Roden and had responsibility for the provision of their workers’ compensation insurance, superannuation contributions, payroll tax, PAYG withholding tax, and public liability insurance. Contracting Solutions contended that the contractual arrangements by which Best and Roden provided work at Quest were akin to those dealt with in *Re Odco Pty Ltd v Building Workers’ Industrial Union of Australia* [1989] FCA 336 (***Odco No 1***); and on appeal, *Building Workers’ Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 (***Odco No 2***) and that the reasoning applied to resolve that case was applicable in this case.
6. On that basis, Contracting Solutions contended that given that, from November 2009, there was never a prospective or extant employment agreement between Quest and Best or Roden, the representations made by Quest during the “conversion” process that Best and Roden would work at Quest as independent contractors contracted to Contracting Solutions were not misrepresentations and that therefore, no contraventions of s 357(1) had occurred.

# the proper construction of s 357(1)

1. Section 357 of the FW Act provides:

(1) 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) 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.

1. No issue as to the proper construction of s 357(1) arose before the primary judge. Two issues of construction arise on the appeal. The first relates to the two-pronged operation of s 357(1). There are two kinds of misrepresentations actionable under s 357(1), and s 357(1) operates differently depending upon which kind of misrepresentation has engaged the provision. The second is an important and determinative issue of construction relating to the nature of the representations actionable under s 357(1) to which we have earlier referred. The construction we have adopted, is applied at [100]-[103] below.
2. The first issue of construction is relevant to whether the Ombudsman established that Quest had made misrepresentations to Best and Roden about prospective contracts of employment. The construction we adopt is applied at [243]-[249] below where we deal with that claim.
3. We will begin with a consideration of the first issue. The terms of s 357(1) contemplate two distinct kinds of misrepresentations. The first is a representation about a prospective employment. In relation to that kind of representation, a person proposing to engage an individual by an agreement which, if made, would be an employment agreement under which the individual would perform work as an employee, will contravene s 357(1) if the person represents that the proposed agreement would be a contract for services under which the individual would perform work as an independent contractor. A contravention of that kind is dependent upon an affirmative answer to each of the following questions:

(i) Was a representation of that kind made; and

(ii) Would the proposed agreement, if made, be an employment agreement pursuant to which the individual would perform work for the representor?

1. The second kind of misrepresentation contemplated by s 357(1) is a misrepresentation about an extant employment. In relation to that kind of representation, a person who is an employer party to an employment agreement will contravene s 357(1) if the person represents to the employee that he or she performs work under a contract for services made between the parties, when in truth the work is being performed pursuant to a contract of employment between the employer and the employee. The two fundamental elements here raised are:

(i) Was a representation of that kind made; and

(ii) When made, was the individual to whom it was made performing work for the representor under a contract of employment made with that person.

1. In relation to a representation about a proposed agreement, the second question is to be answered by reference to what was being proposed. The nature of the agreement which eventuated may be relevant in determining this, but the relevant question is whether the nature of the agreement proposed was misrepresented at the time the proposal was made. The question is not whether a representation made about the nature of the proposed agreement turned out to be false by reference to the agreement actually made. So much is clear for reasons including that, in relation to a representation about a prospective agreement, a contravention of s 357(1) is not dependent upon the making of any agreement.
2. Conversely, in relation to a representation about an extant agreement, a contravention of s 357(1) is dependent upon the existence of an employment agreement and the making of a false representation about the nature of that agreement.
3. Whether the representation must be about the nature of *that* agreement (ie the prospective or extant employment agreement between the employer and employee) is the issue raised by the second question of construction we need to determine. For ease of reference, we will deal with the issue raised by that second question by reference to a representation about an extant contract. Our reasoning and conclusion would be the same for a representation about a prospective contract.
4. 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. In simple terms, on this construction, an actionable representation is a representation made by an employer that its contract with its employee is not an employment contract but is a contract for services.
5. The alternative construction is that for which the Ombudsman contended when the issue arose on the appeal. 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.
6. Whilst the difference between these two constructions may seem semantic, it is significant. On the construction which we prefer, a representation made by an employer to its employee that he or she is providing work as an independent contractor under a contract for services made with another person is not actionable. In that circumstance, the representation is only a misrepresentation about the contract between the employer and the employee to the extent that it denies the existence of that contract. To be actionable, the representation needs to do more than deny the contract—it needs to mischaracterise the contract as a contract for services made between the employee and the employer.
7. On the Ombudsman’s construction, the same representation would be actionable because whilst not mischaracterising the nature of the contract with the employee, the employer has mischaracterised the status of the employee as that of an independent contractor when in fact the person is an employee.
8. We agree with the Ombudsman’s submission that it is not necessary for the representation made by the employer to expressly advert to the existence of the contract. It would, for instance, be sufficient if the employer said to the employee, “you are working for me as an independent contractor”, where that representation is likely to be objectively understood to be a reference to the nature of the contract between the employer and the employee. It would also be sufficient if the employer said to the employee, “you are an independent contractor”, where the only contractual relationship to which that statement could reasonably be understood to relate is a contract between the representor and the representee. However, the fact that the representation does not need to expressly advert to the contract does not, as the Ombudsman’s submission suggested, relieve the need for the representation to address the nature of the contract which exists between the representor and the representee.
9. The text of s 357(1) identifies the subject matter to which the representation must be directed as the contract made between the employer and employee and not simply the status of the employee. What is proscribed is a representation by the employer to the employee “that *the contract* of employment … is a contract for services”. The contract being referred to is clearly the contract between the employer and its employee and it is the character of that contract, and not that of another contract, that must be misrepresented for the representation to be actionable under s 357(1). That construction is also confirmed by the words of s 357(2), where the definite article “the contract” is used.
10. Our view as to the proper construction of s 357(1) (in relation to both of the issues of construction identified above) is based upon the text of the provision and a consideration of the legislative history and the relevant extrinsic material that sheds light on the purpose and policy of the provision.
11. The predecessor provision to that part of s 357(1) which prohibits a misrepresentation about an extant agreement was s 900(1) of the *Workplace Relations Act 1996* (Cth) (**WR Act**) which provided:
12. A person contravenes this subsection if:
13. the person is a party to a contract with an individual; and
14. the person makes a representation to the individual that the contract is a contract for services under which the individual performs work, or is to perform work, for the person as an independent contractor; and
15. the contract, as in force at the time of the representation, is a contract of employment under which the person is the employer of the individual, rather than a contract for services under which the individual performs work as an independent contractor.
16. The second aspect of s 357(1), concerning a representation about a proposed agreement, was separately dealt with by the WR Act in s 901(1):
17. A person contravenes this subsection if:
18. the person offers to enter into a contract with an individual; and
19. the person makes a representation to the individual that the contract, if entered into, would be a contract for services under which the individual would perform work for the person as an independent contractor; and
20. the contract, if entered into, would be a contract of employment under which the person would be the employer of the individual, rather than a contract for services under which the individual would perform work as an independent contractor.
21. It is evident that s 357(1) of the FW Act is an amalgam of its two predecessor provisions which had separately dealt with a representation about an extant contract and a representation about a prospective contract. The Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) (**The FWA Explanatory Memorandum**) explained at [1447] that:

Clause 357 prohibits an employer misrepresenting an employment or proposed employment relationship as an independent contracting relationship. Although the text of the clause has been simplified, it is intended to broadly cover the effect of sections 900 and 901 of the WR Act.

1. The Explanatory Memorandum to the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (Cth) (**The WRA Explanatory Memorandum**) is more expansive in addressing the predecessor provisions to s 357(1). The WRA Explanatory Memorandum stated at [11], in relation to what became s 901 of the WR Act dealing with prospective contracts, that:

11. Proposed section 901 would provide a civil penalty for *attempting* the conduct outlined in proposed section 900 in that this conduct would occur at the time a person offers to enter into a contract with an individual.

 (emphasis added)

1. Those observations are consistent with our earlier expressed view as to the operation of s 357(1) of the FW Act in relation to prospective contracts. In particular, whether or not the nature of the proposed contract was misrepresented is to be answered by reference to what was proposed, rather than by reference to what eventuated when a contract was later made.
2. Returning, then, to the second issue of construction we have identified, the FWA Explanatory Memorandum addressed what became s 357(1) at [1448]. It essentially repeated the text of s 357(1). Again, the WRA Explanatory Memorandum dealing with the predecessor provisions is more informative.
3. Before turning to consider that, it is necessary first to observe that the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth) enacted Part 22 of the WR Act, in which ss 900–903 (as well as other provisions) were found. Part 22 was headed “Sham Arrangements”. Division 6 of Pt 3-1 of the FW Act (**Division 6**), in which s 357 is contained, repeats that same heading. The enactment of Part 22 of the WR Act was part of a package of reforms which included the enactment of the *Independent Contractors Act 2006* (Cth). The objectives of that legislative package were explained in the “Regulation Impact Statement” (**Regulation Impact Statement**) contained in the Explanatory Memorandum to the *Independent Contractors Bill 2006* (Cth) (**ICA Explanatory Memorandum**). As the WRA Explanatory Memorandum explains at page 3, that Regulation Impact Statement covered the measures contained in the *Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006* (Cth).
4. A number of helpful observations are made in the Regulation Impact Statement which address the objectives of the civil remedies dealing with “sham arrangements” which were first enacted as Part 22 of the WR Act. Relevantly, the Regulation Impact Statement stated (at 9–10) that in order to provide protection to employees, civil penalties should be available to sanction employers found to have disguised genuine employment relationships. That, it was observed, would send a clear message to employers that sham arrangements are unlawful. It was considered that the availability of civil penalties would deter sham arrangements. What was meant by “sham arrangements” was identified (at 9) as:

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.

1. The Regulation Impact Statement further stated (at 10):

Penalties for sham independent contracting arrangements should apply to labour hire agencies that employ workers who are ‘on-hired’ to host businesses in the same way as they apply to other employers.

1. The WRA Explanatory Memorandum stated (at [2]–[3]) that the proposed Part 22 would provide civil penalties for sham arrangements and related matters with respect to employment and independent contracting relationships.
2. In relation to what became s 900 of the WR Act, it was stated (at [4]–[5]):

4. Proposed section 900 would allow a civil penalty to be imposed by a *Court* on persons who misrepresent an employment relationship as an independent contracting arrangement.

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

 (italics in original)

1. An explanation in similar terms was given at [12] in relation to s 901(1).
2. Whilst the task of statutory construction must focus on the text of the provision in question, ascertaining the meaning of that text requires consideration of the purpose and policy of the provision in the context of the legislation as a whole: *Informax International Pty Ltd v Clarius Group Ltd* (2012) 207 FCR 298at [162] (Besanko, Jagot and Bromberg JJ). As French CJ, Gummow, Hayne, Kiefel and Bell JJ said in *AB v State of Western Australia* (2011) 244 CLR 390 at [10] (by reference to the observations of Dixon CJ in *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397), the context, general purpose, policy and fairness of a statutory provision are guides to its meaning. Their Honours continued:

The modern approach to statutory interpretation uses “context” in its widest sense, to include the existing state of the law and the mischief to which the legislation is addressed. Judicial decisions which preceded the Act may be relevant in this sense, but the task remains one of the construction of the Act.

(Footnotes omitted.)

1. Part 22 of the WR Act was replaced by Division 6 of Pt 3-1 of the FW Act. Each of ss 900–903 of the WR Act has a counterpart provision in Division 6. There can be no doubt that Division 6 seeks to address the same mischief as that addressed by Part 22 of the WR Act. The extrinsic material to which we have referred makes it clear that the mischief which is addressed by the provisions which are now found in Division 6 is the attempted avoidance of legal entitlements due to an employee through arrangements which falsely disguise the employee as an independent contractor. Those provisions were clearly intended to protect employees. They should be regarded as remedial and beneficial despite their penal nature. The same approach has been adopted in relation to other provisions of that character contained in Pt 3-1 of the FW Act: *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212 at [14]–[17] (Gray and Bromberg JJ); *Australian Municipal, Administrative, Clerical and Services Union v Greater Dandenong City Council* (2000) 101 IR 143 at [75] (Madgwick J); *National Union of Workers v Qenos Pty Ltd* (2001) 108 FCR 90 at [48] (Weinberg J); *Construction, Forestry, Mining & Energy Union v Pilbara Iron Company (Services) Pty Ltd (No 3)* [2012] FCA 697 at [35] (Katzmann J); and see *Waugh v Kippen* (1986) 160 CLR 156 at 164-5 (Gibbs CJ, Mason, Wilson and Dawson JJ).
2. We would accept that the avoidance of sham arrangements is a broad objective. We also accept, as the extrinsic material indicates, that the avoidance of sham arrangements includes arrangements achieved through triangular contracting involving labour-hire agencies (however described).
3. We recognise that at least in one respect and in relation to the second issue of construction that we have identified, the construction of s 357(1) which we prefer imposes some restriction upon the effectiveness of s 357(1) as a tool for deterring sham arrangements made through triangular contracting. If the employee disguised as an independent contractor is in truth the employee of the labour-hirer, a representation made by that employer as to the nature of the contract between the employee and the labour-hirer will be actionable under s 357(1). In that context there will be a misrepresentation made by an employer to its employee about the nature of the contract between them. However, s 357(1) is likely to be an ineffective deterrent against disguised employment relationships achieved through triangular contracting where the end-user employer simply denies the existence of an employment contract with the worker without mischaracterising that contract to be a contract for services.
4. There are two answers to the suggestion that our preferred construction fails to achieve the beneficial purposes of Division 6. The first is that, at least in relation to situations where an employer seeks to convert its employee or former employee into an independent contractor (including through triangular contracting), another provision may provide relief. Section 359 of the FW Act (formerly s 903 of the WR Act) provides:

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).

1. A second and complete answer is that whilst our approach to construction should strive to give effect to the evident purpose of the legislation, we must nevertheless arrive at a construction consistent with the terms of the legislation: *AB v State of Western Australia* at [23] (the Court). We do not accept that the construction for which the Ombudsman contended is consistent with the terms of s 357(1).

# did the ombudsman raise an actionable claim?

1. 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.
2. The Ombudsman did not plead that Quest made a representation which misrepresented the nature of proposed or extant contracts of employment that Best and Roden had, or were offered, by Quest. Nor did the Ombudsman run its case at trial based upon establishing that a representation of that kind was made. At trial, and on the appeal, the Ombudsman’s position was that the critical part of the representation that was made by Quest was that post the “conversion”, Best and Roden would be, or were, working at Quest as independent contractors. The essence of the Ombudsman’s position was that it was unnecessary for Quest’s representation to mischaracterise the nature of either its proposed or extant contracts with Best or Roden. Instead, it was sufficient for the misrepresentation to mischaracterise the work to be, or which was being, provided by Best and Roden to Quest as work provided by an independent contractor and not work of an employee.
3. The terms of the representation made by Quest at the initial meeting attended by Best and Roden are set out at [30]. That representation addressed the arrangements then proposed. We have accepted at [239] that the representation made at the initial meeting continued to have effect and that, in the absence of any revocation or qualification, it became a second representation about the extant arrangements. However, as is plain from their terms, the representations are not representations about the nature of extant or proposed contracts of employment between Quest and Best or Roden which misrepresented those contracts of employment as contracts for services. Instead, the representations deny the existence of contracts of employment and assert contracts for services with Contracting Solutions.
4. For the reasons we have given, the representations relied upon by the Ombudsman and made by Quest were not actionable under s 357(1) of the FW Act. It follows that the primary judge’s order dismissing the Ombudsman’s s 357(1) application was correct and ought not be set aside. That is so despite the fact that the primary judge dismissed the application on a different basis.

# did the primary judge err?

1. Although we have concluded that the appeal should be dismissed, in deference to the submissions made, and in case we are wrong in concluding that the Ombudsman failed to raise an actionable claim under s 357(1), we now turn to consider and determine the other issues raised by the appeal.
2. Prior to outlining the approach taken by the primary judge to the Ombudsman’s s 357(1) case, we should say at the outset that the competing contentions presented to the primary judge by the Ombudsman and by Contracting Solutions lacked clarity. Issues and facts relevant to the Ombudsman’s s 358 case became unnecessarily entangled in the Ombudsman’s s 357 case. Most of the submissions made by the parties about the s 357 case unduly concentrated upon whether the facts of this case were more similar to those dealt with in *Damevski* or to those dealt with in *Odco*. Much of the appeal was also taken up by that comparative exercise. Whilst that exercise was not irrelevant, the undue focus given to it seems to have distracted the attention of the parties from some of the fundamental issues which required greater attention including, as will already be apparent, issues about the proper construction of s 357(1). Neither *Damevski* nor *Odco* concerned s 357 of the FW Act or its predecessor. Each of those cases turned on its own facts. The use of those facts as short-hand references to the facts of this case was an unfortunate exercise engaged in by all parties and was liable to create confusion as we think it did.
3. It is perhaps unsurprising that, in the context which we have described, the primary judge seems to have misconceived an important aspect of the Ombudsman’s s 357(1) case and dismissed it, at least in part, on the basis of that misconception.
4. That the primary judge misconceived the Ombudsman’s s 357(1) case is the first basis upon which the Ombudsman put its first ground of appeal that the primary judge erroneously dismissed its s 357 application.
5. Under a heading “Sham?” and at [249]–[250] of the reasons for judgment of the primary judge, his Honour said:

[249] The applicant’s argument that the process by which Ms Best, Ms Roden and Ms Buttrum-Virco were converted from employees to independent contractors was, in truth, a sham and legally ineffective *is based on the submission by the applicant that each of the three employees was constructively dismissed.*

[250] I am unable to reach the conclusion that this was so given my conclusion that the employees did, in reality, have choices as to whether or not they signed the Contractor Applications. Sections 357 and 358 of the FW Act are civil penalty provisions. In my view, the applicant has not established a dismissal as it contends.

(emphasis added)

1. Shortly thereafter and under a heading “Summary and Conclusion” and at [255], the primary judge said:

The applicant also pleads various representations. By ASOC at [11], it pleads that on various occasions in November 2009 QSP, by Mr Konstek acting for and on behalf of QSP and Contracting Solutions, represented *inter alia* to Ms Best and Ms Roden that if they underwent the conversion, they would thereafter be engaged under a contract for services under which they would perform work for QSP as independent contractors. The representations were said to be oral at meetings conducted by Mr Konstek in November 2009 and in writing in a document ‘Quest – System Changes’ signed *inter alia* by Mr Konstek and by the ‘Contractor Application’ each furnished to Ms Best and [Ms Roden] by or at the direction of Mr Konstek and executed by them and finally, in the case of Ms Roden, by a letter addressed to her under the letterhead of Contracting Solutions dated 30 November 2009. The problem with this plea is that it does not set up any contravention of the FW Act. Assuming those representations were made, they only breach the FW Act if they are misleading on the basis that the employees concerned remain in truth employees and never became independent contractors. *But the applicant’s primary case was that they did become independent contractors yet by force or threat rather than voluntarily. I have found they did become independent contractors but voluntarily*.

(emphasis added)

1. It is evident from the passages we have set out from the primary judge’s reasons that the primary judge was of the view that the Ombudsman’s s 357(1) case was based on the contention that in the “conversion” process, Best and Roden had been constructively dismissed. That much seems clear from the observations made by the primary judge at [249]. The observation made in the last two sentences of [255] also suggest that the primary judge’s understanding of the Ombudsman’s case was that the process of “conversion” (which included the dismissals) was achieved by force or threat rather than the voluntary assent of Best and Roden.
2. It is by reference to the observations recorded at [249] and [255] of the primary judge’s reasons for judgment that the Ombudsman contended that the primary judge erroneously considered that its case under s 357 depended on a finding that Best’s and Roden’s contracts of employment with Quest were each constructively terminated by Quest in the “conversion” process.
3. We accept that an error of that kind was made by the primary judge.
4. In the penultimate sentence of [255] of the primary judge’s reasons, his Honour described the Ombudsman’s “primary case” as being that Roden and Best became independent contractors by force rather than voluntarily. We accept the submission made by the Ombudsman that it was not its case that Best and Roden became independent contractors involuntarily or at all. Rather, the Ombudsman’s case was that Best and Roden were employees of Quest who, post the “conversion”, became employees of Quest again and never became independent contractors.
5. It is clear that a contravention of s 357(1) does not require that it be established that an employee was dismissed by the employer, let alone constructively dismissed. Nor, for that matter, does a contravention of s 357(1) depend upon whether the person to whom a prohibited representation is made thereafter becomes an independent contractor voluntarily or involuntarily.
6. There is nothing in the Ombudsman’s pleadings which supports any contention that its s 357(1) case relied upon Quest having dismissed Roden or Best. At trial, the Ombudsman accepted that, as a matter of fact, the employments of Best and Roden by Quest had been terminated in the process of the “conversion”. Primarily in support of its s 358 case, those terminations were asserted by the Ombudsman to have been constructive dismissals. Whilst that characterisation and the fact of the dismissals was adverted to as part of the factual matrix relied upon by the Ombudsman, we accept the Ombudsman’s contention that it did not put its s 357(1) case on the basis that it was dependent upon either the fact of the terminations or their characterisation as constructive dismissals.
7. It may well be, as Contracting Solutions contended on the appeal, that the mechanism by which Best and Roden ceased to be employees was relevant “to ascertaining the intended and actual legal relationship between the parties for the purpose of s 357”. Whilst we accept that to be so, it could not be said that the voluntariness or involuntariness of the terminations was determinative of the nature of the contractual relationships thereafter formed. In any event, the Ombudsman’s assertion that post conversion, Best and Roden were employees of Quest and not independent contractors was not put on the basis that the acceptance of that assertion was dependent upon the Ombudsman establishing involuntariness on the part of Best or Roden.
8. For those reasons, we accept that the primary judge misconceived the basis upon which the Ombudsman put its s 357(1) case.
9. That misconception was material. It is apparent from the observations made by the primary judge at [250] and also at [255] that, at least part of the basis (if not the basis) for the primary judge dismissing the s 357(1) case was his Honour’s view that the Ombudsman had failed to establish that Best and Roden had been constructively dismissed and then involuntarily become independent contractors.
10. The second and third bases upon which the Ombudsman sought to support its first ground of appeal were separately particularised in the Ombudsman’s Notice of Appeal. Those particulars alleged, in essence, that the primary judge failed to consider the Ombudsman’s case by reference to the principles in *Damevski*, came to the wrong conclusion that after their “conversion” Best and Roden performed work at Quest as independent contractors and further alleged that the primary judge erred because that conclusion was not attended by any reasons. The Ombudsman contended that a central question raised by this part of its challenge to the primary judge’s judgment was whether the primary judge erred in not finding that, post the “conversion”, Best and Roden provided work at Quest as employees of Quest and not as independent contractors. Relevantly, the Ombudsman contended that the primary judge should not have found that Best and Roden became independent contractors as a result of the “conversion” process. The Ombudsman contended that the purported “conversion” was legally ineffective and did not explain the provision of work by Best and Roden to Quest. The explanation for that work lay in the existence of a contract of employment between Quest and Best and Quest and Roden which was to be implied from their conduct. The Ombudsman contended that the primary judge should have, but failed to, make a finding that Best and Roden were employed by Quest.
11. Conversely, Contracting Solutions contended that the primary judge correctly found that the legal status of Best and Roden was altered through the “conversion” process to that of independent contractors. Contracting Solutions further contended that whatever the legal status of Best and Roden was after the “conversion”, there was no implied contract of employment between either of them and Quest.
12. These were the central questions addressed by the parties on the appeal. That contest assumed that:

(i) the primary judge found that after the “conversion”, Best and Roden were independent contractors engaged by Contracting Solutions to provide services to Quest and were not employees of Quest; and

(ii) that finding was material to the primary judge’s dismissal of the Ombudsman’s s 357(1) case.

1. As to (i), there are observations made by the primary judge at [5], [9], [153], [204], [226], [249] and [255] which either record, or from which it may be inferred, that the primary judge was satisfied that the “conversion” process was legally effective and achieved a change to the legal status of Best and Roden from that of employees of Quest to that of independent contractors of Contracting Solutions. From those observations, it may further be inferred that the primary judge was satisfied that after the “conversion”, Best and Roden were not employees of Quest.
2. The extent to which those findings made by the primary judge were material to and fed into the primary judge’s dismissal of the Ombudsman’s s 357(1) case is less clear.
3. The basis upon which the Ombudsman contended at trial that the “conversion” was legally ineffective and that Best and Roden never became independent contractors was multi‑faceted. The Ombudsman relied upon a detailed comparison between the triangular arrangements envisaged by the “conversion” process and what in fact happened. The Ombudsman contended that what was envisaged never happened as a matter of practical reality and that the contractual arrangements made were never fulfilled or exercised so that Best and Roden never became independent contractors at all or independent contractors engaged by Contracting Solutions. Almost the entirety of those submissions were put by analogy with the facts of, and in reliance upon the principles applied in, *Damevski*. Those principles were also relied upon to support the Ombudsman’s assertion of an implied contract of employment between Quest and each of Best and Roden.
4. The primary judge’s reasons for judgment make no express reference to *Damevski* at all and contain no analysis of the submissions made by the Ombudsman which we have just outlined. The vast majority of the factual findings which the Ombudsman’s case called for were neither considered nor made. Further, there is no explanation given in the reasons for judgment as to why the Ombudsman’s contentions were rejected, other than perhaps the observation made at [226] that “the circumstances in this case stand in the same category as those in *Odco*”. How that observation fed into what seems to be the ultimate basis (at [255]) for the primary judge’s rejection of the s 357(1) case is not clear. What [255] seems to record is the rejection of the Ombudsman’s case because Best and Roden had become independent contractors on the basis of arrangements which were legally effective simply because they involved no involuntariness on the part of Best and Roden. As we have said, however, the Ombudsman did not contend that the arrangements were legally ineffective because of Best and Roden’s involuntariness but contended that those arrangements were legally ineffective because, as in *Damevski*, the arrangements were never fulfilled or exercised.
5. In our view, the primary judge’s misconception of what was the primary basis of the Ombudsman’s s 357(1) case led to the Ombudsman’s actual primary basis not being properly considered. The case put by the Ombudsman should have been fully considered and its rejection should have been attended by reasons.
6. The provision of reasons by a judge for his or her decision has long been recognised as central to the judicial function: *Wainohu v New South Wales* (2011) 243 CLR 181 at [54]‑[58] (French CJ and Kiefel J). A failure to provide any or any sufficient reasons for a decision may amount to an error of law: *Pettitt v Dunkley* [1971] 1 NSWLR 376 at 382 (Asprey JA), 384 (Manning JA), 388 (Moffitt JA); *Waterways Authority v Fitzgibbon* (2005) 79 ALJR 1816 at [129] (Hayne J).
7. If we had not come to the view that the Ombudsman failed to raise an actionable claim under s 357(1), we would have set aside the order made by the primary judge on the basis of the errors we have identified in this section of our reasons. We would have acceded to the Ombudsman’s request, from which Contracting Solutions did not demur, that we make our own findings and form our own judgment pursuant to the powers conferred by ss 27 and 28 of the *Federal Court of Australia Act 1976* (Cth), rather than remit the proceeding to the primary judge.

# reconsidering the ombudsman’s claim

1. In case we are wrong on the s 357(1) construction issue, and right in our conclusion that the primary judge misapprehended the Ombudsman’s case, it is then necessary for us to address the primary judge’s findings that Best and Roden were independent contractors of Contracting Solutions and not employees of Quest. We would then need to set out why it is that we respectfully disagree with those findings and why it is that, on a reconsideration of the Ombudsman’s case, we would have been satisfied that Best and Roden were not independent contractors of Contracting Solutions providing services to Quest but, instead, were employees of Quest working under an employment contract made with Quest. Once that central matter is addressed we will turn to consider whether we would have been satisfied that other elements necessary to establish the two kinds of contraventions of s 357(1) alleged against Quest were established. Lastly, we will deal with whether Contracting Solutions and Konstek were liable as accessories.
2. In order to undertake that task, it has been necessary for us to make many of the factual findings additional to those made by the primary judge which are recorded in these reasons. All parties recognised the need for that to be done in the resolution of the issues raised on the appeal. Contracting Solutions, by its Notice of Contention, submitted that the primary judge’s judgment is supported by additional grounds including a host of additional factual findings available on the evidence but not relied upon by the primary judge. Insofar as we regard the additional findings that Contracting Solutions sought that we make to have been made out, they have been included in the findings we have recorded.
3. The Notice of Contention also challenged a finding made by the primary judge at [206] and repeated at [230] that the arrangements made between Quest and Contracting Solutions included that following the “conversion”, Quest’s workers would be paid for their work by Contracting Solutions, on behalf of Quest and as its agent. That was said by the primary judge to not appear to be in dispute. We accept the submission of Contracting Solutions that it did dispute that those payments were made by Contracting Solutions as the agent of Quest. Whilst the finding reflects the Ombudsman’s position, it was axiomatic to the case relied upon by Contracting Solutions that Contracting Solutions would and did engage the workers as independent contractors to provide services to Contracting Solutions which were to be delivered to Quest. Under those alleged contracts, Contracting Solutions’ position was that it paid the workers as a principal party for work provided to it. We have not relied on the finding made by the primary judge that Contracting Solutions paid Best and Roden as an agent for Quest.

## Were Best and Roden Employees of Quest?

### The Applicable Principles

1. The applicable legal principles need to be considered to address the Ombudsman’s contention that Best and Roden were in truth employees of Quest. The Ombudsman submitted that the Court should look to the “reality” of the situation to conclude that Best and Roden were not independent contractors engaged by Contracting Solutions, were not independent contractors provided by Contracting Solutions to Quest, and that their provision of work to Quest is to be explained by the existence of contracts of employment with Quest implied from conduct.
2. In asserting that we should be guided by the “reality” or “true” nature of the arrangements, the Ombudsman was able to rely upon a number of authorities where courts have emphasised such a view, including *Damevski*. We will refer to those authorities shortly. Before doing that, the prevalence of disguised employments and the situations in which they may occur deserve some brief attention.
3. An employment relationship involves a wage/work bargain in which the time, skill and effort of a natural person is provided to and paid for by another. In that relationship, the employee works as the agent of and under the control of the employer who is the principal. But when a natural person provides his or her labour to another in exchange for a payment, he or she may not be doing so as an employee. Labour can legitimately be provided by one person to another in a range of other circumstances. An individual may be self-employed in his or her own business and through that business provide that person’s labour to another person. When that occurs, the relationship between the provider of labour and the end-user is not a relationship between a principal and its employee agent, but a commercial relationship between one principal and another.
4. Triangular contracting arrangements are also used to provide labour to end-users. These arrangements involve a third person intermediary. Sometimes, the intermediary will be an agency which merely facilitates (by way of recruitment, introduction and like services) the engagement of an employee by an employer. An agency of that kind may also facilitate the engagement by one business of the labour services provided by another, including where the provider business is that of a self-employed independent contractor.
5. Other intermediaries contract with the end-user business as a provider of labour. That is commonly known as labour-hire and usually involves the intermediary providing the labour of a natural person that the intermediary employs as its employee. Another form of labour‑hire is where an intermediary provides the labour of an independent contractor to an end-user business. Finally, an intermediary may be found between a natural person who provides labour and an end-user where one company in a group of related companies provides the labour of its employees to other companies within the group.
6. The many and varied ways in which the labour of an individual may be provided to an end‑user have facilitated the provision of labour through arrangements which do not create an employment relationship between the provider and the end-user. The use of such arrangements may be real or artificial. Where artificial, the external form, appearance or presentation of the relations between the parties may cloak or conceal either an underlying employment relationship or the identity of the true employer. This is what is commonly referred to as a disguised employment.
7. The use of disguised employment has been the subject of a great deal of commentary. At the international level, for example, a report of the International Labour Organisation (**ILO**) titled “The Employment Relationship” (Report V(1) to the International Labour Conference, 95th Session, 2006) describes (at [46]) a disguised employment relationship as:

…one which is lent an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by the law or evading tax and social security obligations. It is thus an attempt to conceal or distort the employment relationship, either by cloaking it in another legal guise or by giving it another form. Disguised employment relationships may also involve masking the *identity of the employer*, when the person designated as an employer is an intermediary, with the intention of releasing the real employer from any involvement in the employment relationship and above all from any responsibility to the workers.

1. In Australia, many similar observations have been made by leading academic scholars. Some scholars have emphasised the ease with which carefully drafted contracts can purport to convert an employment relationship into an arrangement by which a person is engaged by another as an independent contractor: see Roles C and Stewart A, “The Reach of Labour Regulation: Tackling Sham Contracting” (2012) 25 AJLL 258 at 280; Stewart A,“Redefining Employment? Meeting the Challenge of Contract and Agency Labour” (2002) 15 AJLL 235 at 246–247; and see generally Creighton B and Stewart A, *Labour Law*, (5th ed, The Federation Press, 2010) at [7.59]–[7.61]; and Owens R, Riley J and Murray J, *The Law of Work*, (2nd ed, Oxford University Press, 2011) at 164–5.
2. Owens, Riley and Murray point out that most contracts for the performance of work are “contracts of adhesion” – that is, contracts the terms of which are set by the dominant party on a “take-it-or-leave-it” basis. The dominant party may set contractual terms that are suitable to its own purposes. Owens, Riley and Murray describe the incentive for this as “primarily economic” in nature. These incentives include avoiding complying with a wide range of statutes and industrial instruments setting pay and conditions, workers’ compensation levies, payroll tax, and superannuation contributions.
3. The existence of disguised employments underpins the enactment of the provisions of the FW Act with which we are here concerned: see [88]–[93] above.
4. The prevalence of disguised employments may serve to explain why appellate courts in Australia and the United Kingdom have been particularly alert, when determining whether a relationship is one of employment, to ensure that form and presentation do not distract the court from identifying the substance of what has been truly agreed. It has been repeatedly emphasised that courts should focus on the real substance, practical reality or true nature of the relationship in question: *R v Foster; Ex parte The Commonwealth Life (Amalgamated) Assurances Limited* (1952) 85 CLR 138, at 151 and 155 (Dixon, Fullagar and Kitto JJ);  *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, at [24], [47], [57], [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 232 ALR 69 at [25] and [31] (Wilcox, Conti and Stone JJ); *Damevski* at [77]–[78] (Marshall J, with whom Wilcox J agreed) and [144], [172] (Merkel J); *Dalgety Farmers Ltd t/as Grazcos v Bruce* (1995) 12 NSWCCR 36 at 46–48 (Kirby ACJ, with whom Clarke and Cole JJA agreed); *Autoclenz Ltd v Belcher* [2011] 4 All ER 745 at [22], [25]–[26], [29]–[32] (Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed).
5. In looking to the reality of the situation and in determining what it is that has truly been agreed, it is necessary to ensure that the conclusion reached coheres with applicable principles of contract law.
6. Sometimes, a disparity between what is presented on the face of the contract and the reality of what has truly been agreed, is explained by the existence of a sham or a pretence. A sham at common law may be described as an agreement or a term of an agreement not intended by the parties “to have substantive, as opposed to apparent, legal effect” and which is the product of the common intention of the parties to deliberately deceive third parties: *Raftland Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* (2008) 238 CLR 516 at [33]–[35], [58] (Gleeson CJ, Gummow and Crennan JJ) and at [85], [112] and [148] (Kirby J); *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at 802 (Diplock LJ).
7. As a sham of that kind requires both parties to have worked together to conceal their true intent and deceive third parties, it will usually be of little utility in exposing a disguised employment in which the employee is “usually either ignorant of the deceit or a victim of it”: Davies ACL, “Sensible Thinking About Sham Transactions”(2009) 38 ILJ 318. As the learned author observed, in the United Kingdom, the *Snook* definition of a sham has been supplemented by a broader doctrine of pretence in which a common intention to deceive is not required in order for a false arrangement to be disregarded.
8. The doctrine of pretence developed from the landlord and tenant cases as a mechanism for avoiding attempts by landlords to contract out of statutory protections afforded to tenants. The doctrine has now been applied to employment contracts by the United Kingdom’s Supreme Court in *Autoclenz* at [21]–[35], (Lord Clarke SCJ, with whom Lord Hope DP, Lord Walker, Lord Collins and Lord Wilson SCJJ agreed); see Davies (2009), referred to with approval in *Autoclenz* at [28]; and see *Raftland* at [47] (Gleeson CJ, Gummow and Crennan JJ) where, by reference to one of the landlord and tenant cases, the majority observed that “a part of an instrument may be a pretence,” and at [119] (Kirby J); see further Irving M, *The Contract of Employment* (LexisNexis Butterworths, 2012)at [2.27]‑[2.28]; and Roles and Stewart (2012).
9. In *Autoclenz* at [35], Lord Clarke SCJ, speaking for the Court, observed that:

…the relative bargaining power of the parties must be taken into account in deciding whether the terms of any written agreement in truth represent what was agreed and the true agreement will often have to be gleaned from all the circumstances of the case, of which the written agreement is only a part. This may be described as a purposive approach to the problem.

A number of the terms of the agreement considered in *Autoclenz* were regarded as ineffectual because they did not “reflect the true agreement between the parties” (at [38]). The terms disregarded provided for rights or imposed obligations of a kind which served to indirectly disclaim the existence of an employment relationship.

1. Even in the absence of a sham or pretence, the parties’ characterisation of their relationship, whether direct (by the application of a label) or indirect (as in *Autoclenz*) may not be given effect according to its terms, because that characterisation contradicts the nature of the relationship the parties have actually created: *Curtis v The Perth and Freemantle Bottle Exchange Co Limited* (1914) 18 CLR 17 at 25 (Isaacs J); *Garnac Grain Company Incorporated v HMF Faure & Fairclough Ltd* [1968] AC 1130 at 1137 (Lord Pearson); *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 389 (the Court) (*AMP Society*), citing Lord Denning MR in *Massey v Crown Life Insurance Co* [1978] 2 All ER 576 at 579; *Hollis* at [58] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ). In that situation, the character of the relationship created by the contract will be revealed by all the terms of the contract (*AMP Society* at 388–389), examined in the light of the circumstances surrounding the making of it: *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597 at 601 and 606 (Lord Keith of Kinkel, Lord Elwyn-Jones, Lord Roskill, Lord Brandon of Oakbrook and Lord Templeman); *ACT Visiting Medical Officers Association* at [24] (the Court).
2. In other cases, the disparity between what was recorded on the face of the contract and what is demonstrated to have occurred by reference to the subsequent conduct of the parties may be explained by the recognition that, by their conduct, the parties have impliedly varied their contract by adding to or modifying its terms: *Narich Pty Ltd* at 601 and 604; *AMP Society* at 392. That the subsequent practice or conduct of parties to a contract may evidence a variation of the contract is also apparent from the observations made in *R v Foster* at 151 (Dixon, Fullager and Kitto JJ), and those made in *Rowe v Capital Territory Health Commission* (1982) 2 IR 27 at 28 (Northrop, Deane and Fisher JJ). In the context of triangular arrangements, the conduct of the parties may demonstrate that an initial contract made between a worker and an intermediary was ineffective or inoperative and that the existence of a contract of employment between the worker and the end user is to be implied from their conduct: *Damevski* (Marshall J, with whom Wilcox J agreed, at [89]); *Brook Street Bureau (UK) Ltd v Dacas* [2004] IRLR 358; *Cable & Wireless plc v Muscat* [2006] IRLR 354; *James v London Borough of Greenwich* [2008] EWCA Civ 35; *Homecare Direct Shopping Pty Ltd v Gray* [2008] VSCA 111.
3. Ultimately, the search for the reality or truth of what has been agreed, is a search for the common intention of the parties. That common intention is to be determined by what a reasonable person would have understood the parties to mean and, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction: *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at [40] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ). Whilst well known contractual principles are to be applied, an overly technical approach to contractual analysis is to be avoided. As McHugh JA (with whom Hope and Mahoney JJA agreed) said in an often cited passage from *Integrated Computer Services Pty Ltd v Digital Equipment Corp (Aust) Pty Ltd* (1988) 5 BPR 11,110 at 11,117–118:

It is often difficult to fit a commercial arrangement into the common lawyers’ analysis of a contractual arrangement. Commercial discussions are often too unrefined to fit easily into the slots of “offer”, “acceptance”, “consideration” and “intention to create a legal relationship” which are the benchmarks of the contract of classical theory. In classical theory, the typical contract is a bilateral one and consists of an exchange of promises by means of an offer and its acceptance together with an intention to create a binding legal relationship …

Moreover, in an ongoing relationship, it is not always easy to point to the precise moment when the legal criteria of a contract have been fulfilled. Agreements concerning terms and conditions which might be too uncertain or too illusory to enforce at a particular time in the relationship may by reason of the parties’ subsequent conduct become sufficiently specific to give rise to legal rights and duties. In any dynamic commercial relationship new terms will be added or will supersede older terms. It is necessary therefore to look at the whole relationship and not only at what was said and done when the relationship was first formed.

#### Implied Contracts

1. We need to consider in more detail the cases in which a contract between a worker and an intermediary has been held to be ineffective and where a contract between the worker and the end-user has been implied from their conduct. There are a number of examples in the cases where attempts to interpose a third party between an employer and its employee have failed because the contractual arrangements put in place to achieve that purpose were held to be ineffective. Many of the Australian cases concern an intermediary that was a related corporation of the putative employer: *Textile Footwear & Clothing Union of Australia v Bellechic Pty Ltd* [1998] FCA 1465; *Fair Work Ombudsman v Eastern Colour Pty Ltd (No 2)* [2014] FCA 55; but see *Golden Plains Fodder Australia Pty Ltd v Millard* (2007) 99 SASR 461 where the related company was found to be the true employer.
2. *Damevski* concerned arrangements made by an employer (**Endoxos**) to interpose between it and its employees a labour-hirer called “MLC” which would provide independent contractors. Endoxos informed the employees that there would be a restructure of its operations and that all of its employees would be offered work through the labour-hirer. Endoxos told its employees that “nothing would change”, but that if they did not sign up with the labour-hirer, they would not have any work. The employees would continue to perform the same work for clients of Endoxos but do so as independent contractors of the agency. In response to a letter from Endoxos, an employee (**Damevski**) advised Endoxos that he agreed to accept the labour-hirer’s offer, “as detailed in the information pack delivered to me”. Damevski resigned from his employment with Endoxos with effect from 19 August 2001. The information pack referred to in Endoxos’ letter included a “Contractor Guide” which described the labour-hirer as providing the administrative services of a contractor management agency to bona fide self-employed contractors. A document entitled “Agreement to Contract” (in terms similar to the Agreement to Contract) was included in the information pack. It was unclear whether that document was executed by Damevski. A “Hiring Agreement” was made between Endoxos and the labour-hirer under which the labour-hirer purported to supply Endoxos with its former employees as independent contractors. The rates charged by the labour-hirer included an “administration charge” and were also inclusive of the cost of the labour-hirer meeting “all statutory obligations for the contractor” (ie income tax deductions, workers’ compensation insurance, payroll tax and superannuation).
3. After Damevski resigned from his employment with Endoxos on 19 August 2001, he continued to work exclusively at the direction of Endoxos, in the same manner as he had previously done as an employee of Endoxos. Damevski continued to wear Endoxos’ uniform and use Endoxos’ tools. He submitted timesheets to both Endoxos and the labour-hirer. Endoxos paid the labour-hirer for Damevski’s services and Damevski was paid fortnightly by the labour-hirer. About two months after the new arrangement took effect, Damevski’s rate of pay was increased. This occurred at the instance of Endoxos. Several months into the arrangements, Damevski registered a business name. Some six months after the arrangements took effect, Endoxos informed Damevski that he was being “taken off the job”.
4. Damevski applied to the Australian Industrial Relations Commission (**AIRC**) claiming that he had been unfairly dismissed by Endoxos. His application was struck out on the basis that Endoxos was not his employer. The issue before the Full Court in *Damevski* was whether the AIRC had incorrectly determined that Damevski was not employed by Endoxos. The Full Court determined that on or after 19 August 2001, Endoxos re-employed Damevski and that Damevski was an employee of Endoxos at the time that he was informed that his services were no longer required. Marshall J (with whom Wilcox J agreed) came to that conclusion on the basis that the existence of a contract of employment between Damevski and Endoxos was to be implied from their conduct. The other member of the Full Court (Merkel J) reasoned that as the agent of Endoxos, the labour-hirer re-engaged Damevski to be Endoxos’ employee.
5. In order to arrive at the conclusion that an implied contract of employment existed between Endoxos and Damevski, Marshall J considered whether or not the arrangements made as between Endoxos and the labour-hirer, and between the labour-hirer and Damevski, were legally effective. At [48], Marshall J stated that “[t]here was no clear and unambiguous contract” between the labour-hirer and Damevski, as the only evidence of any agreement (Damevski’s response to Endoxos’ letter) was that Damevski agreed with Endoxos to accept the labour-hirer’s offer. However, assuming that there was a contract between Damevski and the labour-hirer, Marshall J concluded that it was questionable whether that contract “was ever fulfilled or exercised by either party” (at [49]). Marshall J considered that to be so because, if the terms and conditions of such a contract were to be discerned from the
labour-hirer’s information pack which Endoxos provided to Damevski, the arrangements there detailed bore little resemblance to what the parties actually did.
6. Part of that disparity between the arrangements as documented in the material in the information pack and the actuality of what occurred was that Damevski was not a “bona fide” independent contractor (at [50]). At [53]–[56] under the heading “Was Mr Damevski an independent contractor?”, Marshall J said:

53 There is no evidence in the current case of Mr Damevski providing his services as an independent contractor, using the introduction and administrative services of MLC.

54 The arrangement detailed in the information pack would have Mr Damevski as an independent contractor running his own cleaning business, calling MLC when he was available for work and being directed to various companies holding contracts to clean government and private premises. In running his own business, Mr Damevski would presumably also build his own contacts and provide cleaning services outside of his arrangement with MLC. To maintain consistency in his workflow he would “stay in contact” with MLC.

55 To argue that the above occurred in the present case is to defy reality.

56 The only evidence used to show that Mr Damevski actually performed the role of an independent contractor is that, as requested, he registered a business name 18 days before he was allegedly terminated. There are no other indicators that would suggest Mr Damevski was engaged in his own “economic enterprise”: see *Country Metropolitan Agency Contracting Services Pty Ltd v Slater* (2003) 124 IR 293 and *Dacas v Brook Street Bureau (UK) Ltd* [2003] IRLR 190.

1. Merkel J also considered whether any contracts made between Endoxos and the labour-hirer, and between the labour-hirer and Damevski, were effectual. At [172], his Honour concluded that Endoxos had failed to achieve its intended outcome that its workforce would perform its work as independent contractors. In that respect, Merkel J made a number of observations about the conduct of the parties, including (at [172(3)]):

All of the relevant features of Damevski's employment, save for the manner and quantum of payment, remained unchanged. Damevski did not supply any of the equipment required to perform his services. Viewed as “a practical matter” Damevski did not conduct his own business or enterprise or have any independence in the conduct of the cleaning services he provided to Endoxos. Little skill or training was necessary for him to carry out his services. Neither Damevski, or his putative agent AICA/MLC, had any real scope for bargaining for rates of remuneration. Damevski could not take work or annual leave as and when he wanted. His tools and equipment were provided by Endoxos, which controlled and directed where, when and how he was to work. Applying the factors relied upon in the joint judgment in [*Hollis*] it is clear that, notwithstanding the labels employed by the parties, Damevski provided his services to Endoxos as from 19 August 2001 as an employee, rather than as an independent contractor.

1. In *Damevski*, Marshall J held that the existence of a contract of employment was to be implied from the conduct of Damevski and Endoxos. At [81]–[88], his Honour considered contractual formation by reference to a range of authorities including *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 and *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd* (1985) 2 NSWLR 309. Marshall J noted that whilst the existence of a contract is not to be lightly implied, informality in contractual formation is not uncommon. The law takes a practical approach to contractual formation despite the technical and schematic nature of the doctrine of contract. The existence of an intention to create contractual relations, offer, acceptance and consideration may be evinced from conduct, with post-contractual conduct being admissible on the question of whether a contract was formed. Marshall J largely relied on the fact that Damevski returned to work for Endoxos in circumstances where the labour-hirer had no relevant role and nothing had changed. Endoxos continued to maintain control over Damevski. It directed his work and provided his equipment and attire. His Honour concluded that by their conduct, each of Endoxos and Damevski evinced an intention to re-enter an employment relationship on the same terms and conditions under which Damevski and previously worked for Endoxos.
2. Not long after *Damevski* was handed down, the first of a series of judgments on implied contracts arising out of triangular work arrangements was delivered by the English Court of Appeal. The most prominent of those judgments are *Brook Street Bureau*, *Cable & Wireless*,and *James.*
3. Those authorities were discussed and followed by Neave and Kellam JJA and Forrest AJA in *Homecare Direct Shopping*. The issue before the Victorian Court of Appeal was whether a worker engaged in selling products on behalf of a retailer was the employee of the retailer. Two formal standard form contracts prepared by the retailer were considered. The first, between the retailer and an individual designated as the retailer’s “Area Manager” provided that the Area Manager was an “independent Agent” of the retailer who would buy and resell, either directly or through “Sub-Agents (Distributors)”, the retailer’s products to the public in a defined region. By an agreement made between the Area Manager and the worker, the worker was appointed as an “independent Sub-Agent/Distributor” for the stated purpose of soliciting sales of the retailer’s products on the Area Manager’s behalf.
4. By the time the litigation reached the Court of Appeal, it was not disputed that the worker was an employee. The only issue was whether she was employed by the Area Manager or the retailer. The trial judge found that a contract of employment existed between the worker and the retailer. The trial judge reasoned that the Area Manager, as the agent of the retailer, had effectuated an employment contract between the retailer and the worker. Alternatively, the trial judge was satisfied that an implied contract of employment was made between the retailer and the worker.
5. The Court of Appeal agreed that the retailer had contracted with the worker through its agent the Area Manager. The Court also set out its conclusions as to whether the trial judge was correct to find an implied contract and concluded that it was open for the trial judge to have done so.
6. Forrest AJA (with whom Neave and Kellam JJA agreed) began his Honour’s consideration of that issue by noting at [62] that whether a contract exists between two parties is a question of fact which has to be determined within a legal framework which recognises that a contract may be implied between parties. His Honour then considered the legal principles, including those dealt with by the English authorities to which we have already referred, in an analysis with which we respectfully agree. At [64]–[70], his Honour said:

[64] The law has recognised for centuries that the objective assessment of the conduct of the parties may lead a Court to infer that the parties intended to create a contractual relationship. For instance, in *Young v Moller*, a bill of lading case, Baron Parke said:

No doubt where a cargo is received under a bill of lading, that, though not necessarily raising a contract in law, is evidence from which a jury may infer a contract to pay freight, in consideration of the captain giving up his lien on the goods.

Over the years, there have been many such cases in which contracts have been inferred between parties other than those originally party to a particular bill of lading. Those authorities were assembled and considered by the English Court of Appeal in *The Aramis* in which Bingham LJ concluded:

These cases may be said to decide no more than that whether a contract is to be implied is a question of fact and that a contract will only be implied where it is necessary to do so.

[65] In recent years in the United Kingdom that line of authority has been applied to cases involving the outsourcing of labour by the use of labour hire arrangements. On occasions courts have considered the implication of a contract of service between labour hire employees and those whose workforce they had been integrated into absent any express contract - in a situation where it is accepted that the employee has a parallel enforceable contract with the labour hire organisation.

 …

[66] In *Brook Street Bureau (UK) Ltd v Dacas* the English Court of Appeal was required to determine whether a person engaged as a cleaner pursuant to a labour hire agreement was an employee of either the labour hire company or the end user, a local council. Although the case turned on establishing a ‘contract of service’, there was a thorough analysis by the Court of the implication of a contract in the context of the performance of work by one person for another. Mummery LJ said:

The statutory definition of a contract of employment as a “contract of service” expressly includes an “implied” contract. This should not be overlooked. I think that it has been. Like other simple contracts, a contract of service does not have to be in any particular form. *Depending on the evidence in the case, a contract of service may be implied – that is, deduced – as a necessary inference from the conduct of the parties and from the circumstances surrounding the parties and the work done.* As already indicated, the overall situation under consideration is shaped by the triangular format used for the organisation of the work: the applicant, the employment agency and the end-user are all involved. Each participant in the triangular situation may have an express contract with either one of, or with each of, the other two parties.

*The critical point is that, although the construction of the contractual documents is important, it is not necessarily determinative of the contract of service questions, as contractual documents do not always cover all the contractual territory or exhaust all the contractual possibilities. In determining the true nature of the relationship (if any) between each of the respective parties, it is necessary to consider the total situation occupied by the parties.*  The totality of the triangular arrangements may lead to the necessary inference of a contract between such parties, when they have not actually entered into an express contract, [either written or oral, with one another. Although there was no express contract] between the applicant and the end-user in this case, that absence does not preclude the implication of a contract between them. That depends on the evidence, which includes, but may not be confined to, the contractual documents. (My emphasis.)

[67] These statements are consistent with what was said by the High Court in *Ermogenous*: the search for whether a contract exists may not be confined to an examination of the terms of a particular contractual document. In certain cases, of which I think this is one, it is the whole of the circumstances viewed objectively that will determine whether a contract exists or not. Indeed, this has consistently been the approach of the High Court in determining the characterisation of contracts where one party carries out work for the benefit of another: *Dietrich v Dare*; *Stevens v Brodribb, Hollis v Vabu*. Moreover, the Act itself, by s 5, envisages a contract of service being either express or implied.

[68] It is, therefore, both permissible and, in this case, I think, necessary to look outside the express terms of the distributor agreement to determine whether there was a separate contractual arrangement between Homecare and the respondent in relation to the work carried out by her for Homecare’s benefit.

[69] I return to *Brook Street Bureau* and what was said by Sedley LJ:

The argument for Wandsworth proceeds from the fact that it had no written agreement of any kind with Mrs Dacas to the submission that there was accordingly nothing into which any terms could be implied.  *This, however, misses the critical point that there are more means of expressing mutual intentions than putting them in writing. In the field of employment it is not uncommon to find that a contract of employment has come into being through the conduct of the parties without a word being put in writing or even, on occasion, spoken.* In particular, conduct which might not have manifested such a mutual intention had it lasted only a brief time may become unequivocal if it is maintained over weeks or months. Once the intention to enter into an employment relationship is so expressed, the common law will imply a variety of terms into it and simultaneously will spell vicarious liability out of it; and statute will add a series of other rights and obligations. (My emphasis.)

[70] *Brook Street Bureau* has subsequently been considered on several occasions by English courts [*Cable & Wireless; Hudson Contract Services v Her Majesty’s Revenue and Customs* [2007] EWHC Civ 73 (Ch); and *James*]. My analysis of these cases is that there has been no departure from the principles set out in *Brook Street Bureau*. The question in these subsequent cases, as here, is whether the facts, including the nature and terms of any written agreements, support the implication of a contract between the relevant parties.

1. The factual matters which Forrest AJA regarded as supportive of an implied contract between the retailer and the worker included that the worker sold the retailer’s products for the retailer’s benefit; the retailer determined whether the worker would sell its products, where she would work and what goods she would sell; all the goods, catalogues and documentation for the sales were prepared and provided by the retailer; if the worker engaged in activities prejudicial to the retailer’s interests, she was in breach of her distributor agreement; the worker’s mode of selling, rate of commission and accounting for her sales was determined by the retailer; it was up to the retailer to decide whether it accepted sales orders obtained by the worker; on occasions the worker would account directly to the retailer for the sale of its products; there was no re-selling of goods by the Area Manager to the worker. In that setting, Forrest AJA reasoned, there were mutual benefits to both the retailer and the worker—the retailer sold its products and the worker received payments for such sales.
2. The judgments of the English Court of Appeal in *Brook Street Bureau* and *Cable & Wireless* had earlier been considered by this Court in *Wilton v Cole & Allied Operations Pty Ltd* (2007) 161 FCR 300. In *Wilton*, the central issue was whether workers working in a coal mine were employees of the operator of the coal mine or employees of the labour-hirer engaged by the operator to supply supplemental labour. Conti J rejected the contention that the workers were employees of the operator. His Honour concluded (at [187]) that “in substance and reality” each of the workers was an employee of the labour-hirer. Whilst a range of matters may have been indicative of a direct employment such as the workers working side by side with, in the same manner as, and under the same control as, the direct employees of the operator, those circumstances were regarded by Conti J as explained by the labour-hire contractual arrangements in place as between the workers and the labour-hirer and the labour-hirer and the operator. There was no suggestion in that case that the labour- hirer arrangements were either artificial or ineffectual. Conti J distinguished the conclusion of implied contracts arrived at in both *Damevski* and in *Cable & Wireless.* His Honour regarded the approach taken in those cases as instructive of the approach to be taken by a court where an employer has sought “to restructure an existing employment relationship into a framework of labour hire” (at [172]–[173]).
3. In *Wilton*, Conti J expressed reservations about the “notion of implied relationships of employment” at [182] and considered that there was no good reason for imputing that notion to the circumstances of that case and more generally to the “context of labour hirer arrangements”. As we read his Honour’s reasons, the reservations are twofold. First, his Honour expressed some concern about whether the approach taken in *Brook Street Bureau* asto the need to demonstrate intention to create legal relations was out of step with the approach in Australia, including as explained in the High Court in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95. With respect to his Honour, consistently with the view of the Victorian Court of Appeal in *Homecare Direct Shopping* (at [63], [66] and [67]), we do not consider the observations of Mummery LJ in *Brook Street Bureau* to be inconsistent with what was said in *Ermogenous*. Secondly, the doubt expressed at [182] by Conti J about the applicability of an implied contract analysis to establish a contract between a worker and end-user in a labour-hire setting is a doubt, as we see it, about the capacity for such an implication to be made where the hallmarks of a genuine labour-hire arrangement exists. So much may be gleaned from [183] where Conti J relied upon the distinction made by Merkel J in *Damevski* at [174] between the facts of *Damevski* and the facts of cases in which courts have found an effective contractual relationship between labour-hirer and worker.At [174] of *Damevski*, in a passage also referred to by Buchanan J in *Fair Work Ombudsman v Ramsey Food Processing Pty Ltd* (2011) 198 FCR 174at [68] to make the same point, Merkel J said:

However, the present case differs in significant respects from those cases. In those cases, in general, the hiring agency interviewed and selected the workers, and determined their remuneration, without reference to the client. Usually, a client requesting a worker with particular skills was provided with one, who may or may not have been “on the books” of the hiring agency at the time the order was placed. The workers of such hiring agencies were usually meant to keep the agency informed of their availability to work, and in many cases were not to agree to undertake work for the client which had not been arranged or directed by the hiring agency. Equipment was either supplied by the worker themselves, or by the hiring agency, except for specialist safety equipment which the client often supplied. Dismissal of a worker was only able to be effected by the hiring agency. The client can only advise the hiring agency that the particular worker is no longer required by it.

…

1. There will be limited scope for the implication of an employment contract between a worker and an end-user in a triangular setting, where the provision of a worker to the end-user is explained by the presence of a genuine labour-hire arrangement evidenced by the existence and performance of the hallmarks that such arrangements commonly bear.
2. That limitation is also recognised in the United Kingdom, where an employment contract will not be implied in a labour-hire setting where “it is not necessary to imply one in order to explain the work undertaken by the worker for the end-user”: *James* at [51] and [52], Mummery LJ (with whom Thomas and Lloyd LJJ agreed). The reference made to necessity, as the observations at [23] and [63] of *James* suggest, is a reference to the necessity to “give business reality to what was happening” taken from the test of necessity for implying a contract enunciated by Bingham LJ in *The Aramis* (1989) 1 Lloyd’s Rep 213 at 224.
3. In *James* at [29], Mummery LJ referred with approval to what he identified as helpful observations made by Elias LJ in the decision below (before the Employment Appeals Tribunal, published as *James v London Borough of Greenwich* [2007] IRLR 168) about how tribunals might approach the question of whether to imply a contract between a worker and an end-user. Of the observations made by Elias LJ, the following are most pertinent to the issues raised in this case (at [57]–[58] and [60]):

[57] …Provided the arrangements are genuine and the actual relationship is consistent with them, it is not then necessary to explain the provision of the worker's services or the fact of payment to the worker by some contract between the end-user and the worker, even if such a contract would also not be inconsistent with the relationship. The express contracts themselves both explain and are consistent with the nature of the relationship and no further implied contract is justified.

[58] When the arrangements are genuine and when implemented accurately represent the actual relationship between the parties – as is likely to be the case where there was no pre-existing contract between worker and end-user – then we suspect that it will be a rare case where there will be evidence entitling the tribunal to imply a contract between the worker and the end-user. If any such a contract is to be inferred, there must subsequent to the relationship commencing be some words or conduct which entitle the tribunal to conclude that the agency arrangements no longer dictate or adequately reflect how the work is actually being performed, and that the reality of the relationship is only consistent with the implication of the contract. It will be necessary to show that the worker is working not pursuant to the agency arrangements but because of mutual obligations binding worker and end-user which are incompatible with those arrangements.

[60] It will, we suspect, be more readily open to a tribunal to infer a contract in a case like *Muscat* where the agency arrangements were super-imposed on an existing contractual relationship. It may be appropriate, depending on the circumstances, to conclude that arrangements were a sham and that the worker and end-user have simply remained in the same contractual relationship with one another, or that even if the intention was to alter the relationship that has not in fact been achieved. That may be legitimate, for example, where the only perceptible change is in who pays the wages. In such a case the only effect of the agency arrangements may be to make the agency an agent of the employer for the purpose of paying wages. However, in these cases the tribunal is not strictly implying a contract as such but is rather concluding that the agency arrangements have never brought the original contract to an end.

1. Consistently with those observations, at [30] Mummery LJ said:

[30] … In the agency worker cases the problem in implying a contract of service is that it may not be necessary to do so in order to explain the worker’s provision of work to the end user or the fact of the end user’s payment of the worker via the agency. Those facts and the relationships between the parties are explicable by genuine express contracts between the worker and the agency and the end user and the agency, so that an implied contract cannot be justified as necessary.

1. More recently, in *Tilson v Alstom Transport* [2010] EWCA Civ 1308, Elias LJ (with whom Pitchford and Arden LJJ agreed) dealt with the same question of when a contract can be implied. Elias LJ confirmed (at [8]) the approach taken to that question in *James.* Elias LJ noted the observation of Bingham LJ in *The Aramis* that it would be fatal to the implication of a contract that the parties would or might have acted as they did in the absence of it. Elias LJ posed (at [45]) what might be regarded as a guiding question, namely:

Is it necessary to infer a contract to explain this divergence between contract and practice?

#### Distinguishing an Independent Contractor from an Employee

1. The Ombudsman’s contention that Best and Roden were employees of Quest and Contracting Solutions’ contention that they were independent contractors engaged by it requires us to consider what it is that, as a matter of law, distinguishes an independent contractor from an employee.
2. The term “independent contractor” is likely to have its origin in cases dealing with vicarious liability in which it was necessary to draw a legal distinction between a person providing services to another as a servant or agent and a person providing services under an “independent contract”: see the discussion in *Construction, Forestry, Mining and Energy Union v Victoria* (2013) 302 ALR 1 at [128]–[129] (Bromberg J). With the increasing trend to self-employment over the past four or five decades, the term “independent contractor” has become increasingly used in the authorities to distinguish between two kinds of workers - an employee at common law and a person who is not an employee but who, like an employee, provides personal services for hire. In making that distinction, the decided cases have identified the characteristics of a worker who is an employee. In doing so they have also identified the hallmarks of a worker who is an independent contractor and in particular a self-employed person who mainly provides personal services under an independent contract. At least as between those two kinds of workers, the divide between employee and independent contractor appears to be binary. In Australia, no third category has yet been recognised by the law to describe the worker and none is apparent. That means that the worker will either be an employee or an independent contractor.
3. Contracting Solutions relied on the observation made by Mummery LJ in *Brook Street Bureau* at [49] that the temptation to conclude that an individual is an employee simply because he or she is not a self-employed person carrying on a business of his or her own should be resisted. However, those remarks were made, as the first of the authorities relied upon by Mummery LJ suggests, in the context of the law in the United Kingdom where, unlike in Australia, a casual worker with a series of short-term engagements is not ordinarily recognised as having a continuing employment relationship with the person that regularly engages the worker: see Sappideen C, O’Grady P, Riley J, and Warburton G, *Macken’s Law of Employment* (7th ed, Lawbook Co., 2011) at [2.150]. Thus in the United Kingdom the existence of a third category of worker is a possibility but once that possibility is discounted, as the English Court of Appeal said at [54] in *Cable & Wireless*:

… We find it hard to imagine a case in which a worker will be found to have no recognised status at all, either as an employee of someone or as a self-employed independent contractor … .

1. It is permissible and necessary to examine the common hallmarks of both an employee and an independent contractor in order to identify the side of the binary divide upon which the worker falls. In the Australian context, if the worker providing personal services is not an independent contractor, the worker will be an employee.
2. It is uncontroversial that a multi-factorial assessment is required in evaluating whether a person providing personal services is an employee or alternatively an independent contractor. As Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ said in *Hollis* at [24], it is “the totality of the relationship” which is to be considered.
3. However, at least since *Hollis*, it may be accepted that the distinction between an employee and an independent contractor is “rooted fundamentally in the difference between a person who serves his employer in his, the employer’s, business, and a person who carries on a trade or business of his own” (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ at [40], citing Windeyer J in *Marshall v Whittaker’s Building Supply Co* (1963) 109 CLR 210 at 217, and see *Hollis* further at [47] and [57] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ)). The observations made by Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Sweeney v Boylan Nominees Pty Limited* (2006) 226 CLR 161 at [30]–[33] are also consistent with the running of a business being the essential hallmark of an independent contractor.
4. The distinction first drawn by Windeyer J in *Whittaker* was referred to by Wilson and Dawson JJ in *Stevens v Brodribb Sawmilling* *Company Proprietary Limited* (1986) 160 CLR 16 at 35 as a characterisation of “the ultimate question”. That point of distinction has been elsewhere referred to as the “ultimate question” posed by the totality approach or “the focal point” of that approach: *On Call Interpreters and Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)* (2011) 214 FCR 82 at [207] (Bromberg J); and see to similar effect *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 at [29] (Perram J); and on appeal *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 at [93] and [102] (Buchanan J, with whom Lander and Robertson JJ agreed).
5. If an independent contractor is a person who operates a business, it is next necessary to consider what are the hallmarks of a business. In *On Call* at [210], Bromberg J observed:

…to carry on a business is to conduct a commercial enterprise as a going concern: *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* (2005) 222 CLR 194 at [83]. It will usually involve the acquisition and use of both tangible and intangible assets in the pursuit of profit: *Gribbles Radiology* at [39]. The desire to make profit is an important element and generally a business will enter into transactions on a continuous and repetitive basis in the pursuit of profit: *Hope v Bathurst City Council* (1980) 144 CLR 1 at 8-9. A business typically has (or at least aspires to have) value (goodwill or saleable assets) beyond its physical assets: [*Stevens*] *v Brodribb* at 37. A common intangible asset of a business is its name, brand, reputation or goodwill. Typically, the activities of a business will be organised in a business-like manner, including by the use of systems: *Ferguson v Federal Commissioner of Taxation* (1979) 9 ATR 873 at 876-877. The word “business” imports the notion of system, repetition and continuity: *Hungier v Grace* (1972) 127 CLR 210 at 216-217. A business will normally operate in a business-like way; *Puzey v Federal Commissioner of Taxation* (2003) 131 FCR 244 at [48].

1. As was stated in *London Australia Investment Company Limited v The Commissioner of Taxation of the Commonwealth of Australia* (1977) 138 CLR 106 at 129, it is not possible to exhaustively enumerate the facts and circumstances which will support the inference that a course of activity is a business. The nature of a business will vary. Some businesses have complex operations. Others adopt a lean and simple form. Some of the typical indicia of a business will be more relevant in some settings than in others.
2. Of central concern to the issue which arises here are the characteristics of a business in which personal services are provided either entirely or predominantly by the business’s principal or owner. That kind of business is more likely to have a simple and less sophisticated structure. Nevertheless, even a small, simple commercial enterprise will have some of the fundamental hallmarks of a business, even though they may be modest or muted. The pursuit of profit is at the core of entrepreneurship and to be regarded as one of the primary hallmarks, if not the primary hallmark, of a business. A commercial enterprise, no matter how small, is an undertaking in which time, money, and effort are risked in the hope of making a profit. Unlike the employee, who will be content to be remunerated with a wage which reflects the value of the personal services provided, the entrepreneur providing commercial services will want to be remunerated by making a profit. In pursuit of a profit, the independent contractor will not merely seek remuneration commensurate with the value of the personal services or work provided, but will want a return on the risk and expense involved in running a business.
3. Beyond the pursuit of profit, the nature of the economic activities and organisational structures of an enterprise will tend to distinguish it as a business. To that end the following indicators were distilled from the authorities at [217] of *On Call*:
* Do the economic activities of the putative business involve the taking of risk in the pursuit of profits?: *Gribbles* at [39]; *Hope v Bathurst* at 9; *Roy Morgan Research* (2010) at [47]; *Yaraka Holdings* at [41] and [49]; *City of Montreal v Montreal Locomotive Works Ltd* [1947] 1 DLR 161 at 169; *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 at 184; *Lee Ting Sang v Chung Chi-Keung* [1990] 2 AC 374 at 382.
* Does the putative business engage in a repetitive and continuous manner with purchasers of its services?: *Hope v Bathurst City Council* at 9; *Hungier v Grace* at 216–217; *Puzey* at [48]; *Federal Commissioner of Taxation v Sleight*  (2004) 136 FCR 211 at [48];
* Does the putative business employ or engage persons other than the owner/operator to carry out its economic activities?: *Stevens v Brodribb* at 26 and 38;
* Is goodwill (name, brand and reputation) being created by the economic activities of the putative business?: *Hollis* at [48]; [*Stevens*] *v Brodribb* at 37*; Roy Morgan* (2010) at [46]; Re *Porter; Re Transport Workers Union* at 186;
* Is the putative business promoted as a business to the public through advertising or other promotional means?: *Hope v Bathurst City Council* at 9; *Abdalla v Viewdaze* at [35]; *Yaraka Holdings* at [35];
* Does the putative business have tangible assets such as buildings and equipment which are utilised to support its economic activities?: [*Stevens*] *v Brodribb* at 37; *Gribbles Radiology* at [39];
* Does the putative business have the basic transactional systems that are common of a business of that kind? For instance: invoicing systems; standard rates and terms and conditions of trade; insurance coverage; payment and debt collection systems; appropriate financial records; budgeting or forecasting systems; business based arrangements with a bank or other financial institution: *Hollis* at [54]; *Sweeney* at [31]; *Hope v Bathurst City Council* at 9; *Wesfarmers Federation Insurance Ltd v Wells* [2008] NSWCA 186 at [42]; *Ferguson* at 311;
* Do the services provided by the putative business involve the provision of labour of sufficient skill to be suggestive of the pursuance of a profession or trade through a business?: *Hollis* at [48]; *Stevens v Brodribb* at 36–37; *Yaraka Holdings* at [51];
* Are the regulatory requirements of a business (including business name registration, taxation, GST and ABN registration and compliance) being met by the putative business?: *Wesfarmers* at[39]–[42].
1. In relation to unskilled workers, the prima facie position is clear. As the majority said at [48] of *Hollis*, it is “intuitively unsound” to conclude that unskilled workers are “running their own enterprise” when providing their labour.
2. Where the hallmarks of a business are absent, it will be a short step to the conclusion that the worker is an employee. As Lander J said in *ACE Insurance* at [15]:

If the respondents were not conducting their own business then logically it followed that they must have been working in the appellant’s business.

1. Where the hallmarks of a business exist, it will be necessary to turn to the second question posed by the majority in *Hollis* at [39], [40], [47] and [57] (and see *Sweeney* at [31] and the Full Court in *ACE Insurance* at [93], [121] and [128]). That question requires an examination of whether the work provided is being performed in and for the worker’s business as a representative of that business and not of the end-user’s business.
2. For reasons we will shortly explain, the second question does not need to be answered in this case, but where relevant that question will need to be assessed in the context of the totality of the relationship. A range of indicia identified in the authorities may need to be examined in an exercise which is not to be performed mechanically because different significance may attach to the same indicators in different cases (see *On Call* at [218]–[220]). We respectfully agree with the emphasis placed by the Full Court in *ACE Insurance* at [37], [38], [102], [119] and [120] upon a worker's ability to delegate the performance of the work to another as being a strong indicator that the worker is an independent contractor working in his or her own business. The right to control remains an important consideration in many cases (*ACE Insurance* (Full Court) at [103]). To that end, a lack of “real independence of action or true independence of organisation” in the performance of the work provided to the end-user will be suggestive of an employment relationship (*ACE Insurance* (Full Court) at [147]–[148]).

### Application of the Legal Principles

1. The Ombudsman’s submissions recognised that for it to succeed in establishing the existence of an implied contract of employment between Quest and each of Best and Roden, it was first necessary to establish that the contractual arrangements upon which Contracting Solutions relied were ineffective and did not explain the basis upon which Best and Roden provided their labour at Quest.
2. That approach seems to us to be consistent with authority, and required by the necessity principle to which we have referred. If contracts made between Contracting Solutions and each of Best and Roden and between Contracting Solutions and Quest explain the provision of work by Best and Roden to Quest, there would be no basis for thinking that the provision of work by Best and Roden was the consequence of an implied contract. 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.
3. For reasons we will explain, a question vital to whether any of the contracts upon which Contracting Solutions relied were made, or if made, whether those contracts were operative, is the question whether Best and Roden were independent contractors.
4. Accordingly, in the application of the legal principles outlined above, the following questions need to be considered:
* Were Best and Roden independent contractors?
* Were contracts made between Quest and each of Best and Roden engaging them as independent contractors and, if so, were those contracts effective?
* Was the Hiring Agreement effective?
* If those contracts were ineffective, is an employment contract between Quest and each of Best and Roden to be implied?

#### Were Best and Roden independent contractors?

1. On the basis of the principles we have outlined earlier, the conclusion that Best and Roden were providing work at Quest as independent contractors requires a finding that each of Roden and Best was operating her own business. The evidence is all but barren in support of any such finding. To borrow from the conclusion reached by the majority in *Hollis* at [48] as to the activities of the bicycle couriers considered in that case:

The notion that the [housekeepers] somehow were running their own enterprise is intuitively unsound, and denied by the facts disclosed in the record.

1. There was no evidence that the economic activities of either Best or Roden involved:

(i) the taking of risk in the pursuit of profit;

(ii) repetition and continuity with multiple purchasers;

(iii) the employment or engagement of other persons to perform the activities;

(iv) the promotion of the activities to the public as a business through advertising, uniforms, badges or any other means;

(v) the ownership or use of any assets or equipment;

(vi) the use of even the most basic transactional systems such as invoicing, standard rates and terms and conditions of trade, or business based arrangements with a bank or other financial institution;

(vii) the provision of sufficient skill to be suggestive of the pursuance of a profession or trade through a business; or

(viii) registration of the activities of the business for business name, GST, or other regulatory purposes.

1. As the primary judge found, the economic activities of Best and Roden were “precisely the same” and performed in “exactly the same way” as they had been when Best and Roden were performing work at Quest as employees of Quest. Those activities were directed and controlled by Quest. There is no suggestion in the evidence that Best and Roden had any independence in the conduct of those activities including as to how or by whom the services were provided.
2. A demonstrated desire on the part of a person to operate his or her own business and an acknowledgment that the person operates such a business may well be supportive of the existence of a business. But there is no support in the evidence for concluding that when Best and Roden registered with Contracting Solutions as independent contractors, either of them had any real understanding that being an independent contractor entailed the running of a business or had any genuine desire to run a business. To the contrary, all that Best and Roden wanted was to continue to work at Quest as they had previously done.
3. Whilst working at Quest after the “conversion”, Best and Roden took no active part in what registration with Contracting Solutions purported to entail. Despite the requirement specified in the Contractor Guide that the registrant call Contracting Solutions to advise of his or her availability (which included a warning that a failure to do so would result in Contracting Solutions assuming that the registrant is no longer available for work through Contracting Solutions), neither Best nor Roden did so.
4. The fact that each signed the Contractor Application is not indicative of any genuine desire on the part of Best or Roden to become independent contractors. As the primary judge said at [239], Best and Roden did that because they believed they had no or little option but to do so if they wanted to continue working at Quest.
5. There is only one indicator in favour of the suggestion that each of Best and Roden was operating a business. The maintenance of public liability insurance is a common requirement for the proper operation of a business and is not an expense which would ordinarily be necessary for an employee to incur. Contracting Solutions relied upon the fact that after the “conversion” and whilst Best and Roden worked at Quest, Contracting Solutions maintained public liability insurance on their behalf. In filling out the Contractor Application, each of Best and Roden opted to participate in the public liability cover offered and must be taken to have read the information there set out, being to the effect that to provide public liability cover, Contracting Solutions would deduct 1% “from my payment as I work”. However, their participation was contingent upon being engaged by Contracting Solutions. If they were not engaged, or if that engagement was ineffective, whatever Contracting Solutions may have done to maintain insurance cover was not done on behalf of Best and Roden.
6. Even if we were satisfied that Best and Roden were engaged by Contracting Solutions and that they therefore may be taken to have authorised Contracting Solutions to take out public liability insurance cover for them, we would not be satisfied that Best and Roden were running their own businesses. We would not regard the existence of that transactional feature of a business as providing any significant indication in favour of a conclusion that Best and Roden were each running their own business. It is a single indicator greatly outweighed by many strong indications to the contrary. In the context in which each of the authorisations took place, we would not regard them as being anything other than the reluctant and largely uncomprehended act of a person who was simply desirous of maintaining the practical status quo.
7. The maintenance of public liability insurance may also be regarded as an act which flowed out of the subjective characterisation adopted by the parties, or some of them, as to the nature of their relations and, for that reason, deserving of little weight. A similar view was taken by Buchanan J (with whom Lander and Robertson JJ agreed) in *ACE Insurance* at [130]. In that case, persons who were held to be employees principally because they were not conducting their own businesses had not only taken out insurance cover but had made taxation related claims for business expenses, had provided their own motorcars, and had prepared their own financial statements amongst a range of other activities asserted to be indicators of non-employment: see at [130]–[137].
8. We conclude that neither Best nor Roden operated a business. It must follow from that conclusion that neither was an independent contractor. The fact that neither Best nor Roden was an independent contractor is significant to the question of whether the triangular contractual arrangements upon which Contracting Solutions relied were made, or if made were operative and effective.

#### Were contracts made between Contracting Solutions and each of Best and Roden engaging them as independent contractors and if so, were those contracts effective?

1. At trial, Contracting Solutions relied upon the Agreement to Contract as the contract by which each of Best and Roden was engaged as an independent contractor by Contracting Solutions to provide services at Quest. There is no issue that each of Best and Roden executed with Contracting Solutions an Agreement to Contract.
2. The Ombudsman contended that the Agreement to Contract did not, of itself, evidence the engagement of Best or Roden by Contracting Solutions to provide services at Quest and that the evidence did not establish that any such contract was made.
3. When the terms of the Agreement to Contract are examined, it is clear that its terms do not create any extant rights or obligations. The rights and obligations agreed to are contingent. They are intended to be incorporated into, and become operative upon, the engagement of the contractor for particular work. The same conclusion was reached in relation to an “Agreement to Contract” in relevantly identical terms by Mason CJ, Brennan, Dawson, Toohey and McHugh JJ in *Accident Compensation Commission v Odco Pty Ltd* (1990) 64 ALJR 606 at 609.
4. In *Odco No 1*, Woodward J considered the contract of engagement made between the persons providing work and the relevant labour-hirer (**Troubleshooters**). Contractors with Troubleshooters signed an “Agreement to Contract” in terms relevantly identical to the terms of the Agreement to Contract which Contracting Solutions utilised in this case. Woodward J concluded that the “Agreement to Contract” did not amount in law to a contract at all (at [55]). His Honour regarded the process in which the “Agreement to Contract” was signed as part of a registration process registering the contractor as a person willing, from time to time, to accept work from Troubleshooters (see at [103]).
5. Consistently with the view that we have expressed, Woodward J held that the terms of the “Agreement to Contract” were incorporated into the agreement made between the contractor and Troubleshooters when each offer of an engagement was made by Troubleshooters and accepted by the contractor (at [55]). His Honour’s analysis was that the agreement between Troubleshooters and the contractor was concluded when the offer of work was made, usually over the telephone, and was accepted by the contractor (at [102]). The terms of the engagement were that the contractor agreed to attend at the time and place indicated, to report to the person nominated and to work as required for up to eight hours on that day. Eight hours was the standard working day in the relevant industry. His Honour also said at [102]:

If the builder indicates a continuing requirement for his work, the man may accept or reject each subsequent day’s work as he pleases.

1. Those findings were not disturbed on appeal. The Full Court at 116 of *Odco No 2* (Wilcox, Burchett and Ryan JJ) regarded the contract of engagement between the contractor and Troubleshooters as concluded when the contractor acceded to Troubleshooters’ request to attend at a particular site on a given day.
2. In the facts under consideration in *Odco*, the daily hiring engagement of some of the workers by Troubleshooters was, from time to time, altered or extended without the knowledge of Troubleshooters. That, for instance, occurred when a builder requested that the contractor perform overtime or work an additional day or days. Both Woodward J at first instance (at [116]–[118]) and, on appeal, the Full Court (at 117–118) considered that, as between Troubleshooters and its client, arrangements of that kind were made by the contractor as the agent of Troubleshooters. As between the contractor and Troubleshooters, arrangements extending the initial period of work must have been considered to have been made pursuant to the terms of the original engagement which gave the contractor a capacity to accept any request from a builder for an extension. Whilst that was not expressly said, it appears to follow from the finding extracted at [205] above.
3. Counsel for Contracting Solutions referred to the Agreement to Contract as a “generic document” and seemed to accept that its operation was contingent upon an engagement. Yet, Contracting Solutions did not identify any engagement of Best or Roden by Contracting Solutions. There was no evidence of telephone calls or other like conduct in which offers to work at Quest were made by Contracting Solutions after Best or Roden signed up with Contracting Solutions.
4. When pressed as to the terms of Contracting Solutions’ engagement of Best and Roden, Contracting Solutions contended that the engagements of Best and Roden on the various shifts performed by them occurred in the same way as “it worked in the *Odco* case”. That submission does not assist. It seems to be directed at another issue, namely how a change to a daily engagement was contractually explicable in the particular facts considered in *Odco.* The question here is different, including because the facts are different. As no express contract was made on the execution of the Agreement to Contract, the question is: what facts demonstrate the ongoing and regular engagement by Contracting Solutions of Best and Roden as independent contractors to provide their services at Quest?
5. Whilst inconsistent with the terms of the Contractor Application in which Best and Roden were specifically told that their application had to be approved before they could be engaged by Constructing Solutions, it may be that an offer of an engagement can be implied from what Best and Roden were told at the meeting or meetings held with Konstek and Buiks. The housekeepers were told that if they signed up with Contracting Solutions they would continue to work at Quest. Their continued work for Quest may be characterised as their implied acceptance of Contracting Solutions’ implied offer of engagement of them to provide their services to Quest on Contracting Solutions’ behalf. Contracting Solutions did not, however, make a submission to that effect. Contracting Solutions did not expressly identify when it asserted a contract of engagement was made, how it was made, or what were its terms.
6. On any view, if contracts engaging Best and Roden were made, they were (at least in part) constituted by conduct. It is apparent then that both the Ombudsman and Contracting Solutions rely upon the existence of a contract to be implied from conduct to explain the provision of the work performed by Best and Roden at Quest.
7. Whilst the facts are not particularly clear, what is clear (if those facts are taken at face value) is that the subject matter of any contemplated or executed arrangement between Contracting Solutions and each of Best and Roden was that any labour to be provided by those workers to Contracting Solutions would be provided by them as independent contractors. That each of Best and Roden would, prior to the delivery by them of any services to Contracting Solutions, become independent contractors may well have been a common assumption intended as a condition precedent to the creation of any contractual obligations: cf *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 at 409 (Dixon and Fullagar JJ).
8. If that was so, in the absence of the common assumption being satisfied (as we have concluded above), no contract at all would have been made between Contracting Solutions and either of Best or Roden. Alternatively, if contracts were formed, a condition of each contract must have been, again taking the facts at face value, that the services to be provided by the workers be provided by them as independent contractors. In that case, whilst a contract (in each case) was made, as its performance was dependent upon the provision of work by an independent contractor, the contract was ineffective in the sense that it was not performed.
9. Ultimately, we need not determine whether or not a contract was made between Contracting Solutions and each of Best and Roden, by which those persons were engaged to provide services to Contracting Solutions as independent contractors. Even if those contracts were made, Best and Roden were not independent contractors, and so those contracts were ineffective and fail to explain the provision of labour by Best and Roden to Quest.

#### Was the Hiring Agreement effective?

1. It is also necessary for Contracting Solutions to rely upon the effective operation of the Hiring Agreement made between Contracting Solutions and Quest to explain the provision of work by Best and Roden and the payment in relation to it made by Quest to Contracting Solutions and, in turn, by Contracting Solutions to the workers. There is no issue that the Hiring Agreement was made between Quest and Contracting Solutions.
2. However, taking the facts at face value, it was fundamental to the performance of the Hiring Agreement that Contracting Solutions supply Quest with genuine independent contractors. The Hiring Agreement described Contracting Solutions as supplying self-employed contractors. The service contracted for was described as the engagement and administration of contractors of Contracting Solutions as requested by Quest. The Hiring Agreement contained an assurance that the contractors supplied by Contracting Solutions would not be Quest’s contractors and that no contractual relationship would exist between Quest and the contractors provided by Contracting Solutions. The warranty that genuine independent contractors would be supplied by Contracting Solutions is also apparent from the Proposal, in which it was stated that:
* Contracting Solutions removes the uncertainty and risk associated with direct contractor engagement and direct employment;
* Contracting Solutions contractors are bona fide independent contractors who will not be deemed to be employees, will not be subject to industrial relations legislation, or awards or other employment entitlements and will have no contractual connection to Quest; and
* Quest will no longer need to worry about “confusion about legitimacy of contractors (i.e. contractors vs employee)”.
1. The supply of a different product to that contracted for is a clear case of non-performance of a contract. The classic example is the seller who sends beans when the contract requires the delivery of peas: *Chanter v Hopkins* (1838) 4 M&W 399 at 404; 150 ER 1484 at 1486–7 (Lord Abinger CB).
2. In the end, we do not consider that Contracting Solutions supplied the services of Best and Roden to Quest at all, in any capacity. But if it did, it is evident it did not do so in performance of the Hiring Agreement. The Hiring Agreement, in that respect, was ineffective and does not serve to demonstrate, as Contracting Solutions contended it did, that Best and Roden worked at Quest as independent contractors supplied by Contracting Solutions.

#### Can an employment contract between Quest and each of Best and Roden be implied?

1. As the contractual arrangements relied upon by Contracting Solutions do not explain the provision of the labour of Best and Roden to Quest, a conclusion that the labour was provided pursuant to other contracts becomes available. No party contended that employment contracts existed between Contracting Solutions and each of Best and Roden and that they provided work to Quest as employees of Contracting Solutions. Nor did any party contend that Best and Roden had contracts for services with Quest. We can exclude those possibilities. Contracting Solutions did however raise an alternative possibility to the existence of contracts of employment with Quest. Contracting Solutions contended that if we were satisfied that any implied contracts between Quest and each of Best and Roden existed, those contracts were not employment contracts but were contracts *sui generis*.
2. Contracting Solutions’ alternate characterisation is misconceived. The characterisation is taken from the dicta of Cooke Jin *Construction Industry Training Board v Labour Force Ltd* [1970] 3 All ER 220 at 225 that:

…there is much to be said for the view that, where A contracts with B to render services exclusively to C, the contract is not a contract for services, but a contract sui generis, a different type of contract from either of the familiar two.

1. That observation was made in the context of Cooke J having earlier stated that the sole question there raised was whether contracts of service were made between a labour-hirer and particular workers and that it did not matter whether the contracts in question were contracts for services or some further variety of contract (at 224).
2. Whether a contract made between a labour-hirer and an independent contractor for the provision of the services of the independent contractor exclusively to a third person, is not a contract for services but a peculiar contract of its own kind, is not helpful to the analysis here being considered. We have already determined that there was no such contract. The question currently under consideration is whether a contract made between a provider of labour and its end-user is an employment contract. In a bilateral arrangement of that kind, as we have earlier said, the contract will either be a contract of service or a contract for services. No party contended for the existence of the latter and our analysis that Best and Roden were not independent contractors would not, in any event, allow for the conclusion that contracts for services existed between Quest and Best and Roden. It follows that if there was a contract between Quest and each of Best and Roden, it must have been an employment contract.
3. That conclusion, reached by a process of elimination, is confirmed by a multifactorial factual analysis which unquestionably reveals the common hallmarks of an employment relationship between Quest and each of the workers. Best and Roden provided their labour to Quest personally. They did not and, it may be inferred, had no capacity to delegate. They worked as and when required by Quest, under Quest’s direction, supervision and control. They wore Quest’s uniforms and were portrayed or represented as part of Quest’s business. Their activities were integrated with the business of Quest. They performed work using Quest’s equipment at Quest’s facilities. The basis for the calculation of and the quantum of their remuneration was consistent with what may be expected would be paid to an employee performing the same work. There are arguably three considerations that point the other way. One, which we have already considered (at [197]–[199]), is the payment by Best and Roden of an amount purportedly in regard to public liability insurance. We will now address the other two.
4. On and from 18 November 2009, Best and Roden were no longer paid by Quest but received payment from Contracting Solutions. Other related activities such as the issuing of payslips and the withholding of PAYG tax were also no longer performed by Quest but done by Contracting Solutions. Given that the essence of an employment contract is the exchange of labour for remuneration, payment by the employer may be regarded as fundamental. However, it is not inconsistent with the existence of an employment contract for an employee to receive payment from a third person. Whether the payment is received directly or indirectly from the end-user of the labour is not determinative. As the Privy Council said in *Narich* at 607, it is not the manner of payment but its substance that matters:

…the substance of the matter is that the [putative employees] have their fees paid to them out of monies belonging to [the putative employer], and must therefore, as a matter of commonsense, be regarded as being paid by [the putative employer].

1. Other cases demonstrate that the payment made by a third party to a worker is not necessarily inconsistent with the existence of an employment relationship between the worker and the end-user: *Odco No 2* at 119 (the Court); *Damevski* at [91] (Marshall J, with whom Wilcox J agreed); *Bellechic Pty Ltd* (Ryan J); *Australian Insurance Employees Union v WP Insurance Services Pty Ltd* (1982) 1 IR 212 at 216 (Evatt J).
2. Given our view that, in relation to Best and Roden, the Hiring Agreement was inoperative and that Contracting Solutions did not, either via that agreement or at all, provide the labour of Best and Roden to Quest, the monies that were paid by Quest to Contracting Solutions and calculated by reference to what Best and Roden were paid for the work they performed for Quest, must be regarded as the funds of Quest thereafter paid by Contracting Solutions to Best and Roden on behalf of Quest. The substance of the matter was that Best and Roden were paid out of monies of Quest for work they provided to Quest and not to Contracting Solutions. In relation to those payments and the related payroll functions provided by Contracting Solutions, Contracting Solutions must be regarded as having performed those functions as the agent of Quest.
3. Nor do we consider the evidence that Contracting Solutions set the rate it would pay to independent contractors provided by it to Quest to be of any significance to the issue of whether Quest was the employer of Best and Roden. As we have said, Best and Roden were never provided by Contracting Solutions to Quest as independent contractors or at all. That the rate set for a purpose that never eventuated became the default rate for the purpose of the payment made to Best and Roden for work provided by them to Quest is of no moment to the question of whether Quest was the employer. In any event, having regard to the evidence, the rate set by Contracting Solutions was set with the acquiescence of Quest. Other than the three aspects to which we have referred, the activities of Best and Roden and the circumstances in which those activities were carried out were indistinguishable from those that existed when Best and Roden were unquestionably employees of Quest. Those three factors are, in our opinion, substantially and decisively outweighed by factors to which we have already referred and which tend in favour of the conclusion that Best and Roden were employees.
4. As to the standard elements of contractual formation, there is no issue as to certainty or consideration which would serve to deny the existence of contracts of employment between Quest and each of Best and Roden.
5. As Gaudron, McHugh, Hayne and Callinan JJ said in *Ermogenous* at 105–106, the search for an intention to create contractual relations requires an objective assessment of the state of affairs between the parties free of the application of prescriptive rules. What matters is what is objectively conveyed by what was said and done in the circumstances in which that occurred, irrespective of the uncommunicated subjective motives or intentions of the parties. Here, the state of affairs (in each case) from the time of “conversion,” bore the hallmarks of an employment relationship and, taking an objective assessment, there is no reason to suppose that the parties did not intend to make the very relationship that their conduct suggests was made.
6. For those reasons, we are satisfied that each of Best and Roden was an employee of Quest. Best was employed by Quest from 2 November 2009 to 28 November 2009. Roden was employed by Quest from2 November 2009 to 14 November 2010.
7. Before we leave that issue, it is convenient at this juncture to further address the reliance placed by Contracting Solutions on *Odco* and its contention that the facts of that case are analogous to the facts of this case and that accordingly we should reject the proposition that Best and Roden were employees of Quest.
8. In *Odco No 1*, at first instance, Woodward J described the issue of whether workers supplied by Troubleshooters were “bona-fide self-employed sub-contractors” as laying “at the heart of” that proceeding (at [24]). Woodward J found that the workers engaged by Troubleshooters were independent contractors (at [270]). That finding was confirmed on appeal (at [127]). Woodward J came to that conclusion primarily because he considered (relying upon what Wilson and Dawson JJ said in *Stevens v Brodribb* at 36) that “the degree of independence overall is sufficient to establish” that the workers provided by Troubleshooters were not employees but were independent contractors.
9. Woodward J did not have the benefit of the analysis in *Hollis*. His Honour did not consider whether the workers engaged by Troubleshooters “carried on a trade or business of their own” with quite the centrality that we have. Whether or not the same conclusion would be reached today, Woodward J was persuaded that the relevant workers were independent contractors. That conclusion was reached including because the workers considered in that case (or many of them) carried significant business expenses including in relation to clothing, equipment, vehicles and sickness and accident insurance (at [245]); they wished to be considered, and thought of themselves, as self-employed independent contractors who had deliberately chosen a working pattern which gave them control over their working lives (at [141]); many of them were skilled tradesmen; the tradesmen amongst them were contractors who moved between their own operations and engagements with Troubleshooters (at [142]); a significant number of them arranged their businesses as partnerships or, in a few cases, companies or family trusts (at [151]); and, they worked across a multitude of businesses, moving from one builder to the next on a daily hire basis (see at [98]–[102]).
10. In the facts of *Odco,* there was a stronger foundation for the conclusion that the workers were running their own businesses than is available on the facts of this case or those considered in *Damevski*. In any event, each case needs to be considered on its own facts. We have concluded that in this case, as in *Damevski*, and in contrast to *Odco*, the relevant workers were not independent contractors. That fundamental difference is central to distinguish the result in *Odco* from the result in *Damevski* and from the conclusion that we have reached that Best and Roden were employed by Quest.

## Did Quest contravene s 357(1) by making a representation about extant contracts?

1. The finding that Best and Roden were Quest’s employees provides an essential foundation to the Ombudsman’s case that, whilst the employer of Best and Roden, Quest represented to them that they were independent contractors and not employees. We are satisfied that such a representation was made. There are two ways in which the Ombudsman contended that, from November 2009, Quest represented to Best and Roden that they were independent contractors.
2. Those two ways were set out in the particulars given to paragraph 12 of the Ombudsman’s Amended Statement of Claim. First, it was asserted that the representation should be implied from Quest’s silence in not withdrawing or qualifying the earlier representation made (in the meetings prior to “conversion”) that if Best and Roden underwent “conversion,” they would thereafter be engaged under a contract for services under which they would perform work at Quest as independent contractors. We have found above at [30] that this earlier representation was made, although more properly described, the representation was that Best and Roden would perform work at Quest as independent contractors *contracting with Contracting Solutions*.
3. Secondly, it was asserted by the Ombudsman that the representation was made by conduct, in that Best and Roden were paid by Quest and Contracting Solutions as though they were engaged under a contract for services under which they performed work for Quest as independent contractors.
4. Section 357(1) prohibits the making of certain representations. There is no requirement to demonstrate that the representation was relied upon or effective in the sense that the message conveyed was comprehended. A representation will commonly be made by words but can obviously be made by conduct. Silence or an omission is a form of conduct. Section 12 of the FW Act defines “conduct” to include an omission. Although the word “conduct” is not utilised in s 357(1), we can see no reason for thinking that the reach of s 357(1) was not intended to extend to a representation made by conduct and thereby potentially by omission. The relevant question is, what would a reasonable person in the position of Best and Roden have understood Quest’s conduct to have meant: *North East Equity Pty Ltd (ACN 009 248 819) v Proud Nominees Pty Ltd (ACN 074 270 938)* (2010) 269 ALR 262 at [46]–[48] (Sundberg, Siopis and Greenwood JJ).
5. We consider that in the context of the earlier representation that on “conversion,” Best and Roden would be independent contractors of Contracting Solutions, Quest’s “post‑conversion” silence conveyed the message that after their “conversion” Best and Roden were working at Quest as independent contractors of Contracting Solutions. That Best and Roden received payments for the work they performed from the hands of Contracting Solutions and not from those of Quest would have reinforced the message conveyed that Best and Roden were not employees of Quest but independent contractors of Contracting Solutions. That conduct may be regarded as the conduct of Quest because, as we have earlier found, Contracting Solutions made those payments as Quest’s agent.
6. 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 as independent contractors of Contracting Solutions. Quest did not prove that when the representation was made, it: (a) did not know; and, (b) was not reckless as to whether Best and Roden were employees rather than independent contractors. On that basis, and applying the construction of s 357(1) and (2) for which the Ombudsman contended (rather than the construction which we prefer), we would have found that Quest contravened s 357(1) of the FW Act.
7. We should add that we reject the contention of Contracting Solutions that it was open to it to prove the matters required by s 357(2) to be proved by the employer. The terms of s 357(2) are clear. Section 357(1) does not apply “if the employer proves” the matters spelt out by s 357(2). The terms of s 357(2) do not countenance that burden being discharged by anyone other than the employer. The burden is personal to the employer and must be discharged personally.
8. The contention was largely driven by Contracting Solutions’ point that an alleged accessory ought be able to contest the state of mind issues raised by s 357(2) and ought not be disadvantaged by the failure of the employer to do so. However, the feared disadvantage is illusory. As we later explain, there will be no liability imposed upon an accessory, unless it is established that the accessory had knowledge of the essential elements of a contravention of s 357(1). As one of those essential elements is concerned with the subject matter dealt with by s 357(2), a person alleged to be an accessory can contest liability by reference to whether the person had knowledge of the primary contravener’s state of mind.

## Did Quest contravene s 357(1) by making a representation about prospective contracts?

1. We would not have found that the Ombudsman made out a contravention of s 357(1) by Quest based upon the earlier representation (made prior to the “conversion”). That earlier representation was directed at what, in construing the terms of s 357(1) (see [67]–[99] above), we earlier identified as a representation about a prospective or proposed contract.
2. The terms of that representation were pleaded at paragraph 11 of the Ombudsman’s Amended Statement of Claim (see [57] above) and the manner in which it was alleged the representation misrepresented the prospective contract was pleaded at paragraph 13 of the Amended Statement of Claim (see [60] above).
3. As we have earlier concluded (see at [72] above), in relation to a representation about a prospective contract, whether the contract was mischaracterised is a question to be answered by reference to what was proposed at the time the representation was made and not by reference to what in fact eventuated. As we have said, the question is not whether a representation made about the nature of the proposed agreement turned out to be false by reference to the agreement actually made.
4. Consistently with the view just expressed, in its oral submissions on the appeal, Contracting Solutions contended that whether what Quest proposed was a contract of employment needs to be assessed by reference to what was proposed at the time the proposal was made. Contracting Solutions contended that what was proposed by Konstek in the meetings prior to the “conversion” was a contract with Contracting Solutions by which Best and Roden would be engaged as independent contractors. There was no contract of employment with Quest proposed, even if, as things turned out, such a contract was later made.
5. In its written submission in response to that contention, the Ombudsman asserted that Contracting Solutions was here raising a new point not taken in the primary proceeding. That submission drew attention to what was raised in the primary proceeding. When we examined that issue by reference to the pleadings, it became evident that the Ombudsman’s pleading failed to make any allegation that the proposed contracts for services under which Best and Roden would perform work for Quest as independent contractors were, in fact, proposed contracts of employment with Quest. All that the Ombudsman pleaded at paragraph 13 of its Amended Statement of Claim (see [60] above) was that, notwithstanding the representation, after the “conversion”, Best and Roden “were in fact thereafter employed by Quest under a contract of employment”.
6. The Ombudsman’s pleading demonstrates that its case as to why the representation about the prospective contracts was actionable was based upon the allegation that post the “conversion”, Roden and Best were in fact employed under a contract of employment by Quest. The Ombudsman’s case, in this respect, failed to raise the proper question. Neither its pleading nor the case it ran engaged with the need to establish that the prospective contracts the subject of the representation were, at the time the representation was made, prospective contracts of service.
7. It may well have been that what was proposed “was objectively a contract of employment” as the Ombudsman’s written submissions in reply belatedly asserted. However, it was for the Ombudsman to make that case. Whilst it might have established that to be so, the Ombudsman neither pleaded such a case nor identified a proper basis for it. Its case in this respect must be rejected.

## Were Contracting Solutions and Konstek involved in any contravention of s 357(1) by Quest?

1. By grounds two and three of its Notice of Appeal, the Ombudsman contended that as a product of, and consequential on, the errors made by the primary judge raised by its first ground of appeal, the primary judge erroneously dismissed the Ombudsman’s application for a declaration that each of Contracting Solutions and Konstek was involved in Quest’s contravention of s 357, and for orders consequent to that declaration.
2. The reasons of the primary judge referred to accessorial liability at [251] and [253]. Those references, however, related to the claimed contravention of s 358 of the FW Act concerning Buttrum-Virco. The reasons for judgment of the primary judge did not deal with the question of accessorial liability in relation to contraventions of s 357, and that is presumably so because his Honour found no primary contravention.
3. Section 550(1) of the FW Act provides that a person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision. Section 550 is in the following terms:

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

(2) A person is ***involved in*** a contravention of a civil remedy provision if, and only if, the person:

(a) has aided, abetted, counselled or procured the contravention; or

(b) has induced the contravention, whether by threats or promises or otherwise; or

(c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or

(d) has conspired with others to effect the contravention.

1. The nature of the liability imposed by s 550(1) (in the context of the meaning of “involved in” set out in s 550(2)), was explained by Tamberlin, Gyles and Gilmour JJ in *Construction, Forestry, Mining and Energy Union v Clarke* (2007) 164 IR 299 at [26] as follows:

Regardless of the precise words of the accessorial provision, such liability depends upon the accessory associating himself or herself with the contravening conduct - the accessory should be linked in purpose with the perpetrators (per Gibbs CJ in *Giorgianni v The Queen* (1985) 156 CLR 473 at 479-480; see also Mason J at 493 and Wilson, Deane and Dawson JJ at 500). The words “party to, or concerned in” reflect that concept. The accessory must be implicated or involved in the contravention (*Ashbury v Reid* [1961] WAR 49 at 51; *R v Tannous* (1987) 10 NSWLR 303 per Lee J at 307E-308D (agreed with by Street CJ at 304 and Finlay J at 310)) or, as put by Kenny J in *Emwest Products Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2002) 117 FCR 588; 112 IR 388 at [34], must participate in, or assent to, the contravention.

1. The requirements of what was then s 75B of the *Trade Practices Act 1974* (Cth)were considered by the High Court in *Yorke v Lucas* (1985) 158 CLR 661. The terms of the former s 75B are the same as those found in s 550(2) of the FW Act. A wide range of elements are identified by the four sub-paragraphs of s 550(2). Each of those elements was considered by the majority in *Yorke*, although some only in passing. The majority (Mason ACJ, Wilson, Deane and Dawson JJ) held that each of the elements required intentional participation by an accessory in the primary contravention and that it was necessary to prove that the accessory had knowledge of the essential elements of the primary contravention (see at 667 and 670).
2. Relying upon *Yorke*, Contracting Solutions contended that it was incumbent upon the Ombudsman to prove that, in each case, Contracting Solutions and Konstek had knowledge of the elements of any contravention by Quest of s 357. The fact that the Ombudsman bore the onus of proof was not in contest.
3. An assessment of whether or not that onus was discharged must commence with an identification of the essential elements of a contravention of s 357(1). Given our conclusions to this point, we will confine our assessment to the kind of contravention by Quest which we have identified at [240].
4. In our view, s 357(1) contains two essential elements. The first is concerned with the contravener’s conduct. The second with the contravener’s state of mind. Broadly speaking and as to conduct, what is required is the making of a prohibited representation about the nature of a particular contract. As to state of mind, what is required to establish liability is that when the representation was made, the representor knew that the contract the subject of the representation was a contract of employment rather than a contract for services or was reckless as to whether that was so.
5. The first element we have identified is expressly dealt with by the terms of s 357(1). It must have been intended that the second element is also there contained. That is so because the terms of s 357(2) must be taken to assume that liability under s 357(1) includes proof of the second element. Section 357(2) both identifies the content of that second element and the way in which it may be negated. That the content of the second element first finds expression in s 357(2), is the result of a drafting technique designed to make it clear that the onus of proof in relation to the second element is reversed.
6. That analysis suggests that to establish accessorial liability, the Ombudsman needed to prove that, in each case, Contracting Solutions and Konstek had knowledge of each of the essential elements of Quest’s primary contravention. The primary contravention we have found (on the assumption that an actionable claim was made) has two essential elements as follows:

(i) after the “conversion”, Quest represented to Best and Roden that they were performing work at Quest as independent contractors of Contracting Solutions; and

(ii) when Quest made that representation, Quest knew that Best and Roden were its employees rather than the independent contractors of Contracting Solutions or was reckless as to whether that was so.

(Again, we have cast the elements listed in different terms to the words of s 357. That has been done so that, consistently with our assumption, the Ombudsman’s construction of s 357, rather than the construction we prefer, is accommodated).

1. We then turn to examine whether the Ombudsman discharged its onus and established that, in each case, Contracting Solutions and Konstek had knowledge of the two essential elements that we have listed.
2. The submissions made by the Ombudsman to the primary judge on the question of accessorial liability were scant. They did not engage at all with establishing the requisite knowledge. The submission made by Contracting Solutions to the primary judge were similarly unengaged. On the appeal, Contracting Solutions contended that it and Konstek had no involvement in the conduct of Quest after the “conversion” including in the making of any representation to Best and Roden. Accordingly, it was contended that Contracting Solutions and Konstek had no knowledge of the essential elements of the primary contravention.
3. That contention was challenged by the Ombudsman in reply submissions made in writing after the appeal was heard. The Ombudsman contended that Contracting Solutions was here taking a new point not taken in the primary proceeding and objected to it on that basis.
4. Whilst it seems to be true that it was only on the appeal that Contracting Solutions first sought to contend that it and Konstek were not accessorily liable because they had no involvement in the conduct of Quest after the “conversion”, the Ombudsman’s objection is beside the point. It was for the Ombudsman to establish that Contracting Solutions had knowledge of the essential elements. The Ombudsman only began to engage with that issue very late in the course of the appeal. Prior to the making of its written reply, very little was said beyond the broad assertion that “it is plain that each [of Contracting Solutions and Konstek] knew the objective facts that constituted the essential elements of the contravention”. It was only in its written reply and in the alternative to the objection that it raised, that the Ombudsman first identified the facts upon which it relied to establish knowledge by Contracting Solutions and Konstek of the essential elements of Quest’s contravention. Whilst Contracting Solutions was given the opportunity to and did make a written responding submission, it is both regrettable and unsatisfactory that the Ombudsman should have raised for the first time by its reply, the basis upon which it sought to contend that the essential elements of the primary contraventions it asserted were known to Contracting Solutions and Konstek.
5. The basis upon which the Ombudsman ultimately contended that Contracting Solutions and Konstek were accessories was that they continued to be involved in the relationship between Quest and the “converted” housekeepers. We accept that the evidence relied on by the Ombudsman establishes that Contracting Solutions continued to pay the housekeepers until at least 17 November 2010. Further, on behalf of Contracting Solutions, Konstek visited Quest’s premises on some 10 occasions over the six month period following the “conversion” to see how everything was going and to answer any questions. In that period, Konstek observed that Quest had ceased to regard itself as the employer of the workers who had agreed to become independent contractors and was telling those workers that once they had become independent contractors, they were no longer employees. Konstek never said anything to the workers to contradict what he had told them in his earlier meetings with them that if they agreed to become independent contractors they would cease to be employees.
6. Putting to one side the lateness at which this evidence was first relied upon, we consider that the evidence is sufficient to demonstrate that Contracting Solutions and Konstek had knowledge of the first essential element of Quest’s contravention, namely that after the “conversion”, Quest represented to Best and Roden that they were performing work at Quest as the independent contractors of Contracting Solutions.
7. As we have said, the second essential element is an element which goes to Quest’s state of mind. 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.
8. The need to establish an accessory’s knowledge of the primary contravener’s state of mind in an adverse action claim brought under s 340(1) of the FW Act, in which the contravener’s motive is an essential element of the contravention, was considered by Bromberg J in *Construction, Forestry, Mining and Energy Union v McCorkell Constructions Pty Ltd (No 2)* (2013) 232 IR 290 at [288]–[290], in a passage not dealt with subsequently in the reasons of the Full Court that considered that judgment. His Honour said:

[288] The CFMEU contended that whilst it is necessary to prove that the accessory knew what the principal contravener was doing, an accessory cannot know what the other person is feeling or thinking. It argued that whilst it was necessary for an accessory to have knowledge of the essential elements of a contravention, it was not necessary for an accessory to have knowledge of the principal contravener’s motive for the contravention.

[289] That submission must be wrong where a particular motive is a necessary element of the contravention. For instance, a person who assisted in the dismissal of an employee carried out by a contravener because of the employee’s race, could not be an accessory to the discriminatory conduct in the absence of having assisted knowing that the contravener’s conduct was motivated by race. Without that knowledge, it could not be said that the alleged accessory is “linked in purpose with the perpetrators”.

[290] An accessory will often know the principal perpetrator’s motive because the perpetrator will have revealed it. Alternatively, an accessory may know the perpetrator’s motive because their conduct is so intertwined, that the motive of one will be the obvious motive of the other.

1. To establish liability under s 357(1) it is not necessary to prove that the primary contravener held a particular motive, but the contravener’s state of mind is nevertheless relevant. What is required is that when the representation about the contract was made, the primary contravener knew that the contract was a contract of employment rather than a contract for services or was reckless as to whether that was so. (That requirement will be presumed where the employer fails to negate it in accordance with s 357(2)).
2. In that context, and in relation to this element of the primary contravention, to establish accessorial liability it would be sufficient to show that the accessory either knew that the primary contravener understood the contract to be a contract of employment rather than a contract for services or had knowledge of facts from which the accessory should reasonably have concluded that the contravener was reckless in its understanding of whether the contract was an employment contract rather than a contract for services.
3. There was evidence available to the Ombudsman from which it may have been able to establish that on the facts known to Contracting Solutions and Konstek, they had no reasonable basis for concluding that any view held by Quest that Best and Roden were independent contractors, was a view arrived at free of recklessness.
4. Somewhat incredibly, Konstek held the view that the mechanism by which the housekeepers were converted from employees to independent contractors was that they agreed to be independent contractors upon completing the Agreement to Contract. In other words, in Konstek’s view, an independent contractor was simply a person prepared to accept that designation. That view was shared by Buiks. It was also shared by the ultimate manager of Contracting Solutions, Robert Hutchinson. Contracting Solutions was a substantial business which traded upon its capacity to provide other businesses with the services of independent contractors. In the 2009–2010 financial year, Contracting Solutions made more than $16 million in payments to persons provided by it to other businesses as independent contractors. It did so operating a system which asserted an understanding of the legal distinction between an employee and an independent contractor and which warranted the provision by Contracting Solutions of what the law would recognise to be independent contractors and *not* employees.
5. The state of mind and the recklessness of Contracting Solutions or Konstek is not directly at issue. However, there was evidence that Quest relied on Contracting Solutions’ advice and was specifically told that the mechanism by which its employees would become independent contractors was simply that they agreed to do so.
6. For Quest to have accepted a proposition as simplistic as that, advanced by a party with a financial interest in what was then a proposed commercial arrangement, in the absence of independent advice, was probably reckless. That is particularly so in circumstances where Quest must have known that there existed a legal distinction between an employee and an independent contractor and that the distinction was one upon which important legal obligations depended. Contracting Solutions and Konstek, aware of those circumstances, may have lacked any basis for thinking that Quest was acting otherwise than recklessly. However, that evidence needed to be raised and relied upon by the Ombudsman in support of its claim of accessorial liability, for reasons including that Contracting Solutions and Konstek could respond to it. It was not raised and not relied upon. That seems to be so because the Ombudsman’s case did not properly engage with the need to discharge its onus and establish that Contracting Solutions and Konstek had knowledge of the essential elements of any contravention of s 357(1) by Quest.
7. For those reasons, if we had found the contravention of s 357(1) by Quest which we have described at [240], we would not have been satisfied that the Ombudsman had established that Contracting Solutions or Konstek were accessorily liable.

# disposition

1. In light of our conclusion that the representations made by Quest are not actionable under s 357(1) of the FW Act, the appeal must be dismissed.
2. We presume that the parties have proceeded on the basis that by the operation of s 570(1) of the FW Act, no order as to costs should be made. If, however, a costs order is sought and opposed, we will determine that issue on the basis of further short written submissions. If that is the case, the party seeking the order should file and serve its submission within seven days and a response should be filed and served seven days thereafter.

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| I certify that the preceding two hundred and seventy-six (276) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices North and Bromberg. |

Associate:

Dated: 17 March 2015

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| WESTERN AUSTRALIA DISTRICT REGISTRY |  |
| FAIR WORK DIVISION | WAD 314 of 2013 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | FAIR WORK FAIR WORK OMBUDSMANAppellant |
| AND: | QUEST SOUTH PERTH HOLDINGS PTY LTD (ACN 109 989 531)First RespondentCONTRACTING SOLUTIONS PTY LTD (ACN 099 388 575)Second RespondentPAUL KONSTEKThird Respondent |

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| --- | --- |
| JUDGES: | NORTH, BARKER AND BROMBERG JJ |
| DATE: | 17 MARCH 2015 |
| PLACE: | PERTH |

**REASONS FOR JUDGMENT**

# barker j:

1. The primary issue in this appeal, as the joint judgment of North and Bromberg JJ explains, is whether the primary judge erred in dismissing the claim of the appellant, the Fair Work ***Ombudsman***, that the first respondent, ***Quest*** South Perth Holdings Pty Ltd, contravened s 357(1) of the *Fair Work Act 2009* (Cth) (***FW Act***).
2. Subsidiary issues that enable the resolution of the primary issue are:
3. whether the construction of s 357(1) contended for on the appeal by the Ombudsman should be accepted;
4. if so, whether at material times Ms Best and Ms Roden (***housekeepers***) were engaged by Quest under contracts of employment; and
5. if so, whether at material times Quest represented to the housekeepers that their contracts of employment were contracts for services under which they performed, or would perform, work as an independent contractor.
6. In the event that the Court were to find that Quest contravened s 357(1), two further issues arise as to the “accessorial liability” of the second respondent (***Contracting Solutions***) and the third respondent (***Mr Konstek***).
7. The background facts presented and found by the primary judge and relevant to the appeal have been set out in some detail in the joint judgment of North and Bromberg JJ under the heading “Facts”, and particularly at [7]‑[27] and [31]‑[54], and I need not repeat them here.

### How should s 357(1) be construed?

1. Section 357 of the FW Act provides as follows:

(1) 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) 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.

1. Section 357, along with ss 358 and 359, appear in Div 6 of Pt 3-1 of Ch 3 of the FW Act, under the heading “Sham arrangements”.
2. Section 13(2)(d) of the *Acts Interpretation Act 1901* (Cth) makes it tolerably clear that the heading before the Division is part of the FW Act. Thus, it might be regarded in determining the proper construction of s 357.
3. The Ombudsman says that the first, and fundamental, aspect of the first ground of appeal – that the primary judge was wrong in dismissing the application for orders against Quest under and consequential on s 357 – is that the primary judge materially misconceived the Ombudsman’s case against Quest for orders under s 357. It is contended that his Honour erroneously considered that the Ombudsman’s case depended on a finding that the contracts of service under which the housekeepers were originally employed before their so‑called “conversion”, had been constructively terminated by Quest. The Ombudsman says this erroneous view is expressly articulated at [249] and in the penultimate sentence of [255] of the judgment of the primary judge.
4. The Ombudsman contends that the correct position is that the mechanism by which the original contracts were terminated was irrelevant to the Ombudsman’s case against Quest under s 357, because s 357 is indifferent as to whether the workers to which it relates were ever party to a contract of service or, if they were, to whether or how those contracts were terminated. Thus, the Ombudsman submits the only relevant question is whether the contracts, that the housekeepers were told were contracts for services, were in fact contracts of service.
5. The Ombudsman says that issue was raised for decision before the primary judge by [11]‑[14] of the Ombudsman’s amended statement of claim and was addressed in its final submission before his Honour.
6. The Ombudsman says the second aspect of this first ground of appeal is that the primary judge failed to address the Ombudsman’s reliance on ***Damevski*** *v Giudice* [2003] FCAFC 252; (2003) 133 FCR 438, and instead found, at [226] of his judgment, that the circumstances of the present case stood “in the same category” as those in *Building Workers’ Industrial Union of Australia v* ***Odco*** *Pty Ltd* (1991) 29 FCR 104 without there being any basis in the evidence for such a conclusion.
7. The Ombudsman says that the third aspect of the first ground of appeal is that, if the observations made in the primary judgment in the last sentence at [5], the first sentence of [9] and the last sentence of [19] constitute a finding that the contracts under which the housekeepers performed work after their “conversion” were contracts for services, then such a finding:
8. is wrong and, as *Damevski* demonstrates at [6], [51], [52], [89], [90], [96], [101], [102], [143] and [172(3)], cannot stand with the findings in the primary judgment at [19] and [213], that the work performed by the housekeepers and their relationship with Quest did not change “in any practical sense”, or the finding in [206] that Contracting Solutions acted as Quest’s agent in paying them;
9. may have been influenced by an erroneous view, articulated in [227] of the primary judgment, that the subjective view of Quest and Contracting Solutions was determinative of whether the housekeepers were employees or independent contractors, when *Damevski* demonstrates that the correct position is that the reality of the relationship is the only determinative factor; and
10. in any event, is not attended by any reasons or reasoning.
11. In the course of the hearing of the appeal, a question was raised by the Court as to the proper construction of s 357(1) and whether it could be said to apply in the factual circumstances of this case – a constructional issue apparently not raised by the respondents on the appeal, or raised before the primary judge.
12. In their joint judgment, North and Bromberg JJ deal with the question of the proper construction of s 357(1) at [67]‑[99].
13. In the result, North and Bromberg JJ say, at [100], that to be “actionable” under s 357(1), 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.
14. Because the Ombudsman did not plead that Quest made a representation which misrepresented the nature of the proposed or extant contracts of employment it alleged that the housekeepers had with, or were offered, by Quest, and because the Ombudsman did not run its case before the primary judge based upon establishing that a representation of that kind was made, North and Bromberg JJ consider that the primary judge’s order dismissing the proceeding under s 357 was correct and ought not be set aside.
15. I have been in two minds about the proper construction of s 357(1). An alternative construction to that preferred by North and Bromberg JJ, is the construction contended for by the Ombudsman. Having regard to the text of s 357(1), it may be said it was not incumbent upon the Ombudsman, in alleging contravention of s 357 before the primary judge, to prove that the “contract for services” representation was a representation about a particular contract that the “employer” (as defined in s 357(1)) and the “individual” (referred to in s 357(1)) were negotiating or had just concluded in respect of their personal contractual relationship.
16. On this reading of the text, there is no reason why the relevant representation, 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”, may not encompass a representation that the work which the individual performs, or would perform, as an independent contractor, is or will be work under a contract for services the individual has made, or proposes to make, with a third party, such as a labour hire firm like Contracting Solutions. The question is why the type of contract for services to which s 357(1) refers should be confined to a contract made, or to be made, by the employer with an individual.
17. In finding that the representation must be of that type, North and Bromberg JJ place emphasis on the text of s 357(1), and particularly the words suggesting that the representation of the employer concerning the contract for services must necessarily relate to “*the* contract of employment under which the individual is, or would be, employed by the employer” (emphasis added), as well as the legislative history of s 357, including s 900(1) of the earlier *Workplace Relations Act 1996* (Cth) and the Explanatory Memorandum to the Fair Work Bill 2008 (Cth) and the Explanatory Memorandum to the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (Cth), each of which appears to support the construction their Honours prefer.
18. It might be argued, however, that these extraneous materials need not be relied on to construe the meaning of the text used in s 357(1), if the text is otherwise plain.
19. In the context of such an extensive piece of workplace regulation as the FW Act, there may be said to be every reason why s 357(1) should be construed strictly according to its ordinary grammatical meaning, albeit in context and having regard to the objects and purposes of the FW Act; as required by *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [78] (the plurality).
20. The primary object of the FW Act is set out in s 3, which provides that the object is to provide “a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians”, by the mechanisms then set out in (a) to (g). Paragraph (a) states:

providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia’s future economic prosperity and take into account Australia’s international labour obligations.

1. Section 336(1) of the FW Act specifies the objects of Pt 3-1 of the Act, within which, as noted above, Div 6 and s 357 appear. Those objects 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.

1. Section 336(2) (which came into operation on 1 January 2013) emphasises that the protections referred to in subs (1) are provided to a person, whether an employee, an employer or otherwise.
2. To the extent that these objects of the FW Act should be regarded and may be considered helpful in the construction of s 357(1), they tend to emphasise that there is to be freedom and flexibility in agreement making and freedom from discrimination in the exercise of workplace rights. Probably, however, they do not help very much in the construction of s 357.
3. To the extent that the heading to Div 6 – “Sham arrangements” – is relevant to the constructional issue, it perhaps speaks for itself. That is to say, the substance of a transaction or dealing will always trump the form that it takes in the course of legally characterising it. But it also may be said not to take things terribly far.
4. Militating against the alternative construction to s 357(1) is s 357(2). This is because there will be no contravention, in terms of subs (1), if the employer proves that, when the relevant representation was made, the employer did not know and was not reckless as to whether “*the* contract was a contract of employment, rather than a contract for services” (emphasis added).
5. The use of the definite article “the” in this context, before the phrase “contract of employment …” strongly suggests that, as a matter of fact, there is, or 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.
6. 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.
7. While it may be contended that subs (2) is intended to permit a defence that is limited in scope and does not cover a representation about a third party contract for services, it seems unlikely that such a partial defence would have been intended. Rather subs (2) helps in understanding the true scope of subs (1).
8. In these circumstances, I consider the construction preferred by North and Bromberg JJ is, with respect, correct.
9. Accordingly, for the reasons given by North and Bromberg JJ in their joint judgment, the appeal pressed by the Ombudsman cannot succeed as there is no “actionable” representation.

# Were the housekeepers employed by quest under contracts of employment?

1. I should add that if the alternative construction, for which the Ombudsman contended, was to have been preferred, I would have found the housekeepers were indeed employees from the time of their placement with Quest following their “*Odco* conversion”, for the reasons, briefly stated, that follow.
2. The *critical* question, on the pleadings (as explained in the joint judgment of North and Bromberg JJ), is whether the placement of the housekeepers by Contracting Solutions with Quest after the conversions were made resulted in them being properly characterised, at law, as employees, not as independent contractors. If they were employees then, as discussed below, Quest represented to them from the commencement of their placement as at 2 November 2009, that their contracts were for services, in contravention of s 357(1).
3. The primary judge appears to have accepted that because the *Odco* arrangements were purportedly implemented, with the housekeepers formally and voluntarily resigning their positions with Quest and signing on with Contracting Solutions as “independent contractors”, it was not open to find they became employees upon their placement with Quest.
4. In that regard, I accept the submission made on behalf of the Ombudsman that the earlier apparent implementation of the *Odco* arrangements does not preclude consideration and acceptance of the Ombudsman’s contention in this regard.
5. That is not to say, however, as discussed below, that the arrangements variously made: by Quest with Contracting Solutions; by the housekeepers with Contracting Solutions; and the terms of the arrangements upon the housekeepers’ placements with Quest, are irrelevant, for they are not.
6. The *Odco* case – which had the effect, broadly speaking, of legitimising the operation of labour hire firms and characterising the labour they supplied to business enterprises as labour provided or engaged on an independent contracting basis – supports the view of Quest that the housekeepers, following their *Odco*-like conversions, were independent contractors supplied to it by Contracting Solutions, and that they did not thereafter become employees of Quest (or indeed independent contractors to Quest under any direct contractual arrangements with Quest).
7. While I understand the primary judge to have adopted that approach, the Ombudsman submits that, upon detailed analysis and having regard to the factual circumstances that prevailed upon their placement with Quest following their conversion, the housekeepers became employees. This analysis, the Ombudsman submits, is well‑illustrated by *Damevski*.
8. In my view, depending on the circumstances of a particular case, an *Odco* outcome might reasonably be arrived at, or a *Damevski* outcome might reasonably be arrived at. As demonstrated in their Honours’ analysis of this broad question at [132]-[171] of the joint judgment, the authorities have often sought to characterise the true relationship of a worker and an enterprise, in circumstances where a labour supply arrangement has been interposed between them, in terms of whether the labour supply arrangement is coherent, in commercial terms, so as to make the continued characterisation of the worker as an independent contractor factually explicable. If it is not, the view may be adopted that the worker is not hired help, but an employee of the enterprise.
9. In *Damevski*, Merkel J, at [144], made the point, with which I respectfully agree, that whether a contractual relationship of employer‑employee exists between an enterprise and a worker placed with that enterprise, “depends on the proper characterisation of the contractual arrangements made between the various parties”. His Honour in referring to the “various parties” was referring not only to the enterprise and the worker but also to the labour hire firm involved in the hiring arrangement. His Honour there further made the point, which I accept, that the labelling of the relationship of the parties, chosen by the parties, may be disregarded where in law they are wrong having regard to “the real substance” of the relationship: see *Curtis v Perth and Fremantle Bottle Exchange Co Ltd* [1914] HCA 21; (1914) 18 CLR 17 at 25 (Isaac J).
10. Ultimately, at [172], Merkel J concluded that the “real substance” of the contractual agreements made between the various parties in *Damevski* was that the labour hire firm had the role, in the relationship between the enterprise and its former employees, of agent for both parties and in creating privity of contract between them. His Honour gave four detailed reasons for coming to that conclusion, which are worth noting in detail, as follows.
11. First, under the respective agreements entered into by the enterprise in respect of all of its employees in the ACT, including its managers and supervisors, those employees were to be employed precisely as they had been previously, save that the arrangements for payment were to differ as a result of the interposition of the labour hire firm as a conduit for payment of the new rates of pay payable to the employees. The labour hire firm was to receive the “contractors’” time sheets and pay them the amount due and receive an administration charge. There was some evidence that the labour hire firm paid Mr Damevski only after it was paid by the enterprise. That evidence was also consistent with a principal/agent relationship. In any event, as was pointed out in *Odco,* at 119, payment by an “intermediary” is not fatal to the existence of an employment relationship between the contractor and the putative employer.
12. When the role of the labour hire firm in the relationship was considered it was difficult to see it as anything other than an intermediary employed by both parties to create privity of contract between them. It was significant that the labour hire firm was to play, and played, no role in determining the rates payable, other than to ensure they included its administrative charges, or in determining the time and content of the services to be performed by the former employees. Both of those matters were determined by the enterprise.
13. Secondly, the enterprise, rather than labour hire firm, made *all* of the specific arrangements relating to Mr Damevski’s re-engagement to work as a cleaner for it as from the date of conversion. It determined and informed him about where, when and how he was to work under the new arrangements and how much he was to be paid for that work. It provided him with the vehicle, clothing and equipment that enabled him to carry out his cleaning work for it. When the enterprise no longer required his services that effectively brought to an end his employment under these arrangements. The enterprise’s conduct was consistent with it acting as a principal, rather than as an agent for the labour hire firm, in relation to the employment after the conversion date.
14. Thirdly, all of the relevant features of Mr Damevski’s employment, save for the manner and quantum of payment, remained unchanged. He did not supply any of the equipment required to perform his services. Viewed as “a practical matter” he did not conduct his own business or enterprise or have any independence in the conduct of the cleaning services he provided to the enterprise. Little skill or training was necessary for him to carry out his services. Neither he, nor his putative agent, the labour hire firm, had any real scope for bargaining for rates of remuneration. He could not take work or annual leave as and when he wanted. His tools and equipment were provided by the enterprise, which controlled and directed where, when and how he was to work. Applying the factors relied upon in the joint judgment in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 it is clear that, notwithstanding the labels employed by the parties, Mr Damevski provided his services to the enterprise post‑conversion as an employee, rather than as an independent contractor.
15. Accordingly, Merkel J was satisfied that the common intention of the parties, viewed objectively, manifested by their words and conduct, was that Mr Damevski was to re‑employed by the labour hire firm acting as agent on behalf of the enterprise and Mr Damevski. Save for the labour hire firm’s role in respect of payment, the evidence did not establish that it was to have any role as principal in relation to his employment relationship with the enterprise as and from the post‑conversion date.
16. His Honour concluded that was consistent with the commercial circumstances surrounding the communication and with the subject matter of those communications between those various parties. His Honour said that those circumstances and that subject matter could be simply stated as the enterprise “requiring that its workforce and their work continue in all respects as before, save that the workforce performed that work as independent contractors”. Merkel J said that the failure of the enterprise to achieve that outcome is the result of the parties not having the legal capacity to determine the nature of their contractual relationship by the use of labels that do not accord with the real substance of that relationship.
17. Fourthly, the factors that led the Full Court to reject a similar agency argument in *Odco* were absent in Mr Damevski’s case. The enterprise, rather than the labour hire firm, effectively fixed the remuneration to which Mr Damevski was entitled. Further, the labour hire firm played virtually no role in relation to Mr Damevski’s employment relationship with the enterprise. Although the labour hire firm was liable to pay Mr Damevski the agreed rate, his Honour was not satisfied that the evidence justified a finding that there was a common intention that Mr Damevski could not look to the enterprise for payment of his services. Rather, the re-employment relationship his Honour was satisfied existed as from the post‑conversion date, entitled him to look to the enterprise for payment if, for some reason, the labour hire firm was not paid in respect of Mr Damevski’s services.
18. While Marshall J did not rely on the conduct of the labour hire firm as agent of the parties in the way that Merkel J did – and the presiding judge, Wilcox J, said, at [2], that he preferred the view of Marshall J in this regard – Marshall J also concluded, at [65], that, on the facts as found, the enterprise did not establish an arrangement in the form recognised in *Odco* or any like arrangement.
19. Marshall J was also fortified in the conclusion he reached, by his finding that the alleged contract between the labour hire firm and Mr Damevski was ambiguous, which, of itself required the “reality of the situation” to be examined closely to establish what legal relationship, if any, actually existed (at [79]).
20. Wilcox J, having preferred the view of Marshall J on the agency question, also doubted that the difference mattered very much. With that observation, I respectfully agree.
21. Wilcox J, at [4], said that the finding of his colleagues to the effect that there was a contract of employment between the enterprise and Mr Damevski was compelling, whether one focussed on the evidence relevant to the existence of any relationship between Mr Damevski and the labour hire firm, or that relevant to any relationship he had with the enterprise.
22. Wilcox J, who was also a member of the Full Court in *Odco*, noted, at [7], that he was a party to that decision and did not resile from anything there decided. His Honour stated that “the facts of that case were significantly different from those of the present case”.
23. In my view, the substance of the arrangements between the various parties considered by Merkel J in *Damevski* are present in this case. I am satisfied that, in substance, and despite the labels that various parties endeavoured to apply to the housekeepers following their resignation as employees and “conversion” to independent contractors, upon recommencing work with Quest a new contract of employment was effected, by implication, for the same reasons that Merkel J found Mr Damevski was an employee.
24. In my view, there is no significant distinction between the two cases. Here, as in *Damevski*, the hiring agreement provided for Contracting Solutions to bill Quest before paying the housekeepers. While in *Damevski*, but not here, the enterprise controlled the rates of pay of the workers, that seems to me to be an immaterial difference when one considers the nature of the relationship overall by which Quest controlled the implementation of the arrangements.
25. In short, the reality of the situation here was that nothing changed for the housekeepers from the work day prior to the conversion, to the work day following the conversion. They had no control over their work. They did not operate any independent business. Further, from the housekeepers’ point of view, nothing changed in the performance of their work after the conversion. The lip service paid by Quest and Contracting Solutions to the legal language of being an independent operation, by creating separate pay, superannuation, insurance and tax structures and the like, cannot hide the substance of the arrangement that subsisted between the housekeepers and Quest following the “conversion”. While their take‑home pay was higher, something Quest had acceded to, nothing else changed. The housekeepers were employees.
26. Thus, if I had considered the alternative construction of s 357(1) which the Ombudsman contended to be the proper construction of the provision, I would have found that from the placement of the housekeepers with Quest from 2 November 2009 they were employees of Quest, as alleged by the Ombudsman.

# did quest represent to the housekeepers that they were engaged under a contract for services?

1. If it had been necessary to so find, I would also have had little hesitation in finding that this representation was made upon the placement of the housekeepers with Quest from 2 November 2009. Quest, by its and Contracting Solutions’ earlier conduct, represented that the relationship between Quest and the housekeepers, as and from 2 November 2009, was not governed by a contract of employment with Quest, but by a contract for services, and the housekeepers were independent contractors of Contracting Solutions. In that regard I would, with respect, adopt the conclusion and reasons for it of North and Bromberg JJ at [239]‑[240] of their joint judgment.
2. It would follow, on application of the alternative construction of s 357(1), that the representations made to the housekeepers from 2 November 2009 and continuing until their employment ceased, were, as alleged by the Ombudsman, in contravention of s 357(1) of the FW Act.
3. I would also agree with North and Bromberg JJ, as explained at [241] of their joint judgment, that it was for Quest to raise and prove the s 357(2) defence at the hearing, not for the Ombudsman to negative it.
4. As no defence was offered by Quest at the hearing before the primary judge that in making the representations it did not know and was not reckless as to whether the contract was a contract of employment, rather than a contract for services, s 357(2) would have had no relevant operation.

# Are contracting solutions and Mr konstek liable for quest’s contravention?

1. If Quest were to have been found liable for contravening s 357(1), for the reasons given by North and Bromberg JJ in their joint judgment at [273], the Ombudsman did not prove that either Contracting Solutions or Mr Konstek had knowledge of the two essential elements of Quest’s contravention of s 357(1) described by their Honours in their joint judgment at [257]. As a result I would have found neither had any accessorial liability for Quest’s conduct.

# Conclusion and order

1. I would, however, for the reasons given above, dismiss the appeal.

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| I certify that the preceding sixty-four (64) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Barker. |

Associate:

Dated: 17 March 2015