

1 SETTLING THE CONTRACT: ESSENTIALS OF FORMATION AND CHARACTERISATION

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1.05 Introduction

This book commences with a discussion about the relationship between employer and employee. Whether a contractual relationship pursuant to which a person works for remuneration for the benefit of another is one of employment is of fundamental importance in Australian employment law. This is because many rights and obligations, principally rights under legislation, depend on the work relationship being one of employer and employee as opposed to some other relationship, such as that of principal and independent contractor. This chapter explains how the courts go about determining whether an individual is an employee. It then goes on to examine the difficulties that can arise in identifying an employee's employer where there are complex corporate arrangements, labour hire arrangements and labour supply chains. Consideration is then given to how the law deals with arrangements in which an employer seeks to disguise an employment relationship as an independent contractor relationship; in particular, by examining the sham contracting provisions in the *Fair Work Act*. The chapter then concludes with a summary of the federal legislation on independent contractors.

1.10 The significance of the employment relationship

There are a number of relationships within which work might be performed by one person for the benefit of another for remuneration.¹ Whether the relationship is one of employer and employee is important in determining what rights and obligations, both at common law and pursuant to legislation, are conferred upon the parties. Indeed, many (although, not all) of the rights and obligations that are the focus of this book depend upon determining whether or not the relationship is one of employment.

1.10.05 Vicarious liability

At common law, perhaps the most significant remaining reason for determining whether or not the relationship is one of employer and employee is vicarious liability.² At common law, an employer will be vicariously liable for the negligent acts of its employee carried out in the course of the

1 The employment relationship is contractual: this is discussed further below. The requirement for remuneration is necessary, because without remuneration there would be no consideration and therefore no contract of employment, or of any other kind: *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515.

2 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161 (*Sweeney*) at [27]. See *ACE Insurance Ltd v Trifunovski* (2011) 200 FCR 532 (*ACE Insurance (decision at first instance)*) at [25] for a discussion of other reasons at common law for which the distinction was once important. This point was not disturbed on appeal: *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 146 (*ACE Insurance (decision on appeal)*). Although vicarious liability is the most fundamental issue at common law concerning the distinction between independent contractor and employee, it should be noted that a number of duties implied into the contract of employment (discussed in Chapter 2) are also now implied into contracts between principal and independent contractor: see, for example, *Gallagher v Pioneer Concrete (NSW) Pty Ltd* (1993) 113 ALR 159, where the court implied a duty to give reasonable notice to terminate a contract between principal and independent contractor.

employment. By contrast, a principal will generally not be vicariously liable for the negligent acts of an independent contractor that it has engaged to perform work.³ The distinction between employees and independent contractors remains critical to the ambit of vicarious liability.⁴

1.10.10 Statutory rights and obligations

Determining whether or not a work relationship is one of employer and employee is of particular significance with respect to a number of legislative rights and obligations in respect of which the right or obligation attaches only to the relationship of employer and employee.

In the context of industrial relations legislation, for example:

- the *Fair Work Act 2009* (Cth) (*Fair Work Act*) predominantly confers rights and obligations on (national system) employers and employees.⁵ Such rights and obligations include minimum employment standards in respect of, for example, minimum hours of work, leave, minimum wages and the right to bring an unfair dismissal claim;⁶
- awards made by industrial tribunals such as the Fair Work Commission generally regulate only the terms and conditions of employment;⁷
- enterprise agreements that can be approved by the Fair Work Commission are made between employer and employees about matters pertaining to the employment relationship.⁸

There are many other legislative rights and obligations dealing with matters such as workers' compensation, taxation, superannuation and intellectual property in respect of which the employment relationship is an important distinguishing feature.⁹

There are also legislative rights and obligations which arise irrespective of whether or not the relationship is one of employer and employee. This is so, for example, in the areas of workplace health and safety, discrimination and victimisation at work.¹⁰

1.15 Identifying an employee

1.15.05 The employment relationship is contractual

Before turning to the common law's approach to determining whether or not a relationship is one of employment, that is, one of employer and employee, it must be understood that the

3 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 (*Hollis v Vabu*) at [32]. Although a principal might be vicariously liable for the negligent acts of an independent contractor where the duty is non-delegable duty: see, for example, *Leichhardt Municipal Council v Montgomery* (2007) 230 CLR 22.

4 *Sweeney* at [27].

5 'National system employee' and 'national system employer' are defined in ss 13 and 14 respectively of the *Fair Work Act*.

6 These rights and obligations and the concept of 'national system' employers and employees (and the types of employment to which various rights and obligations extend under the *Fair Work Act*) is discussed in Chapter 3.

7 The making of modern awards under the *Fair Work Act* is discussed in Chapter 3.

8 The making of enterprise agreements under the *Fair Work Act* is discussed in Chapter 4.

9 Aspects of these legislative rights and obligations are discussed in Chapter 4.

10 Workplace health and safety is covered in Chapter 5, discrimination is covered in Chapter 8, and victimisation at work is covered in Chapter 8.

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employment relationship is contractual. Without a contract between the putative employer and the putative employee there can be no employment relationship.¹¹

This chapter proceeds on the assumption that there is a valid and enforceable contract between the parties. Nevertheless, it is useful to summarise very briefly the key requirements for the formation of a valid and enforceable contract (of employment).

The formation of a contract of employment is governed by the same well-settled common law principles that govern the formation of any valid contract: agreement between the parties; an intention to create legal relations; consideration; and certainty and completeness of terms.¹² Of course, the parties must also have the capacity to contract. At common law the question of capacity – in the employment context – usually arose where the employee was a minor.¹³ The employment of minors is now the subject of specific legislative provisions.¹⁴ It is also possible for issues to arise around the capacity of corporations, unincorporated associations and the crown and its instrumentalities.¹⁵

It is important to note that the law does not require a contract of employment to be in writing. Indeed, it is often the case that there is no formal or detailed written contract. Given the informal way in which parties often enter into an employment relationship, it is not always possible to identify with precision a formal offer and acceptance as might be the case in commercial negotiations. Nevertheless, the parties must have reached an agreement. Where there is no formal offer and acceptance and a dispute arises as to whether the parties have reached a concluded agreement, the court will determine whether an agreement can be inferred from considering all the facts and circumstances objectively.¹⁶

The parties may have reached an agreement but they must also have intended their agreement to be legally binding. Without this intention the agreement will be unenforceable as a contract. The issue does not usually arise where the person is paid a wage for the work they do, although payment in some form does not of itself necessarily establish an intention to create legal relations.¹⁷ In the employment context, the issue of intention to create legal

11 *R v Brown; Ex parte Amalgamated Metal Workers and Shipwrights' Union* (1980) 144 CLR 462, 475; see also *Advanced Workplace Solutions Pty Ltd v Fox and Kangan Batman TAFE* [1999] AIRC 731, where the relationship had all of the characteristics of an employment relationship but the absence of any contract between the putative employer and employee meant that there was no employment relationship.

12 These principles are dealt with exhaustively in textbooks on contract law. See, for example, JW Carter *Contract Law in Australia* (LexisNexis Butterworths, 3rd ed, 2105) Chs 3–8. For a discussion of the principles in the context of employment contracts see M Irving *The Contract of Employment* (LexisNexis Butterworths, 2012) Ch. 3, and I Neil and D Chin *The Modern Contract of Employment* (Thomson Reuters, 2012) Ch. 3.

13 To be valid, the contract had to meet the test of necessity and be for the benefit of the minor: see Carter *Contract Law in Australia* (2105) 325.

14 This legislation is discussed in Chapter 2.

15 See Carter *Contract Law in Australia* (2105) 328–34. In the context of employment contracts see Irving *The Contract of Employment* (2012) 139–41.

16 *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [75]; *Damevski v Giudice* (2003) 133 FCR 438 at [84]–[85]. For a discussion of the objective approach to determining offer and acceptance in the employment context, see Irving *The Contract of Employment* (2012) 84–105.

17 See, for example, *Redeemer Baptist School Ltd v Glossop* [2006] NSWSC 1201. In that case the school paid the teachers but the payment was discretionary and also dependent upon the needs of the teacher and the school's capacity to pay. It was significant that both the school and the teachers said that they did not intend to make a binding contract.

relations has usually arisen in arrangements involving trainees, voluntary workers, ministers of religion and family members. The courts' approach was generally to presume that in those sorts of relationships the parties did not intend to create legal relations. After the High Court's decision in *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95,¹⁸ the better approach is not to presume the absence of an intention to create legal relations but to objectively examine all the facts and circumstances of the relationship between the parties.

To be enforceable, a contract of employment (like any contract) must be supported by consideration.¹⁹ This issue does not often arise in the context of employment as the requirement for consideration will usually be satisfied by the payment of wages (or the provision of other benefits) for the work performed.²⁰ There must generally, however, be what is called a mutuality of obligation.²¹ This means that there must be an obligation to perform work or provide services and an obligation on the other side to pay the agreed remuneration for those services.²²

The essential terms of a contract must be complete and certain. A contract will be incomplete if it does not contain all of the essential terms.²³ As will be seen in Chapter 2, however, incompleteness might be remedied through the implication of a term. Generally, a term will only be uncertain if it is so unclear or ambiguous that a court is unable to give meaning to it.²⁴

There are other matters that can affect the enforceability of a contract. For example, a contract or a term of a contract might not be enforceable because it contravenes a statute or public policy. This is a complex area and a proper treatment of it is beyond the scope of this book.²⁵ Finally, there must be no vitiating factors which could affect the enforceability of the contract, such as duress, unconscionability, undue influence or misleading conduct.²⁶

18 (2002) 209 CLR 95 at [24]–[27]. The High Court held that the relationship between the incorporated association that held property for use by the church and the archbishop was intended to have legal consequences.

19 An exception arises if a contract is made under seal: Carter *Contract Law in Australia* (2105) 116–17. It is rare for an employment contract to be made under seal.

20 The payment must, however, be in exchange for the work performed: see *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308, where the board and lodging provided to a worker at a Christian camp was not provided in exchange for the work he performed at the camp as a helping hand and group leader. The question of consideration in the context of the variation to an employment contract can be complex: see Irving *The Contract of Employment* (2012) 311–22 and Neil and Chin *The Modern Contract of Employment* (2012) 77–8.

21 The requirement for this obligation in the engagement of piece workers and casual employees is more complex: see Irving *The Contract of Employment* (2012) 106–09.

22 *Forstaff Pty Ltd v Chief Commissioner of State Revenue* (2004) 144 IR 1 at [90]. In *Dietrich v Dare* (1980) 30 ALR 407, the High Court held that there was no contract of service because there was no mutuality of obligation: the person, who was engaged on a trial basis and who was to be paid for any work done during that trial, was under no obligation to perform any work.

23 For a discussion about whether a term is essential in the employment context, see Irving *The Contract of Employment* (2012) 121–2.

24 For a discussion about whether a term is uncertain in the employment context, see Irving *The Contract of Employment* (2012) 124–5.

25 *Ibid* 177–86.

26 *Ibid* Ch. 4. Misleading and deceptive conduct is discussed in the context of termination of employment in Chapter 6.

1.15.10 A contract for the provision of personal services

A contract of employment is a contract for the provision of personal services. This means that a contract which permits the work to be done in another manner or by another person is generally not a contract of employment. So the capacity of a putative employee to delegate their services is a factor which tells against the relationship being one of employment. So, too, it follows that employment is something which cannot be unilaterally assigned.²⁷ These matters are taken up later in this chapter in discussing the common law tests for determining whether or not a person is an employee.

It is also important to appreciate that the requirement that the contract be one for the provision of personal services means that an employee must be a natural person.²⁸ As a consequence, a company cannot be an employee.²⁹ This will be so even where the company that has entered into the contract is the personal company of the worker and it is the worker who provides the services under the contract and ultimately benefits from the remuneration paid to the company.³⁰ This does not mean that the court might not look behind the contract and find that in fact the individual is truly the employee and the company has been interposed simply for the purpose of receiving payment under the contract.³¹ Such an arrangement might also come under scrutiny under the sham contracting provisions in the *Fair Work Act*, which are discussed later in this chapter.

1.15.15 The employee/independent contractor distinction

As noted, there are a number of other (contractual) relationships pursuant to which work might be performed for reward.³² However, the distinction between the relationship of employer and employee and that of principal and independent contractor is that which is most often made. It is the one that is most encountered in practice for the purposes of determining the conferral of the rights and obligations outlined above in respect of which the status of the person as an employee is necessary.

1.15.20 The express intention of the parties

The parties are free to choose the legal relationship which best suits their circumstances.³³ However, care needs to be taken as parties must conduct themselves, in their relations with

27 The personal nature of contracts of employment was discussed by Buchanan J in *ACE Insurance (decision on appeal)*, [25]. This is also discussed in Chapter 6.

28 *Humberstone v Northern Timber Mills* (1949) 79 CLR 389 at 404–05.

29 *ACE Insurance (decision on appeal)* at [25].

30 See, for example, *Zoltaszek v Downer EDI Engineering Pty Ltd (No. 2)* [2010] FMCA 938.

31 *Roy Morgan Research Pty Ltd v Commissioner of Taxation* (2010) 184 FCR 448 (*Roy Morgan*) at [43]; *ACE Insurance (decision on appeal)* at [152]–[153]. Note also that under the Part 3 of *Independent Contractors Act 2006* (Cth) the court's power to review a 'services contract' on the basis that it is harsh and/or unfair does not apply to a contract in which the independent contractor is a body corporate unless the work to which the contract relates is wholly or mainly performed by a director of the body corporate or a member of the family of a director of the body corporate: s 11(1)(b).

32 This includes the relationship of bailor and bailee, directors and officers of a corporation, partnerships and holders of public office. That is not to say that an individual might not have dual status as an employee and, for example, a director of the employer company. Officers within the public service are often also employees: public sector employment is dealt with in Chapter 7.

33 Some of the reasons for it suiting an individual worker to be treated as a contractor rather than an employee were noted by Buchanan J in *ACE Insurance (decision on appeal)* at [32].

regulatory agencies such as the Australian Taxation Office, in accordance with the legally correct interpretation of their relationship.³⁴

The parties might expressly set out their choice in a term in the written contract by which they declare the nature of their relationship. The parties' expressed intention will not, however, be conclusive.³⁵ It may be conclusive where an examination of the relationship points clearly to the relationship being that which accords with the parties' expressed intention. Where, however, the relationship is capable of being one or the other, the court will often resolve the ambiguity in favour of the parties' expressed intention.³⁶ However, the courts will go behind the parties' expressed intention when it does not accord with the 'true' character of the relationship. In short, the parties cannot change the true character of the relationship by calling it something it is not.³⁷ The courts will be the ultimate arbiter of whether the relationship is, at law, one of employer and employee or (for example) principal and independent contractor.³⁸ In the end, the parties' expressed intention is simply one factor to be considered.

The question has arisen as to whether the putative employee might be estopped from asserting that they are not an independent contractor in circumstances where they have proceeded with the relationship on the basis of that understanding. This question arose in *ACE Insurance Ltd v Trifunovski*, a case concerning whether insurance salespersons were employees and so entitled to paid leave under industrial legislation and awards. The insurance company that engaged them raised the defence of estoppel by convention on the basis that the parties had for many years proceeded upon the understanding that the agents were independent contractors. The insurance agents gave evidence that they had always believed, until more recent legal advice was obtained, that they were independent contractors. The estoppel argument was rejected.³⁹ In another case, although no argument based on estoppel was raised, the result was also that an employee's insistent statement to their putative employer to the effect that he was not an employee, had been self-employed by the organisation for a number

34 This point was emphasised by Buchanan J in *ACE Insurance (decision on appeal)* at [32].

35 *ACE Insurance (decision on appeal)* per Buchanan J at [32] and [36]. The parties' expressed intention is not the same as their subjective understanding of the legal nature of their relationship. That understanding is not relevant to the question. Nevertheless, how the parties regarded their relationship, in the sense of how they conducted themselves, will be relevant: see *Stevens v Brodribb Sawmilling Co. Pty Ltd* (1986) 160 CLR 16 (*Stevens v Brodribb Sawmilling*) per Mason J at 26.

36 *Massey v Crown Life Insurance Co.* [1978] 1 WLR 676 at 679, applied in *Australian Mutual Provident Society v Chaplin* (1978) 18 ALR 385 at 389–90; see also *Building Workers' Industrial Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104 (*Odco*); *ACE Insurance (decision at first instance)* at [114], a point which was not disturbed on appeal.

37 See, for example, *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184, where Gray J said that 'the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck'; see also *Hollis v Vabu* at [58]; *Roy Morgan* at [39]. And, in *On Call Interpreters & Translators Agency Pty Ltd v Commissioner of Taxation (No. 3)* (2011) 214 FCR 82 (*On Call Interpreters*) Bromberg J summarised the approach in saying, at [193], that 'The trend of Australian courts is to look beyond contractual descriptions and at the substance and truth of the relationship'.

38 For a discussion of the nature of the inquiry as one involving fact and law, see Neil and Chin *The Modern Contract of Employment* (2012) 36–8. As to the assessment being objective, see *On Call Interpreters* at [188].

39 Per Perram J at [145]. The estoppel argument was not pursued on appeal.

of years and would ‘not be told what to do’, was not a bar to his arguing that he was an employee when seeking an unfair dismissal remedy.⁴⁰

1.15.25 The true nature of the relationship: a practical and realistic approach

The courts will also look beyond other terms of the contract which might be relied upon as determinative of the character of the relationship and look to the ‘real substance’ or ‘reality’ of the relationship in question.⁴¹ This requires going ‘beyond and beneath the contractual terms’⁴² and examining the contract and the work practices to establish the totality of the relationship.⁴³ The court’s approach is one that is ‘practical’ and ‘realistic’.⁴⁴ The practical approach requires the analysis to commence with a proper identification of the parties to the relationship, their role and function and the nature of the interactions constituting their relations.⁴⁵

The importance of the court’s focus on the reality of the relationship, and not merely its form, is particularly important given the diversity of modern-day work arrangements. It is also important in the context of what has been described as an increasing trend towards ‘disguised employment relationships’.⁴⁶ Further, the *Fair Work Act* prohibits sham arrangements including where an employer misrepresents that a relationship as one of employer and employee when it is in truth that of principal and independent contractor.⁴⁷ Sham arrangements under the *Fair Work Act* are discussed in s 1.20.

1.15.30 The lack of a unifying definition and the search for an ultimate question

The question then is how to distinguish between the relationship of employer and employee and that of principal and independent contractor given that the employment relationship remains largely undefined as a legal concept.⁴⁸ Most of the statutes (and by derivation, industrial instruments⁴⁹) conferring rights and liabilities in respect of employment do not define or

40 *Meena v Biripi Aboriginal Corporation Medical Centre (t/as Werin Aboriginal Medical Centre)* [2013] FWC 4502.

41 *Damevski v Giudice* (2003) 133 FCR 438 per Marshall J at [144] and [172].

42 *Ibid* [77] and [78].

43 *Hollis v Vabu* at [24] citing *Stevens v Brodribb Sawmilling* at 29 per Mason J with approval.

44 *Hollis v Vabu* at [47] and [57]. For a discussion of these principles and authorities see *On Call Interpreters* at [188]–[199].

45 *On Call Interpreters* at [201].

46 *On Call Interpreters* at [204], and [196], where Bromberg J referred to the use of the expression ‘disguised work relationships’.

47 *Fair Work Act* s 357.

48 *Stevens v Brodribb Sawmilling* at 35 per Wilson and Mason JJ.

49 Industrial instruments such as awards and enterprise agreements will usually define types of employment – for example, whether the employment is full-time, part-time or casual – and provide for various classifications by reference to an employee’s experience and duties. However, whether a person is an employee remains to be determined by reference to the common law.

set out any test for determining who is an employee.⁵⁰ For example, a number of sections in the *Fair Work Act* provide that ‘employer’ and ‘employee’ have their ‘ordinary meanings’.⁵¹ It has been held that this phrase imports into the *Fair Work Act* the common law meaning of employee.⁵² This is perhaps paradoxical, given that, as already discussed, the only significant reason at common law for determining whether an individual is an employee or independent contractor relates to the imposition of vicarious liability.⁵³

The lack of a definition can be problematic given the number of statutes (and industrial instruments) conferring rights and imposing obligations in respect of employment and where legal consequences follow for failure to comply with those obligations.⁵⁴ For example, a contravention of the National Employment Standards in the *Fair Work Act* attracts a civil penalty.⁵⁵ Indeed, as Justice Bromberg noted in *On Call Interpreters and Translators Agency Pty Ltd v Commissioner of Taxation (No. 3) (On Call Interpreters)*, the *Fair Work Act* – whilst avoiding any definition of ‘employee’ – provides for the imposition of a civil penalty on an employer who misrepresents a contract to be one of employment in circumstances where it is not.⁵⁶

As a starting point, the contract of employment is often described as a contract *of* service and the contract between principal and independent contractor as a contract *for* services.⁵⁷ Describing the employment relationship as one *of* service suggests that the relationship is one of dependency and control. Yet, where a relationship might lie on the spectrum from dependency to independence, or on which side of the ‘binary divide’ it may lie, will not always be readily apparent. It will fall to be determined on a case-by-case basis, and no two cases will be the same given the multitude of ways in which the parties might organise and conduct their relationship and work arrangements.

The courts, whilst not seeking to provide a unifying definition, have, at times, approached the task by framing an ‘ultimate question’ in a way that seeks to provide a focal point around which the relationship can be examined.⁵⁸ So, for example, in *Marshall v Whittakers’ Building Supply Co*⁵⁹ the ‘ultimate question’ was posed by Windeyer J when he said that the distinction

50 Sometimes a statute will broaden the reach of a particular right by deeming workers who might not otherwise be employees at common law to have the benefit of that right. The issue of deemed employees is discussed below.

51 See, for example, *Fair Work Act* s 335 (in respect of Part 3-1), and ss 15, 30E, 30P and 770.

52 *C v Commonwealth* (2015) 234 FCR 81 at [34]. By way of contrast, see *Konrad v Victoria Police* (1999) 91 FCR 95 at 127, where a meaning of ‘employee’ wider than that used at common law was accepted on the basis that the provisions of the then *Industrial Relations Act 1988* (Cth) provided that the terms ‘employer’ and ‘employee’ (in respect of unfair dismissal) imported the meaning ascribed to those terms in the International Labour Organization Termination of Employment Convention in which the words ‘worker’ and ‘employer’ did not bear common law meanings because the Convention applied to many countries in which the common law did not apply.

53 *ACE Insurance (decision at first instance)* at [25]–[26]. The point was not disturbed on appeal.

54 *On Call Interpreters* at [206].

55 The National Employment Standards (NES) are contained in Part 2-2 of Chapter 2 of the *Fair Work Act* and provide a number of minimum terms and conditions of employment for employees in relation to such matters as hours of work and leave. The *Fair Work Act* s 44(1) provides that a breach of the NES attracts a civil penalty. The same is true with respect to the contravention of awards or enterprise agreements: ss 45 and 50 respectively of the *Fair Work Act*.

56 *On Call Interpreters* at [206].

57 See, for example, *Stevens v Brodribb Sawmilling* per Wilson and Dawson JJ at 36.

58 *On Call Interpreters* at [207]–[209].

59 (1963) 109 CLR 210 at 217.

between a servant⁶⁰ and an independent contractor ‘is rooted fundamentally 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’.⁶¹ This statement was cited with approval by the plurality of the High Court in *Hollis v Vabu Pty Ltd*, in what is widely regarded as a landmark case on the modern approach to differentiating between an employee and an independent contractor.⁶²

The question has been similarly framed in industrial relations tribunals. For example, in *Abdalla v Viewdaze Pty Ltd* a full bench of the (then) Australian Industrial Relations Commission, in deciding whether a travel agent was an employee for the purposes of the unfair dismissal laws, approached the question by asking whether the person was a servant of another in that other’s business or was conducting a business of their own.⁶³

1.15.35 Restating the ultimate question

A more recent judicial restatement of the ‘ultimate question’ is to be found in the decision of Bromberg J in *On Call Interpreters*. This case was concerned with whether On Call was liable to pay a superannuation guarantee charge in relation to a number of translators and interpreters it engaged to perform translating and interpreting services for its clients on an assignment basis. On Call had treated them as independent contractors and so had not made any superannuation contributions on their behalf.⁶⁴ The Commissioner of Taxation views the translators and interpreters as employees and, accordingly, levied a superannuation guarantee charge. On Call challenged the assessment. In discussing how to distinguish an employee from an independent contractor, his Honour said:⁶⁵

- 60 The use of the word ‘servant’ here harks back to the relationship of master and servant, from which the contractual relationship of employer and employee has evolved.
- 61 Interestingly, Wilson and Dawson JJ in this passage in *Stevens v Brodribb Sawmilling* say that Windeyer J was really posing the ultimate question in a different way, or restating the problem, rather than offering a definition which could be applied for the purpose of providing an answer: 35. Their Honours said they would be doing no more themselves if they were to ‘suggest that the question is whether the degree of independence overall is sufficient to establish that a person is working on his own behalf rather than acting as the servant of another’: 35.
- 62 *Hollis v Vabu* at [40]. Taking the same approach, in relation to the question of whether a person performing personal services for the benefit of another was an employee or an independent contractor, in the context of vicarious liability, the majority of the High Court in *Sweeney* [33] described the worker (a mechanic) who had performed the work as doing so ‘not as an employee of the respondent but as a principal pursuing his own business or as an employee of his own company pursuing its business’. See also *Roy Morgan* at [45] and *ACE Insurance (decision at first instance)* at [29] (not disturbed on appeal).
- 63 (2003) 122 IR 215 at 227–8. See also *ACT Visiting Medical Officers Association v Australian Industrial Relations Commission* (2006) 153 IR 228 where, in the context of an application to the (then) Australian Industrial Relations Commission by an association of visiting medical officers for registration as an association of employees, it was held that visiting medical officers who had their own private practices and had entered into contracts for the provision of their professional services (as visiting medical officers) with the hospital did so as an integral part of their private practices and so were held not to be employees; see also *Jiang Shen Cai (t/as French Accent) v Do Rozario* [2011] FWAFB 8307 at [30].
- 64 The effect of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (which is read together with the *Superannuation Guarantee Charge Act 1992* (Cth)) is to impose a superannuation guarantee charge upon employers (as defined) who fail to pay prescribed contributions for the benefit of their employees. ‘Employee’ is given its ordinary common law meaning but also an extended meaning to include, relevantly, a person who works under a contract that is wholly or principally for the labour of the person: *Superannuation Guarantee (Administration) Act 1992* (Cth) ss 12(1) and 12(3).
- 65 *On Call Interpreters* at [208].