FEDERAL COURT OF AUSTRALIA

On Call Interpreters & Translators Agency Pty Ltd v Federal Commissioner of Taxation (No 3)

[2011] FCA 366

Bromberg J

7-10, 18 June, 8 July 2010, 13 April 2011

Employer and Employee — Superannuation — Whether interpreters engaged by applicant were employees or independent contractors — Indicia of employment — Superannuation Guarantee (Administration) Act 1992 (Cth), s 12.

Superannuation — Liability for superannuation guarantee charge — Whether interpreters engaged by applicant were employees or independent contractors — Superannuation Guarantee (Administration) Act 1992 (Cth), s 12(3).

The applicant operated a business which provided interpreting and translation services to its clients. In issue was whether or not its translators were employees or independent contractors within the meaning of s 12 of the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the Act) or at common law.

The applicant had not been paying the requisite superannuation guarantee charge on the basis the interpreters it engaged were contractors. The Commissioner of Taxation did not agree, and issued an assessment on the basis that they were employees. The respondent disallowed the applicant's objection. This proceeding was an appeal under Pt IVC of the *Taxation Administration Act 1953* (Cth) to set aside or vary the objection decision made by the respondent.

Held (dismissing the application): (1) Whether a person is an employee or contractor is to be assessed by reference to an objective assessment of the nature of the relationship. The Court looks to the "real substance" and the totality of the relationship in question.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; 106 IR 80; *Curtis v Perth & Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17; *Damevski v Giudice* (2003) 133 FCR 438; 129 IR 53; *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179, applied.

(2) The distinction between an employee and an independent contractor is "rooted fundamentally" in the fact that when personal services are provided to another business, an independent contractor provides those services while working in and for his or her own business, whereas an employee provides personal services while working in the employer's business. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; 106 IR 80; *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; 152 IR 317, applied.

(3) In its evidence, the applicant relied upon seven interpreters as a representative sample of its total workforce of approximately 2,500 interpreters and translators. These seven interpreters were not truly representative of that entire workforce, and of that seven, only two were truly operating their own business. The applicant did not demonstrate that its interpreters were, on the whole, self-employed independent contractors, but rather that they were employees.

(4) The applicant had control over the activities of the interpreters. The goodwill generated ensued to the applicant. It was not a case where the product created was different to the labour that created it. There was no right of delegation. The indicia of economic dependency was of limited utility on the facts of this case. The applicant was involved in the training and development of the interpreters. The interpreters assumed no risk of making loss, but had some capacity to manage their affairs to maximise their remuneration. That no tax was deducted from their earnings was of limited weight. Taking all the indicia into account the applicant failed to demonstrate that the interpreters were employees at common law.

(5) Further, the interpreters were workers personally performing work in an employment-like setting and were employees in any event pursuant to the expanded meaning provided by s 12(3) of the Act.

(6) Accordingly, the Applicant failed to establish that the relevant interpreters were not its common law employees and were not its employees within the extended meaning given in s 12(3) of the Act, and its application to set aside and or vary the Commissioner's decision of 6 April 2009 to disallow its objections to the Commissioner's assessments, should be dismissed.

Cases Cited

Abdalla v Viewdaze Pty Ltd (2003) 53 ATR 30; 122 IR 215.

Associated Translators & Linguists Pty Ltd and Federal Commissioner of Taxation, Re (2010) 78 ATR 937.

Curtis v Perth & Fremantle Bottle Exchange Co Ltd (1914) 18 CLR 17.

Damevski v Guidice (2003) 133 FCR 438; 129 IR 53.

Employment and Workplace Relations, Minister for v Gribbles Radiology Pty Ltd (2005) 222 CLR 194; 138 IR 252.

Ferguson v Federal Commissioner of Taxation (1979) 9 ATR 873.

George v Federal Commissioner of Taxation (1952) 86 CLR 183.

Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939.

Hollis v Vabu Pty Ltd (2001) 207 CLR 21; 106 IR 80.

Hope v Bathurst City Council (1980) 144 CLR 1.

Hungier v Grace (1972) 127 CLR 210.

JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue (NSW) (2001) 47 ATR 94; 105 IR 66.

Lee Ting Sang v Chung Chi-Keung [1990] 2 AC 374.

London Australia Investment Co Ltd v Federal Commissioner of Taxation (1977) 138 CLR 106.

Lopez v Deputy Commissioner of Taxation (2005) 143 FCR 574.

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173.

Marshall v Whittakers Building Supply Co (1963) 109 CLR 210.

McCormack v Federal Commissioner of Taxation (1979) 143 CLR 284.

Montreal (City) v Montreal Locomotive Works Ltd [1946] 3 WWR 748.

National Labor Relations Board v Hearst Publications 322 US 111 (1943).

Neale v Atlas Products (Vic) Pty Ltd (1955) 94 CLR 419.

Porter, Re; Re Transport Workers Union of Australia (1989) 34 IR 179.

Puzey v Federal Commissioner of Taxation (2003) 131 FCR 244.

Queensland Stations Pty Ltd v Federal Commissioner of Taxation (1945) 70 CLR 539.

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497.

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic) (1997) 37 ATR 528.

Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation (2010) 184 FCR 448.

Sgobino v South Australia (1987) 46 SASR 292.

State Taxation, Commissioner of v Roy Morgan Research Centre Pty Ltd (2004) 90 SASR 12.

Stevens v Brodribb Sawmilling Co Pty Ltd (1986) 160 CLR 16.

Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161; 152 IR 317.

Taxation, Deputy Commissioner of v Bolwell (1967) 1 ATR 862.

Taxation, Federal Commissioner of v Barrett (1973) 129 CLR 395.

Taxation, Federal Commissioner of v Dalco (1990) 168 CLR 614.

Taxation, Federal Commissioner of v Sleight (2004) 136 FCR 211.

United States v Silk 331 US 704 (1946).

Vabu Pty Ltd v Federal Commissioner of Taxation (1996) 33 ATR 537; 81 IR 150.

Wesfarmers Federation Insurance Ltd v Wells (t/as Wells Plumbing) [2008] NSWCA 186.

World Book (Aust) Pty Ltd v Federal Commissioner of Taxation (1992) 27 NSWLR 377; 46 IR 1.

Yaraka Holdings Pty Ltd v Giljevic (2006) 149 IR 339.

Application to vary or set aside decision of Commissioner of Taxation

F O'Brien SC and *D McInerney*, for the applicant.

P Sest, for the respondent.

Cur adv vult

Bromberg J.

Introduction

1 This proceeding is an appeal against an objection decision made by the respondent (the Commissioner). The appeal arises from assessments made by the Commissioner that the applicant (On Call) is liable to pay a tax known as the "superannuation guarantee charge" in relation to a number of persons that the Commissioner considered were employees of On Call. On Call's objections to the assessments made were disallowed by the Commissioner and, as a result, On Call has instituted this appeal pursuant to Pt IVC of the *Taxation Administration Act 1953* (Cth) (the *Taxation Administration Act*).

2 The superannuation guarantee charges, the subject of the Commissioner's assessments, were imposed pursuant to the *Superannuation Guarantee (Administration) Act 1992* (Cth) (the Superannuation Guarantee Act) which is to be read together with the *Superannuation Guarantee Charge Act 1992* (Cth) (the *Superannuation Guarantee Charge Act*). Those Acts have the effect of imposing a superannuation guarantee charge upon those employers (as defined) who fail to pay prescribed superannuation contributions for the benefit of their employees. The Commissioner collects the superannuation guarantee charge from defaulting employers and pays the prescribed superannuation contributions to the benefit of the employees for whom superannuation was not provided.

3 On Call owns and operates a business which provides interpreting and translating services to its clients. To conduct that business, On Call engages individuals skilled in interpreting and translating. I will refer to interpreters and translators jointly as "interpreters" unless a distinction needs to be drawn between them.

4 In the period 1 July 2002 to 30 June 2007 (the relevant period) On Call did not provide superannuation benefits to the vast majority of interpreters that it utilised in that period. A very small number of interpreters were recognised by On Call as its employees. The vast majority of interpreters utilised were not recognised by On Call as such and were treated by On Call as independent contractors. Contrary to the view taken by On Call, the Commissioner considered that those employees treated as independent contractors during the relevant period were employees of On Call within the meaning of the Superannuation Guarantee Act. Accordingly, the Commissioner assessed On

Call to be liable for the superannuation guarantee charge in relation to those persons and in respect of the remuneration paid to them over the relevant period.

5 The principal question raised by this litigation is whether the interpreters utilised by On Call over the relevant period (but not recognised by On Call as its employees), were in fact employees within the meaning of the Superannuation Guarantee Act or whether instead they were self-employed independent contractors.

6 By reference to the provisions of s 12 of the Superannuation Guarantee Act, the principal question raises two specific and important issues. The first is whether the relevant interpreters were employees within the meaning of s 12(1) of the Act. That issue requires consideration of whether On Call is an employer and the relevant interpreters were employees within the ordinary meaning of those terms at common law. The second issue is whether On Call was an employer (and the relevant interpreters its employees) within the extended definition of those terms as provided by s 12(3) of the Superannuation Guarantee Act. Interesting issues are raised in an area of jurisprudence in which the law has found it difficult to draw a clear dividing line separating an employee from an independent contractor. This case requires these issues to be examined in the particular context of persons who are engaged for short periods and by multiple end users of their labour. On Call contends they are independent contractors, whilst the Commissioner says they are casual employees.

7 For the reasons which follow, I have determined that On Call was the employer of the relevant interpreters within the common law meaning of that term and also within its extended meaning.

The Relevant Statutory Provisions

8 It is necessary to set out s 12 of the Superannuation Guarantee Act in full. It is in the following terms:

> Interpretation: employee, employer
>
> (1) Subject to this section, in this Act, *employee* and *employer* have their ordinary meaning. However, for the purposes of this Act, subsections (2) to (11):
>
> (a) expand the meaning of those terms; and
>
> (b) make particular provision to avoid doubt as to the status of certain persons.
>
> (2) A person who is entitled to payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate is, in relation to those duties, an employee of the body corporate.
>
> (3) If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.
>
> (4) A member of the Parliament of the Commonwealth is an employee of the Commonwealth.
>
> (5) A member of the Parliament of a State is an employee of the State.
>
> (6) A member of the Legislative Assembly for the Australian Capital Territory is an employee of the Australian Capital Territory.
>
> (7) A member of the Legislative Assembly of the Northern Territory is an employee of the Northern Territory.
>
> (8) The following are employees for the purposes of this Act:

(a) a person who is paid to perform or present, or to participate in the performance or presentation of, any music, play, dance, entertainment, sport, display or promotional activity or any similar activity involving the exercise of intellectual, artistic, musical, physical or other personal skills is an employee of the person liable to make the payment;

(b) a person who is paid to provide services in connection with an activity referred to in paragraph (a) is an employee of the person liable to make the payment;

(c) a person who is paid to perform services in, or in connection with, the making of any film, tape or disc or of any television or radio broadcast is an employee of the person liable to make the payment.

(9) A person who:

(a) holds, or performs the duties of, an appointment, office or position under the Constitution or under a law of the Commonwealth, of a State or of a Territory; or

(b) is otherwise in the service of the Commonwealth, of a State or of a Territory (including service as a member of the Defence Force or as a member of a police force);

is an employee of the Commonwealth, the State or the Territory, as the case requires. However, this rule does not apply to a person in the capacity of the holder of an office as a member of a local government council.

(9A) Subject to subsection (10), a person who holds office as a member of a local government council is not an employee of the council.

(10) A person covered by paragraph 12-45(1)(e) in Schedule 1 to the *Taxation Administration Act 1953* (about members of local governing bodies subject to PAYG withholding) is an employee of the body mentioned in that paragraph.

(11) A person who is paid to do work wholly or principally of a domestic or private nature for not more than 30 hours per week is not regarded as an employee in relation to that work.

The Constitutional Challenge

9 By its Amended Application, On Call raised a constitutional challenge to the Superannuation Guarantee Act as well as the Superannuation Guarantee Charge Act. At the time On Call raised its constitutional challenge the same challenge was the subject of an appeal between different parties due to be heard by a Full Court of this Court. By the time that this proceeding was heard, that appeal had been determined and the constitutional challenge rejected: *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2010) 184 FCR 448 (*Roy Morgan (2010)*). On Call accepts that I am bound to follow the decision of the Full Court and made no submissions in support of its challenge other than a formal submission designed to reserve its rights on any appeal. In the circumstances, I reject the challenge on the same basis as did the Full Court in *Roy Morgan (2010)*.

Evidentiary Disputes

10 On Call called eight witnesses in support of its application. Ms Deniz Hulusi gave evidence in her capacity as the National Operations Manager of On Call. Her husband Mr Hulus Hulusi, the Managing Director of On Call, also gave evidence. Additionally, On Call called six interpreter witnesses and sought to rely on the affidavit of a seventh. Each of the witnesses called by On Call made one or more affidavits in the proceeding. Most of the witnesses called by On

Call made affidavits in proceedings in the Administrative Appeals Tribunal (the AAT proceedings), which related to earlier assessments made by the Commissioner for the period 1 July 2000 to 30 June 2005. The AAT proceeding was suspended pending the finalisation of this proceeding. Affidavits filed in the AAT proceeding made by witnesses called by On Call in this proceeding were tendered by the Commissioner and relied upon (the AAT affidavits).

11 The Commissioner did not call any witnesses. An agreed set of documents produced by On Call were tendered as a Court Book.

12 There are a number of inconsistencies in the evidence given by some of the witnesses in this proceeding as compared to the evidence given by those witnesses in their AAT affidavits. Some of those inconsistencies were left unresolved but are not particularly significant. There are also inconsistencies in the evidence given about the operations of On Call as between Mr and Ms Hulusi. Generally, I have preferred the evidence of Mr Hulusi. To some extent I have discounted the evidence given by Ms Hulusi on the basis that on my view, Ms Hulusi was prone to advocate On Call's case and in so doing exaggerate those facts that she regarded as supporting On Call's position.

13 There were two disputes between the parties as to evidentiary matters. Neither dispute is of any particular relevance to the more interesting legal issues raised by the proceeding, but nevertheless those issues need to be resolved.

The Affidavit of Josie Cassar

14 On Call sought to rely on the affidavit of Josie Cassar affirmed on 19 September 2009. Ms Cassar was overseas and was not available to give evidence at the hearing. Shortly before the hearing, On Call gave notice pursuant to s 67 of the *Evidence Act 1995* (Cth) (the *Evidence Act*) that it proposed to rely on s 63(2) of that Act to contend that the hearsay rule did not apply to the affidavit of Ms Cassar.

15 By notice given pursuant to s 68 of the *Evidence Act*, the Commissioner objected to the tender of the affidavit of Ms Cassar. At the hearing, the Commissioner took what it described as a pragmatic position in relation to the reception of Ms Cassar's affidavit. Whilst the Commissioner formally maintained its objection, it conceded that on the basis of the decided cases the Court should admit the affidavit but accord little or no weight to the evidence. That was said in particular as to that of the evidence of Ms Cassar which concerned the contentious question of the alleged "sub-contracting" of work provided by On Call. I have determined to admit the affidavit of Ms Cassar. In doing so I recognise that the Commissioner has been prejudiced by its inability to cross-examine Ms Cassar. Accordingly no weight should be given to that evidence in so far as it addresses controversial matters which would likely have been challenged in cross-examination. The evidence given on the issue of "sub-contracting" falls into that category and accordingly paragraphs 9-12, 18 (last line) and 50 (last seven words) of Ms Cassar's affidavit have not been taken into account. If, however, I had taken that evidence into account, I would have reached the same conclusions as those later detailed, both in relation to Ms Cassar and also in relation to the issue of sub-contracting generally.

Should Witnesses Called Be Regarded as a Representative Sample of the Interpreters?

16 The Commissioner acknowledged that it would have been impractical for On Call to call as witnesses each of the interpreters that the assessments made by

the Commissioner have characterised as employees of On Call (the relevant interpreters). There are in excess of 2,500 interpreters involved. The Commissioner does not complain that On Call called a sample of the interpreters in question, but has raised an issue as to the representative nature of the sample of witnesses called.

17 The Commissioner submitted that each of the witnesses called was a very experienced interpreter. All hold Level 3 NAATI (National Accreditation Authority for Translators and Interpreters) accreditation. Each has extensive and impressive experience, and several have held teaching positions or high level offices in the professional body AUSIT (Australian Institute of Interpreters and Translators Inc). The Commissioner submitted that by virtue of that extensive experience and in contrast to the majority of interpreters on On Call's panel, those persons may:

- Be able to negotiate rates of pay;
- Be less likely to attract any form of disciplinary action;
- Be more likely to be in high demand, and therefore offered work by more than one "agency" or offered work directly by clients of those "agencies";
- Be less likely to require guidance on proper conduct in their work; and
- Be more likely to operate a business providing interpretation/translation services than less experienced interpreters/translators.

18 In these respects, the Commissioner argued that the witnesses called were not reflective of the wider workforce. The Commissioner relies on that submission in order to urge the Court to guard against drawing inferences as to the characteristics of the wider workforce in relation to the features identified.

19 In speaking to On Call's final written submissions, senior counsel for On Call raised, for the first time, On Call's objection to the approach being urged upon the Court by the Commissioner. Reference was made to orders made following a scheduling conference conducted by Gordon J on 6 August 2009 and to the transcript of that conference. It was suggested by On Call that by a combination of what was said at the scheduling conference and the orders there made, an arrangement had been put in place whereby in the absence of an objection from the Commissioner, the trial was to be conducted on the basis that the sample of witnesses put forward by On Call was to be accepted as a representative sample of the wider workforce. I have examined the orders made and the transcript to which I was referred. It is apparent from that transcript that some discussions were held between counsel prior to the scheduling conference about the calling of a representative sample of interpreters. No evidence of those discussions is before me. Counsel for the Commissioner denies any agreement that the witnesses called are to be regarded as representative of the totality of On Call's interpreters.

20 The Commissioner concedes that an arrangement was made but says that the arrangement was that, insofar as On Call did call a representative sample, the agreed position between the parties was that the Court could infer from the representative sample the nature of the relationship between On Call and those interpreters who were not called to give evidence. However, insofar as On Call failed to call a representative sample across some issues or across all issues, no such inferences should be drawn. The Commissioner's position was that the sample of interpreters actually called is in fact representative of the wider workforce for most of the issues that the Court may need to deal with but not

for some including, for example, the question of whether interpreters in the wider workforce of relevant interpreters carried on their own businesses during the relevant period.

21 Beyond the concessions made by the Commissioner, there is no evidence before me from which I could be satisfied of an agreement or arrangement of the kind for which On Call contends. It appears on the material before me that if any agreement or arrangement on this issue was made (and the Commissioner concedes it was) that arrangement occurred outside of the proceedings before Gordon J. However, in the scheduling conference before her Honour discussions occurred and orders were made designed to limit the number of witnesses that might need to be called in order for the Court to determine issues common to the position of many interpreters. For that purpose, Gordon J made orders designed to allow the parties to understand the nature of the evidence intended to be called by On Call by reference to common issues that particular witnesses may address. Accordingly, On Call was ordered to file and serve a witness list that identified "the period and factors to which evidence of that witness will relate". An opportunity was also given to the Commissioner to notify On Call of any "objections or omissions" in relation to the witness list to be provided by On Call.

22 On 28 August 2009, On Call provided its witness list. That list identified proposed witnesses by name, it specified the period of the witnesses' employment and which of either the 2005 or 2007 "standard form contracts" the witness had made. This was what the order made by Gordon J had in mind in relation to identifying "the period". The witness list also identified the "factors" required by that order. Those factors dealt with the usual location of the work assigned to the interpreter (for instance whether Melbourne metropolitan or regional); whether the person was an interpreter, a translator or both; the industry (hospital, education, medical, community, legal) in relation to which the witnesses' assignments were commonly based; and, the availability (day, evening, weekend) of the witness.

23 The experience or inexperience of witnesses was not adverted to as a "factor". When, by letter of 4 September 2009, the Commissioner made its "objections or omissions" in response to the witness list, experience was not raised as a factor. Other factors were raised but no response to that notice was provided by On Call until 3 June 2010 when, by an email of that date, On Call told the Commissioner that the factors adverted to were addressed by the witnesses to be called.

24 In a letter dated 4 June 2010, three days prior to the first day of the trial, the Commissioner wrote to the solicitors for On Call complaining that the Commissioner did not consider that the witnesses for which affidavits had been filed and served by On Call were sufficiently representative of all On Call interpreters. The letter specified by way of example that the witnesses chosen by On Call all had a high or reasonably high level of experience.

25 Counsel for On Call submitted that by virtue of the orders made by Gordon J, the Commissioner was bound to give notice to On Call if the Commissioner believed that the witnesses to be called by On Call were not representative. Counsel contended that the Commissioner had made no mention of the matter until three days prior to trial and therefore could not now raise the submissions sought to be raised.

26 I disagree that the orders made by Gordon J imposed the obligation on the

Commissioner for which On Call contends. The orders were designed to facilitate input from the Commissioner as to the identification of common "factors" which might be dealt with by samples of witnesses. The orders were not designed to, nor did they in terms, disentitle the Commissioner from raising a point such as that now sought to be raised. The orders made did not discharge the onus upon On Call to provide representative evidence in relation to each of the factors that may be relevant to the Court's determination of the issues in the case. Further, as the Commissioner had, prior to the commencement of the trial, raised its concerns about the lack of a representative sample, On Call should have taken the matter up with the Court at the commencement of the trial in order to address any claim of prejudice. That could have been done but was not done. If it had been done either the prejudice which On Call complains about could have been addressed (for instance, an opportunity may have been provided to call inexperienced interpreters) or at the very least, the issues agitated in final submissions could have properly been agitated during the trial, including by the calling of any necessary further evidence.

27 For those reasons, I reject the contention of On Call and its objection to the submission made by the Commissioner. I will, however, take into account the agreement conceded by the Commissioner to have been made between the parties. Thus, insofar as I am satisfied that On Call has called a representative sample of interpreters on an issue or across all issues, and if it is otherwise appropriate to do so, I will infer from the representative evidence that the same circumstances attend the wider workforce of relevant interpreters.

The Evidence

On Call's Business

28 On Call was established in 1984. Initially, On Call operated in Victoria only. Its operations were extended to New South Wales when its Sydney office opened in 1996. Offices in Perth and Adelaide were opened in 2002 and an office in Brisbane opened in 2003. The Adelaide office closed in 2003 but reopened in 2005. On Call offers the services of interpreters and translators in 120 different languages. Its operations are substantial. On Call's Melbourne office deals with 400-600 interpreting assignments per day. Outside of Victoria, On Call's operations are smaller. Queensland generates 120-170 assignments per day; New South Wales 110-150; Western Australia 70-100; and South Australia an average of 5-30 assignments per day. On Call's Melbourne office operates 7 days a week 24 hours per day. Other offices are physically attended during business hours only. Calls outside of business hours are transferred through to the Melbourne office.

29 The number of interpreters and translators on On Call's panel has grown steadily since On Call was established. By mid-2000 there were approximately 1,000 in Victoria and the number grew to 1,500 by the middle of 2007. During the relevant period there were about 2500 interpreters on what On Call calls its "panel". These were interpreters that, in that period, On Call did not recognise as its employees and who were regarded as independent contractors. The number of interpreters of On Call recognised as employees was 10 in September 2006. By September 2009 there were four such employees and more recently five.

30 On Call employed other persons that it recognised as employees. In the main

these consisted of booking officers and administrative staff. When a client contacted On Call seeking an interpreter, the call was taken by a booking officer and processed in the manner I will shortly describe.

31 Assignments were generated from On Call's client base. On Call's clients fell into the following five major categories — hospitals; educational services providers; ancillary health services providers; public and private welfare services providers; and legal services providers. A review of On Call's client list demonstrates that in the hospitals category, there were a large number of public and private hospitals. In the education category the clients were universities or other institutions of tertiary education as well as government departments dealing with education and training. The typical client in the ancillary health category was a community health provider such as an area health service or a provider of counselling or rehabilitation services. These clients included many governmental providers. In the community welfare category, On Call's clients included governmental departments, employment agencies and other providers of community welfare services. In the legal category, the client base included courts and tribunals, legal aid and advice centres, police forces and a small number of legal firms, amongst others. There was also a miscellaneous client category where the client base consisted mainly of private corporations including large insurance companies.

32 It is apparent from On Call's client list and other evidence before me that the majority of the services provided by On Call were provided to large institutional clients. Most often these institutional users of On Call's services had a governmental or semi-governmental character. Some 50% of the services provided by On Call were provided under contract with an institutional client. Contract work was obtained by On Call through tendering processes which provided either for On Call to be the preferential provider of the interpreting services required by the client or, in some cases, for On Call to be the exclusive provider of those services. Other engagements of On Call's services occurred on an ad hoc basis where, in the absence of an overarching contractual arrangement, clients engaged On Call for particular assignments. Ad hoc work of this kind included services provided to regular clients, usually large institutional clients. On Call also provided conference interpreting but this was an insignificant part of its business. The vast majority of the services that On Call provided were interpreting services. Less than 10% of On Call's assignment work involved translating. Translating services accounted for approximately 5% of On Call's turnover.

33 On Call is one of many private providers of interpreter and translation services but is one of Australia's largest providers. Other private providers include private corporations similar to On Call. On Call competes with these other businesses. There are four or five such businesses operating in each State. There are and have in the past been a number of government-owned and operated interpreting services. Examples of these include the Victorian Interpreting and Translation Service (VITS) and the Commonwealth Translating and Interpreting Service (TIS), amongst others. Both the private and public providers of such services utilise panels of interpreters. Most of the interpreter witnesses called gave evidence that they were listed on these panels and regularly performed work for a number of these private or public providers. Those witnesses and others, referred to these providers (including On Call) as the "agencies". As that seems to be the accepted description in the industry, I

will adopt it. I do so without wishing in any way to suggest that On Call (or the other providers) are "agencies", in the sense that they are businesses which act as agents of an interpreter facilitating the provision of work to that person for the payment of a fee. That was never the nature of On Call's business. On Call contracted with the recipients of its services as a principal and was remunerated for providing the interpreting or translating service which it was contracted by its client to provide.

Initial Treatment of Panel Interpreters

34 In the early years of On Call's operations, On Call treated the interpreters on its panel as employees including by withholding taxation from their remuneration. Mr Hulusi gave evidence that this placed On Call at a disadvantage relevant to its competitors and accordingly, in August 1989, he conferred with and later wrote to the Australian Taxation Office (ATO) seeking a ruling that the panel interpreters were not employees but independent contractors. The ATO was advised that the relationship between On Call and the panel interpreters was not an ongoing relationship; that On Call was not entitled to direct and control the work of the interpreter; and that On Call had no authority to order the interpreter to attend an assignment or to direct the manner of performance of work. On Call also advised that the interpreters were not entitled to sick leave or annual leave. Mr Hulusi suggested to the ATO that the terms of engagement of the panel interpreters were similar to those of a surgeon, barrister or public accountant.

35 On 8 January 1990, and on the basis of the information provided, the ATO advised that an employer/employee relationship did not appear to exist between On Call and its panel interpreters. On Call was advised that it was therefore not required to deduct tax instalments from payments made to these interpreters. It was partly on the basis of this advice from the ATO that from about January 1990, On Call began treating the panel interpreters as independent contractors.

36 Whilst the advice given by the ATO is relevant background to the issues before me, On Call has not sought to rely upon it as a means of diminishing or defeating the Commissioner's position in this proceeding.

On Call's Recognised Employee Interpreters

37 In about September 2006, On Call supplemented its panel interpreters with ten interpreters who were regarded as its employees. These interpreters were employed full-time on a 38 hour week. They were initially employed with the intention of servicing a particular client of On Call. However, to keep them busy they were allocated a wide range of available assignments. They performed about 8% of the interpreting assignments generated in the Melbourne office. That involved about three to five assignments each per day. As some of these interpreters left employment with On Call they were not replaced and their work was carried out by members of On Call's panel. As at September 2009, only four of these interpreters remained.

38 For reasons I will shortly deal with, the manner of the performance of work by panel interpreters was largely dealt with by the AUSIT Code of Ethics (the Code of Ethics). Each of those interpreters regarded by On Call as its employees made Australian Workplace Agreements (AWAs) with On Call. Insofar as those agreements relevantly dealt with the manner and performance of work, it was a requirement that the Code of Ethics be observed.

39 The interpreters regarded by On Call as its employees were paid a salary based on an annual rate of pay together with a travel allowance. On Call was required by the AWAs it made to make superannuation payments. Annual and personal leave was provided and the AWAs contained counselling and disciplinary procedures.

40 There is no evidence of any relevant distinction between the manner in which those interpreters regarded by On Call as employees carried out the interpreting assignments required of them, and the manner in which those assignments were carried out by interpreters who were part of On Call's panel but regarded as independent contractors. Beyond the terms and conditions of engagement, the only distinction which On Call sought to emphasise was that the interpreters recognised as employees were obliged to undertake the work involved in any interpreting assignment assigned to them during their working hours. In other words, unlike the panel interpreters that On Call regarded as "freelancers", these interpreters did not have the right to choose whether or not to accept an assignment.

Characterisation of the Status of Panel Interpreters

41 The relationship between On Call and the interpreters on its panel was initiated either by the interpreter or by On Call. When initiated by an interpreter, typically the interpreter would write to On Call and advise that he or she is an accredited interpreter and would like to be registered on On Call's panel. Applications of this kind were regularly received by On Call. Alternatively, On Call was involved in recruiting interpreters. That was done by regularly checking the NAATI and AUSIT websites. On the AUSIT website there is a directory which includes a profile of interpreters who are members of AUSIT. That profile provides the language skills and accreditation of the interpreter together with their contact details. On Call regularly checked to see whether it could identify interpreters with language skills that were in demand and if so would invite interpreters to register with On Call as part of On Call's panel.

42 Ms Hulusi has been responsible for interviewing prospective interpreters since about 1987. It is not clear whether all prospective interpreters were interviewed. Interpreters interviewed by Ms Hulusi were told that they would be working as "an independent contractor". Usually the expression used was that the person would continue to be self- employed or working "freelance".

43 It was the practice of On Call to provide a registration pack to the prospective interpreter. The contents of the registration pack changed over time. A registration pack in use in or after 2003 was in evidence. I will refer to that as "the registration pack". That material contained no direct assertion that the interpreter would be engaged as an independent contractor.

44 In about July 2005, the registration pack was reproduced as the "registration Kit" (the Kit). The Kit was headed "Independent Contractor Information Kit and Contract". After setting out some introductory material about On Call, the Kit included a paragraph headed "Contract Details". In that paragraph the Kit referred to interpreters as working as independent contractors and as "a supplier of Interpreting and Translation Services".

45 The records of On Call in relation to written contracts made between On Call and panel members are shambolic. Three different versions of standard form contracts were utilised by On Call during the relevant period. On Call was unable to establish the periods in which, and the extent to which, each of these versions were utilised. Nevertheless, I would infer that a July 2005 version of

the standard contract (the July 2005 Contract) was made available to prospective interpreters as part of the Kit. The July 2005 Contract (under a heading "Services") stated that On Call engages independent contractors with appropriate qualifications to service its clients. It referred to the interpreter as an independent contractor and sought the interpreter's acknowledgement that the interpreter understood that he or she would be supplying services "as a business entity/agency or otherwise with an ABN number and that your engagement with On-Call does not give rise to any employment or any other joint venture relationship or partnership". The contract provided that each assignment accepted by the interpreter would constitute a separate contract with On Call.

46 A second version of a standard form contract was produced sometime in September 2005 (the September 2005 Contract). Ms Hulusi was unable to say why that version came into existence. The difference between the July and September 2005 contracts is not significant. The September 2005 standard form of contract characterised the nature of the relationship between On Call and the interpreter in the same way as had the July 2005 Contract.

47 A third version of a standard form of contract with interpreters was produced in about October 2006 (the October 2006 Contract). Ms Hulusi's evidence suggests that this version was produced in response to notification that there was an issue with the ATO. The October 2006 Contract specified that it replaced all prior agreements between On Call and the interpreter. Under a heading "Relationship of Parties", the October 2006 Contract specified that the relationship between the interpreter and the company "will be that of an independent contractor and this Agreement does not create a partnership, employment or any other legal relationship except of a contractual one on the terms of this Agreement".

48 Under that same heading, the October 2006 Contract specified that for the avoidance of doubt, the interpreter acknowledged that as an independent contractor the interpreter had no entitlement to annual leave, sick leave, long service leave or any other leave. Additionally the following clause appeared:

> 6.5 To the extent that an employment relationship between the Company and you may be deemed to exist or implied by law you fully indemnify the Company against any liability or claim which may thereby arise.

49 There are two further matters of some interest. The first is that the contract sought the interpreter's acknowledgment that all intellectual property created during the course of the agreement was the property of On Call and/or On Call's clients. Secondly, clause 3.1 of the contract required the interpreter to "follow all reasonable and lawful orders and instructions" of On Call.

50 This version of the standard form of contract came into use from on or about October 2006. Not only were new registrants asked to sign the October 2006 contract but in April 2007 On Call also conducted a mass mailing to all members of its panel.

51 There was a further version of a standard form contract produced in about November 2007. As that version was first utilised outside of the relevant period, I do not need to deal with it further.

52 As I have said, On Call was unable to establish through its records, the number or even the proportion of interpreters on its panel who executed each of the three relevant versions of the standard form contract. What is apparent from the evidence, is that the majority of interpreters on the panel were not subject to

any form of written contract during the relevant period. As to those that were, other than in relation to some of those interpreters who gave evidence in the proceedings, the evidence did not establish which of the three relevant versions were executed. It may have been the case, but the evidence did not establish, that some interpreters made more than one contract with On Call in circumstances where different versions of the standard form of contract applied at different times over the relevant period.

Allocation of Assignments

53 On Call maintained a database which was utilised by booking officers employed by On Call to identify an appropriate interpreter for a requested service. The database included a page of information in relation to each interpreter on On Call's panel. The page was broken up into a range of categories and, beyond name and contact details, included information as to the language skills and the accreditation and qualifications of the interpreter. There was also a section on the page in which comments could be included. On Call's practice was to include comments on a wide range of subject matter, including the areas of language specialisation, the geographical work preferences of the interpreter and indications as to the past performance of the interpreter and the extent to which the interpreter should or should not be utilised in the future.

54 By reference to the client's requirements, On Call's booking officers would typically search the database for an appropriate and available interpreter. Whilst some attempt was made to distribute assignments evenly over a number of panel interpreters with suitable skills, in practical terms the first interpreter called by a booking officer who indicated availability for the particular assignment would usually be allocated the assignment.

No Obligation to Accept Assignments

55 There was no obligation on a panel interpreter to accept an assignment offered. Each version of the standard form contract to which I have referred makes that point. As a matter of practice, interpreters would pick and choose and, on occasion, decline assignments. Some would decline on the basis that they did not want to work in the aged care area or do court work. Alternatively, interpreters declined because they had other commitments. Some interpreters declined assignments because of the travel that was required to undertake the assignment.

Requests for Particular Interpreters

56 On some occasions, On Call's clients would request a particular interpreter. That occurred because a client may have developed a relationship with a particular interpreter in which continuity of service was an advantage. Where such requests were made, On Call would seek to obtain the particular interpreter for the assignment but if the interpreter was not available then offers would be made to other, similarly accredited interpreters, in accordance with On Call's usual process.

Duration of Assignments

57 The duration times for assignments varied depending upon a range of factors. In relation to court interpreting, assignments were requested and allocated on the basis of a half day block or alternatively on the basis of a daily block. That was the standard which the evidence suggests was applied in the industry.

58 For non-court assignments, the industry standard varied from State to State.

In Victoria, an interpreting assignment at a hospital or a community welfare centre or any other non-court setting was based on a maximum period of one and a half hours. In New South Wales, Western Australia and Queensland the period was one hour. Assignments for the Refugee Review Tribunal were based on a two hour block. The practice was for the client to be charged and for the interpreter to be paid on the basis of the block of time for which the assignment was booked.

59 The different blocks of time for which assignments were booked were (in each case) the maximum hire time applicable to what was, in effect, the minimum charge for a particular kind of booking. To some extent the maximum hire time was nominal. The court session in which the interpreter was required may have been over in an hour but the client was charged the minimum half day rate and the interpreter paid on the half day rate. Similarly, if a hospital appointment was concluded in half an hour, the hospital would nevertheless be charged the minimum charge referable to the one and a half hour booking and the interpreter would likewise be paid on that basis. It was commonly the case that interpreters would leave when the interpretation service required of them was completed, rather than stand and wait the entirety of the maximum hire time. That practice was well known to On Call and was consistent with the industry norm.

Double Appointments and Multiple Assignments

60 The identification of a maximum hire time in relation to the minimum charge resulted in some tension between On Call and some of its clients and between On Call and some panel interpreters assigned to interpret for those clients. Ordinarily, interpreting assignments were based on the interpreter interpreting the language of a single person (known as the "CALD" or "UR"). In the ordinary case, there will only be one person whose language requires interpretation. However, some of On Call's larger clients have multiple needs for an interpreter which are proximate in both time and location. Thus, for instance, a hospital may require an Arab speaking interpreter for an Arab speaking patient for an appointment at 10am followed by a further appointment for a different Arab speaking patient with the same doctor at 10.30 am. Ordinarily, each of those requirements for an interpreter were met by two separate assignments and thus two minimum charges. That charging practice from time to time raised tensions and led to the advent of what were called "double appointments". Because of the way in which the minimum charge is made referable to a maximum hire period, some regular clients of On Call (and other agencies) insisted that only one charge be applied where multiple interpreting assignments occurred within the maximum hire time.

61 As Ms Hulusi acknowledged, double appointments don't suit the interests of On Call. Obviously On Call preferred to be paid for two assignments than to be paid for one. For the same reason, double appointments were disadvantageous from the interpreter's perspective. On Call had an ongoing relationship with many of its major clients and did, to some extent, cooperate with those of its clients who sought to allocate more than one CALD or UR to a particular assignment. Double appointments were controversial with panel interpreters. Some would accept them, others would not. On Call always asked the interpreter if he or she was prepared to accept such an arrangement. The fact

that some interpreters refused to stay and perform a second assignment is a factor relied upon by On Call as demonstrating On Call's lack of control over the interpreters.

62 From time to time, On Call tried to persuade interpreters that they should stay for the full maximum hire period in order to accommodate demands by some clients that double appointments be performed within that period. In that context, comments were included in a regular newsletter prepared by On Call and distributed to panel interpreters called the "Bugle". Such comments have included:- "our clients purchase language services on a time basis"; or, "our clients pay for the time they have booked". Those comments are relied upon by the Commissioner to demonstrate that the completion of an interpreting assignment is a time based task rather than the provision of an outcome or result.

63 The fact that more than one interpreter of a particular language may be required at a proximate time and location led to other practices which On Call relies upon as supporting its contention that interpreters have a capacity to manage their affairs so as to maximise their profits. From time to time, On Call had a number of assignments which required a number of interpreters to attend at the same or proximate locations and at the same or similar time. For example, two Italian language interpreters may have been booked to attend at a magistrates court to interpret in relation to two different proceedings to be dealt with at that court on a particular morning. On occasion, a booking officer will have been persuaded by an interpreter to allow the same interpreter to take both assignments on the basis that the interpreter will coordinate with the court, so as to avoid a conflict between the performance of the two assignments. Whilst that conduct involved some risk of conflict and thus may have led to complaints, On Call may have facilitated the practice rather than booking a second interpreter because a second interpreter was, from time to time, hard to find. There was a shortage of interpreters across a range of languages. Allocating multiple assignments to the same interpreter within a maximum hire period often facilitated On Call's need to supply an interpreter but always provided extra remuneration to the interpreter.

64 The evidence also shows that there were instances of multiple assignments within the same maximum hire period being offered to interpreters as inducement to take an engagement. Thus, for example, an interpreter who was reluctant to do a particular assignment at a far off location may have been induced by the offer of multiple assignments at or near that location.

65 Additionally, the practice encouraged by On Call (and no doubt other agencies) of providing multiple assignments within the same maximum hire period also resulted in some interpreters taking multiple assignments from a combination of agencies. For instance, an experienced interpreter allocated an assignment at a hospital by On Call (and knowing that hospital appointments generally take 30 minutes) would take another assignment from another agency due to commence in the last half hour of the 90 minute maximum hire period of the On Call assignment.

66 The extent to which the practice of multiple assignments occurred is not clear. I am unable to say on the evidence how significant the practice was, although I would infer that it was not insignificant.

Extensions of Assignments

67 From time to time, the interpretation service required exceeded the maximum

hire time and an extension of time was required. In that situation, the practice within On Call was that if the interpreter conducting the assignment was available, that interpreter would stay on for the extended period. If the interpreter was not available, On Call would attempt to find another interpreter. On Call did not insist on the interpreter staying.

68 The extension of an assignment did not require the interpreter to obtain On Call's approval. Usually, all that the interpreter was required to do was to inform On Call of the extension so that On Call could charge the client and organise for the interpreter to be paid an additional fee. In the case of Victorian hospitals, an extension of time could not be approved by the medical professional involved but needed to be approved by the hospitals "interpreting office". In that situation, On Call required the panel interpreter to obtain approval for an extension from the interpreting office.

69 In relation to hourly or 90 minute block assignments, if the service was required to be extended it would be extended in 30 minute blocks. The practice was that if an assignment went 10 minutes over the time allocated then an additional 30 minute charge would be paid by the client to On Call and an additional payment would be paid to the interpreter. Any further extensions would be charged and paid on the same basis. In relation to court work, a half day block could be extended by a further half day block. Telephone interpreting was charged and paid for in 15 minute blocks with 5 minute extensions.

Sessional Assignments

70 Beyond those arrangements which I have already described and which operated according to what was regarded as the industry standard, On Call entered into contracts with specific major clients in which interpreters were given assignments which required the interpreter to commence and remain throughout a designated session. These were called "sessional assignments" in which an interpreter would be given a set starting and finishing time and perform whatever interpreting was required by the client during the allocated session.

Cancellations

71 Where a client cancelled an assignment with more than 24 hours notice to On Call, On Call would not charge the client and would cancel the interpreter booked for the assignment without paying a fee. If a client cancelled within 24 hours of the booked time, On Call charged a cancellation fee and would pay a fee to the interpreter who had been booked. A full fee would be incurred by the client and paid to the interpreter where the assignment was cancelled on the same day of the booking.

72 From time to time panel interpreters would cancel booked assignments. Ms Hulusi described it as a constant problem that On Call was faced with every day. On Call did not impose any financial penalty on an interpreter who had cancelled an assignment but unwarranted cancellations may have resulted in the interpreter not been used again.

Pricing, Invoicing and Payments to Panel Interpreters

73 Ordinarily, the rates paid by On Call to interpreters were paid in accordance with schedules of rates set and applied by On Call. On Call had a rates schedule which identified rates paid: for onsite interpreting; for court interpreting; for telephone interpreting; and, for translating. On Call's schedule was attached to the registration pack and to each version of On Call's standard forms of

contract. Each of those contracts provided for the interpreter to be paid in accordance with On Call's schedule of rates. The standard payments varied as between different States.

74 Sometimes On Call negotiated a rate above its standard rate. That happened on an ad hoc basis, for instance an extra inducement may have been provided to get an interpreter to fill an assignment with little or no notice. There are a number of rare languages where interpreters were particularly scarce and negotiations occurred in relation to assignments for those languages. There was evidence from Ms Hulusi of two translators (Mr Giovannoni and another unnamed person) who generally set their own rates for translation work. Mr Giovannoni's evidence, which I refer and later set out in more detail, is that generally there is no negotiation with On Call.

75 On Call provided to members of its panel a book of forms. Interpreters were required to fill in a form in relation to each assignment. The purpose of that exercise was to confirm that the assignment had been completed. The form was provided in triplicate. One copy was provided to On Call's client. On the completion of the assignment, a second copy was forwarded by the interpreter to On Call and the third copy was for the interpreter to retain.

76 Whilst the interpreter was asked to submit a copy of the form to On Call, that was not for payment purposes but simply for verification should there be a dispute with On Call's client as to whether or not the assignment had been completed. An interpreter was paid on the basis of the booking request recorded on On Call's database.

77 Putting to one side the position of the 10% to 15% of panel interpreters who were registered for Goods and Services Tax (GST), panel interpreters did not invoice On Call for the services provided. On a monthly basis On Call produced and forwarded a remittance advice to an interpreter who had provided services in the previous month. The remittance advice would detail the assignments completed by that interpreter in the previous month. The remittance advice would be accompanied by a payment. Interpreters were paid on a monthly basis and not as and when an assignment was completed.

78 In relation to interpreters who were registered for GST, On Call provided a "recipient created tax invoice". On Call's recipient created tax invoices were in the same form as On Call's remittance advice but had an additional heading "Recipient Created Tax Invoice" under a first heading "Remittance Advice". The Australian Business Number (ABN) of the interpreter appeared and a GST component was added to the total remittance paid. That arrangement was facilitated by a form provided by On Call to new interpreters which asked if they were registered for GST purposes and which allowed interpreters to tick a box acknowledging their request for On Call to issue recipient created tax invoices. The form advised that a failure to tick the relevant box would require the interpreter to provide a tax invoice. Ms Hulusi's evidence was that only a very limited number of interpreters provided their own tax invoice.

79 Overwhelmingly panel interpreters did not invoice On Call. The transactional records flowing between On Call and the panel interpreters were produced and superintended by On Call.

Extent of Integration of Panel Interpreters with On Call's Business

80 The vast majority of the services that On Call provided to its clients were provided by the interpreters on On Call's panel. Panel interpreters were engaged in an integral part of On Call's business and were essential to the operation of

that business. This was acknowledged by Mr and Ms Hulusi who also acknowledged that the success of On Call's business depended upon the professionalism and performance of its interpreters.

81 A number of comments were made by On Call to its panel interpreters through the *Bugle* referring to panel members as part of On Call's team. Interpreters were urged to continue to work as a team in order to grow On Call's business.

82 Ordinarily, panel interpreters did not attend at On Call's offices, although invitations for interpreters to drop in were made from time to time including to some social functions such as the anniversary of the opening of an office. Communications between On Call and panel members occurred by telephone, email or other electronic means. The extent of that contact depended upon the extent to which the particular interpreter was utilised by On Call. Many interpreters were utilised regularly and routinely whilst others were only rarely offered an engagement. From time to time, On Call removed from its database panel members who were no longer in use.

83 There were interactions between On Call and its panel members beyond the assignment and performance of work. From time to time On Call offered to panel members training and other professional development opportunities. The Kit provided to panel interpreters stated that On Call would provide professional development opportunities for independent contractors, as part of On Call's commitment to quality. The registration pack stated that On Call strongly supported and encouraged interpreters to undertake courses or workshops relating to interpreting and that, from time to time, On Call conducted courses. Interpreters were encouraged to read the *Bugle* for information on upcoming training courses and seminars. There were comments published in the *Bugle* to the effect that On Call was committed to the personal development of its interpreters.

84 The actual provision of training was not substantial but it occurred from time to time. It was not uniformly made available to all panel members. Occasionally, familiarisation sessions were organised by On Call in order to train interpreters in relation to the particular needs or setting of a major client. For instance, in relation to interpreting work for a particular tribunal, familiarisation sessions were conducted with the assistance of members of the tribunal. The purpose of workshops of that kind was to familiarise interpreters with the role and function of the tribunal, the specific terminology and the procedures and principles that interpreters required by that tribunal were to adhere to. Similarly, familiarisation sessions were conducted by On Call for other major clients. Interpreters were not required to attend but were invited to do so.

85 On Call also provided training to interpreters or would be interpreters in order to fill shortages of required interpreters. Courses of that kind were provided in Perth and also when On Call opened its office in Brisbane. For example, On Call provided a 10 hour introduction to interpreting course for rare languages in these locations. There is also evidence of On Call financially assisting interpreters to complete a Health Interpreting Certificate course provided by TAFEs in Western Australia.

Lack of Exclusivity

86 In the ordinary case, the connection that a panel interpreter had with On Call was not exclusive. Most interpreters worked for more than one agency.

Mr Hulusi explained that this occurred because interpreters wanted to maximise their opportunity to work. The extent of work performed for other agencies by members of On Call's panel varied, including by reference to the extent of work provided by On Call to the particular interpreter. On Call did not discourage interpreters on its panel from working for other agencies, in fact Ms Hulusi's evidence was that On Call encouraged interpreters to do so in order to get experience.

87 From time to time other agencies approached On Call and On Call approached other agencies in order to locate interpreters for available assignments. That practice, no doubt, also encouraged the significant cross fertilisation of interpreters between agencies.

88 On occasion, interpreters on On Call's panel took work from a former client of On Call. There were two occasions in evidence of where a regular user of On Call's services decided to organise for itself its interpreting needs and approached interpreters directly and not through an agency. In those situations, some interpreters on On Call's panel who had carried out On Call's work for that particular client were, at a later time, approached directly by the client to provide interpreting directly to that client. In relation to an existing client, the Code of Ethics prohibits an interpreter from conduct of that kind without the approval of the agency. On Call did, on occasion, remind interpreters of that requirement and instructed interpreters not to provide their contact details to On Call's clients.

Representation of On Call by Panel Interpreters

89 On Call required interpreters to wear an identification badge (ID badge) provided by On Call when on an assignment for On Call. Interpreters were told by On Call, including through the *Bugle*, that On Call's identification badges "must be worn at all times whilst representing On Call". The ID badges provided by On Call were headed "On Call Interpreters and Translators Agency Pty Ltd". On Call's logo appeared on the badge as well as On Call's slogan "Solving your language needs". The badge also listed the address, telephone, fax and email details for On Call. The name of the interpreter together with a photograph and the language the person interpreted appeared on the badge with the description "On Call Interpreter".

90 Interpreters who worked for other agencies had an ID badge from that agency. Some interpreters also had their own identification badge. The Code of Ethics allows that interpreters may present business cards representing the agency for whom they are engaged and that no use is to be made of personal cards of the interpreter or cards which imply employment by any other organisation.

91 Ms Hulusi suggested that the requirement that interpreters wear the ID badges arose for security reasons in circumstances where some clients required the identification of an interpreter entering their premises. Whilst security may have formed part of the motivation at some earlier time, the content of On Call's ID badge makes it plain that its purpose was promotional as well as functional. Whatever its purpose, I would infer that the effect of the wearing of the On Call ID badge by an interpreter was to represent to people dealing with the interpreter that the interpreter was an On Call interpreter representing On Call and providing the service that On Call was engaged to provide. Ms Hulusi did not seek to deny that panel members represented On Call. On Call's

professional indemnity insurance (to which I will refer) only covered panel interpreters who were "employed by or acting solely for or on behalf of" On Call.

92 Further, a number of On Call publications acknowledged that in the performance of their work, panel interpreters were an emanation of On Call. The Kit stated "Our interpreters are the public face of our business, and therefore your conduct and behaviour when on an interpreting assignment is of importance to us". Ms Hulusi acknowledged the correctness of that statement. A large number of statements in various editions of the *Bugle* reminded panel interpreters that they were representing On Call. For instance:- "You represent our agency and if you continue to run late we lose faith with our clients".

Control of Panel Interpreters — Instructions

93 Interpreting assignments were ordinarily conducted by interpreters at the location of On Call's client. Typically, translations were conducted at the office of the translator. As the work is conducted offsite, it was not directly overseen by a manager or supervisor from On Call. In any event, given the instantaneous nature of the work involved in interpreting, there is also little scope for the giving of instructions to the interpreter whilst the work is being performed.

94 Nevertheless, the manner in which interpreting and translating is performed is the subject of standards set by AUSIT in consultation with NAATI. Those standards are set out in the Code of Ethics published by AUSIT. The Code of Ethics consists of three sections:- general principles; a code of practice (annotated for specific practical applications); and, supplementary notes. Ethical requirements such as impartiality, honesty, integrity and dignity are dealt with, but the Code also deals with many practical or practice requirements. These include politeness, reliability, accuracy, clarity of speech and the rectification of mistakes. The Code is reasonably comprehensive in dealing with the attributes and performance requirements of interpreters and translators.

95 Through a range of statements and other measures, On Call made it plain that it expected panel members to observe and abide by the Code of Ethics. Statements of that kind are to be found in the registration pack and the Kit. The Code of Ethics forms part of the Kit and was thus provided to interpreters when first engaged by On Call. Ms Hulusi's evidence was that interpreters were also told about the Code at their first interview and if the prospective interpreter was not NAATI qualified, a copy of the Code was provided. Ms Hulusi accepted that On Call could direct interpreters to follow all the professional requirements of the Code. Each of the July 2005 and September 2005 contracts gave On Call the right to terminate the contract if the interpreter acted in breach of the Code of Ethics. The terms of the Code make it clear that the Code is applicable to interpreters working as independent contractors or to interpreters employed as such.

96 There are numerous examples in the *Bugle* publications published by On Call of On Call notifying panel interpreters of its expectations in relation to their conduct and performance. There were constant reminders that interpreters must be punctual. Interpreters were told to communicate with On Call's office over various matters. Interpreters were encouraged to complete the transactional record keeping requirements of On Call associated with each assignment. Interpreters were reminded about their obligations of confidentiality. Interpreters were constantly told to turn off their mobiles whilst on an assignment. They were told that such conduct was "not acceptable". Interpreters were reminded

about being appropriately attired, including because inappropriate dress reflects badly on On Call. Interpreters were instructed to get authority for extensions of time from the client where that was required. The *Bugle* publications contain instructions to interpreters to be assertive with clients when they were made to wait unnecessarily. Various instructions were provided in relation to direct contact with On Call's clients including to inform the client when the interpreter was running late.

97 The October 2006 Contract required interpreters who were subject to it to "follow all reasonable and lawful orders and instructions". However, for reasons I will explain, the terms of the standard form contracts played little or no part in the practical application of On Call's procedures and processes.

Control of Panel Members — Performance, Compliance and Discipline

98 There were statements made in the Kit which, whilst recognising that interpreting is an "autonomous" activity, acknowledged that interpreters may face many challenges during an assignment and encouraged interpreters to contact the appropriate manager at On Call to discuss issues relating to their performance or to client behaviour. On occasion, Ms Hulusi provided support and advice, listening to the concerns of interpreters and, if necessary, raising those concerns with On Call's clients.

99 Through the Kit, On Call informed panel interpreters that it had a complaints procedure and that the complaints procedure would be followed by the responsible manager of On Call where a complaint was received about the interpreter's performance. The Kit stated that On Call would counsel interpreters who demonstrate poor performance and would offer necessary advice and assistance for improvement. If, however, consistently poor performance was experienced, On Call would remove the interpreter from the panel. Some examples of performance that On Call said it would monitor and appraise as part of its quality assurance systems were set out. Those included: failure to attend assignments; repeat poor performance; a lack of punctuality; failure to adhere to the conditions of the contract; wilful and professional misconduct; good performance; good client feedback; and, the ability to adhere to On Call's "Operational Guidelines".

100 There were a range of items published in the *Bugle* which warned that inappropriate conduct would not be tolerated including unfavourable feedback from clients about lateness. From time to time On Call got complaints about the performance of some of the panel interpreters. When that occurred, the nature of the complaint would be identified and feedback sought from the interpreter and provided to the client. The interpreter may have been reminded of their professional responsibilities. On Call had the practice of recording complaints and instances of non-performance. Typically, that was done by notations made in the comments section on the database page dealing with the particular interpreter. If there was a repeat complaint about a particular interpreter, the interpreter's page would be marked with a "Do not use" or "Only if desperate" or "Caution". Ms Hulusi's evidence was that in those circumstances On Call would not make any further offers to the interpreter if On Call could possibly avoid doing so. Sometimes, despite the database indicating that no further assignments should be provided to an interpreter, On Call did so if no other interpreter was available.

101 Finally, some of the contracts entered between On Call and its major clients not only required that On Call exercise control over the performance and

conduct of its interpreters but also contractually bound On Call to take steps to remove particular interpreters where they were deemed by the client to be unsuitable. Although the complaints procedures were not in evidence, Ms Hulusi indicated that in tendering for contracts with major clients, On Call identified a complaints procedure when setting out On Call's quality assurance systems.

Control — No Obligation to Work

102 On Call asserted an absence of control over the panel interpreters. In particular, On Call emphasised its incapacity to control interpreters by reason of its incapacity to require panel interpreters to take work. I accept that On Call had no power to require a panel interpreter to accept an assignment. On Call's standard contracts for interpreters provided that an interpreter was free to accept or reject an assignment. The evidence showed that often panel interpreters refused assignments offered. Often panel interpreters refused to agree to stay on where an extension of a booking was sought by On Call's client or return to perform an assignment, the commencement of which had been delayed. Often panel interpreters cancelled engagements, including with no notice or with insufficient notice.

Extent of Use of Other Persons to Carry Out Assignments

103 There was a range of evidence before me as to whether, and to what if any extent, panel interpreters provided the services contracted by On Call through the use of another person or persons.

104 Ordinarily, a sub-contracting arrangement is an arrangement where a contractor contracted to perform work sub-contracts with another person to perform that work or part thereof. In such a situation, the head contractor remains responsible under the head contract for the provision of the work and is responsible for remunerating the sub-contractor for the work performed under the sub-contract. Those circumstances involve the delegation of a task to the sub-contractor whilst the head contractor retains responsibility to provide the service.

105 It is apparent from the evidence that the term sub-contracting has been, and is, used by On Call and interpreters to identify practices which would not constitute "sub-contracting" as ordinarily understood. What was often referred to in the evidence as "sub-contracting" is in fact a reference to the swapping of assignments between interpreters. Under an arrangement of that kind, all that occurred was that an interpreter assigned a particular assignment arranged for another interpreter to take over the assignment and perform the work.

106 There was no obligation upon interpreters to find substitutes in circumstances where the interpreter became unavailable for an allocated assignment. The evidence suggests however, that interpreters did from time to time try and find a substitute interpreter including to help overcome the inconvenience that their cancellation may otherwise have caused On Call. In those circumstances, the substitution ordinarily occurred with the knowledge and consent of On Call. There was no element of delegation or sub-contracting involved in practices of that kind.

107 On Call had no difficulty with interpreters swapping assignments so long as On Call was notified and the substitute interpreter had appropriate qualifications. Ms Hulusi told prospective interpreters that if they wanted to "sub-contract", to quote her erroneous use of the term, they needed to let On

Call know who they were sub-contracting to and that the level of qualification of the substitute interpreter had to be the same as theirs. Her evidence was that 90% of interpreters responded that they were not interested in "sub-contracting". The evidence does, however, indicate that on occasion On Call received complaints and discovered that an assignment had been swapped without its consent and that someone of lesser accreditation than the interpreter allocated had done the interpreting. On Call disapproved of that practice and advised interpreters through the *Bugle* that substitution of that kind was unauthorised and that On Call's approval was to be obtained before an assignment was swapped.

108 Each of the July 2005 and September 2005 Contracts provided that an interpreter may choose to "sub-contract" an assignment but only where the substitute was appropriately accredited and only where the substitute was acceptable to On Call and the client. The October 2006 Contract required that On Call be advised of a substitution but was ambiguous as to whether On Call's consent was required. It provided that On Call agreed to allow "sub-contracting" by substitution of another suitably qualified interpreter "provided that you inform the Company of the name and address of the independent contractor". However, each of the contracts required interpreters to comply with the Code of Ethics. The Code provides that interpreters and translators shall not sub-contract work to interpreting and translating colleagues without the permission of their client.

109 Apart from a possible exception in relation to Mr Giovannoni (to which I will shortly refer), there was no evidence of interpreters or translators on On Call's panel delegating work. There was evidence of the swapping of assignments or substitution. Overwhelmingly, substitution occurred with the consent of On Call in circumstances where the substituted interpreter became contracted to On Call and was paid by On Call directly.

Supply of Equipment

110 The work involved in interpreting and translating requires little or no equipment. For specific purposes On Call supplied to its panel interpreters specialist dictionaries that were required for specific settings such as the interpreting of some refugee languages. The provision of this kind of equipment was not substantial.

111 Interpreters typically had their own dictionaries and other reference material. Interpreters carried their own mobile telephones and used those phones occasionally for contacting On Call or On Call's client. Interpreters, and in particular translators, typically used their own computer and had a rudimentary home office. Translators who worked from their home offices frequently used a computer and other rudimentary facilities within their home office. Beyond that, the use of equipment by interpreters and translators in the carrying out of their functions was insignificant.

Risk and Professional Indemnity Insurance

112 In about 1998, On Call took out professional indemnity insurance. The policy covered On Call. Mr Hulusi believed that it also covered interpreters on On Call's panel. In or about 2005 more information about panel members was provided to On Call's insurers because On Call wanted to make sure that panel interpreters were covered by the policy. It appears that the insurer took the view that panel interpreters were not covered. On or about 6 May 2005 a special

condition was inserted into On Call's professional indemnity insurance policy. The special condition had the effect of extending the insurance to natural persons who had entered into a contract of services with On Call "to perform the Firm's Business" and who were members of AUSIT or who had NAATI accreditation, provided that: "at the time of performing the contract of services such natural person was employed by or acting solely for or on behalf of the Insured".

113 The terms of the policy indemnified On Call (including in relation to the acts of its employees and of those covered by the special condition) against loss arising from any civil liability for breach of duty owed in a professional capacity and also for any claim in respect of civil liability for libel or slander. The insurance provided for a limit on each claim and an aggregate limit of $5 million.

114 From the time that On Call took out professional indemnity coverage in 1998, On Call sought contributions from its panel interpreters towards the cost of the insurance. Notices to interpreters were distributed advising interpreters that it was vital for the industry to provide professional indemnity insurance to interpreters. The notices stated that On Call had a policy covering all of its "sub-contractors" and sought that an amount of $25 be paid per interpreter per annum. Ms Hulusi described the payment as voluntary and there is no evidence that the contribution was insisted upon by On Call or that non-contributors were in any way penalised. Not all interpreters made a contribution and the evidence suggests that probably most did not. Ms Hulusi's understanding was that it made no difference whether a contribution was made by the interpreter, the interpreter's work was covered by the policy.

115 The only evidence of a panel interpreter taking out their own insurance against risk related to Mr Giovannoni and Ms Avila to whom I later refer.

Expenses and Allowances

116 The evidence did not indicate that significant expenses are incurred by panel interpreters beyond travel expenses. Typically, On Call did not reimburse its interpreters for their cost of travel within metropolitan areas. However, On Call did generally pay a travel allowance for travel outside metropolitan areas. There was no evidence of the reimbursement of actual travel expenses nor of a formula for calculating a travel allowance. Typically, where an interpreter requested an amount for travel expenses, that would be the subject of some negotiation and an ad hoc allowance may have been agreed to or a standing arrangement adhered to.

Advertising by Panel Interpreters

117 Despite On Call's contention that many panel interpreters advertised, no advertisement was produced in evidence. Ms Hulusi referred to and produced a list headed "Sample of Interpreters and Translators [sic] Advertise to the General Public". That document purports to list interpreters separately from translators and to identify which of those persons had entries in the Yellow Pages or a website identified as www.startlocal.com.au. There was no evidence as to what that website was, or the extent to which it may be of any utility to an interpreter seeking business from the public. Nor was there any evidence as to whether any entry in the Yellow Pages was simply a listing (merely specifying the person's profession or trade) or an advertisement promoting the interpreters

services to the public. In any event, the document suggested that only about a third of the sample of interpreters were included in the Yellow Pages and that two-thirds of the sample of translators were so included.

118 It was clear from the evidence that On Call (and I would infer other agencies) were not induced to acquire the services of panel interpreters through the advertising by those interpreters of their services. On Call recruited interpreters on to its panel by checking the NAATI and AUSIT websites and in particular the directory on the AUSIT website which included a profile of interpreters who were members of AUSIT.

119 Whilst it was suggested that the AUSIT directory was a form of advertising, there was no evidence of the availability of that directory and its use by the general public. Extracts produced from the AUSIT and NAATI websites demonstrate that entries in relation to an interpreter or translator identify the person by name, and provide contact details together with the persons qualifications and preferred areas of work. Trading or business names are not referred to nor is there any other express indication of the operation of a business. Whilst the entries suggest that the person seeks work, they are neutral as to whether work is sought as an employee or as a independent contractor.

Use of Business Names and Incorporation

120 Ms Halliday's evidence (to which I shall return) included her use of a business name. There was little other evidence of any interpreter using a business name. Ms Hulusi gave evidence that about 15 to 20 translators operate through a corporate entity. Several State based lists tendered by On Call and headed "List of Active Interpreters" (which appears to have been produced on 11 August 2009) includes reference to five corporate names and four business names (excluding four providers of Auslan that appear to be institutional providers). That evidence suggests that only a tiny fraction of the 2,500 or so interpreters in question utilised incorporated entities or trading names other than their own names. The relation between an interpreter and any corporation utilised by that person was not the subject of any evidence.

Taxation and Business Registration Arrangements

121 The practice of On Call in the relevant period was not to withhold tax from payments due to panel interpreters where the panel interpreter provided to On Call an ABN registration number. On Call advised panel interpreters that unless On Call received the ABN details of the interpreter, On Call would withhold 48.5% of payments due. That was stated to be On Call's position as a result of the requirements of the ATO. I infer that overwhelmingly interpreters held ABN registrations.

122 A list of interpreters registered for GST was produced. The list of 5,185 interpreters shows that 658 were registered for GST.

123 Other than for a number of interpreters who were called to give evidence (whose evidence I deal with next) there was no evidence of interpreters maintaining business based taxation records.

Josie Cassar

124 When Ms Cassar was first engaged by On Call there was nothing formal about the process. Mr Hulusi simply rang her and asked her to do a job. She kept working for On Call from that time onwards. She described her relationship with On Call as quite simple. On Call called her up, offered her work and she generally tried to do it. She preferred to work near her home but

was generally available to work in all locations in Melbourne. She had occasionally received On Call's newsletters. On occasion she had received feedback as to her interpreting work from clients. That had always been positive. She had never been provided with any training by On Call. Occasionally, On Call offered her double appointments and she accepted those assignments.

125 She wore the badge of the agency that sent her on an assignment. All of the agencies have identification badges similar to On Call's badge.

126 Ms Cassar described herself as a self-employed interpreter and translator. She had a registered ABN which she had held since 2000. She traded under her own name. She described herself as working for a number of agencies and named six. She did not seek out direct clients. She chose to work for all of the agencies she worked for because no single agency provided her with enough work to keep her occupied. She avoided taking some jobs which she found stressful, for instance, interpreting in a stressful court case. She usually accepted the standard fee offered by On Call. As her language (Maltese) was not in high demand, it was difficult for her to negotiate a fee.

127 Under a heading "My Business", her affidavit gave a one line description. It stated that she shared a home office with her husband and "keeps the records of the business". Under a further heading "Business Expenses" she said that her major business expenses were her travel to attend her assignments as well as her mobile phone. She had made claims in her taxation returns for those expenses. She did not take out insurance but said "I pay the agencies a fee for insurance cover for my work".

Ngoc-Anh Tran

128 Since 1996 Ms Tran has been employed at various universities in Melbourne teaching interpreting. She did that part-time. She has been providing interpreting and translating services since 1990 and for the last five years on a part-time basis. She accepted an average of 20-24 hours of work per week depending on her commitments. She worked for various agencies and identified four. Over the last five years most of her work has been for On Call. She has "direct" clients for whom she would interpret and translate, but no evidence was given as to the nature or extent of those clients, save that in her AAT affidavit she said that over the past 12 months (December 2006-December 2007) she had accepted tasks "from private clients, including the Government". Thirty per cent of her work was translation.

129 She did not usually negotiate her fees with On Call, she just accepted the fees offered. She did however negotiate a fee to accommodate travel. She gave no evidence as to fee arrangements with other agencies or direct clients. In relation to On Call she carried out her assignments personally. If she could not do an assignment she would find a substitute but that person would be paid by On Call directly. She received no commissions. She preferred to operate like that. She did not seek to make commissions from "sub-contracting". She regarded that as too complicated and not worth it.

130 She received an identification badge from On Call which did not have the correct photograph on it. She never used that or any other badge from On Call. There is no evidence of her use of ID badges in relation to other agencies.

131 She described her job as that of a freelance interpreter and considered herself to be self-employed. Her name was listed in the NAATI directory but she has never advertised. She did not have any professional indemnity or other

insurance. She had an ABN since April 2000 and she was also registered for GST. She had used a business card in the past but says that she mainly gained her work by word-of-mouth. She had various business expenses that she claimed on her taxation return. She did not keep a separate business bank account. She had a room at home with a desk, computer and bookshelf which she called her office. That contained some of her accounts and records. She contributed to her own superannuation fund.

132 She did not give evidence that any goodwill enured to her business but, under a heading in her affidavit, "Goodwill", she said that on occasion, she was specifically asked for and that she tended to receive offers to do On Call's more difficult work because of her qualifications, experience and reputation. She thought her work generated goodwill for herself and for On Call.

Susana Shuk Man Loy Lui

133 Like most of the other witnesses called, Ms Lui is also a highly experienced interpreter with tertiary qualifications and an impressive employment history in her original place of residence in Hong Kong. In 2001, Ms Lui started interpreting and translating sporadically, initially for her friends and relatives. She then started to register with the various agencies one by one. She provided interpretation and translation to a number of agencies including On Call. Some 95% of her work was interpretation services and the remainder translation services. She gave evidence that she had some direct clients who make special requests for her and that she would take that work if it did not clash with other engagements. She gave no detail as to the extent of direct work of that kind nor as to any arrangements associated with it.

134 Ms Lui gave a brief account of how she dealt with the agencies, noting that each of the agencies dealt with her in the same or similar way. She would receive a request from a booking officer who would contact her advising of the nature of the work and the anticipated duration. She could either accept or decline the booking. If she accepted the booking, she completed a timesheet noting various information including her name, the language required, the name of the client, the date of the appointment and the starting and finishing times of the booking. Once the assignment was completed, the client of the agency would sign her timesheet verifying that the service was provided. She was paid monthly by On Call via payment into her bank account.

135 She did not negotiate the fees that she charged. She said she felt embarrassed to negotiate even for extra payment when the job involves travelling. Therefore, she only accepted jobs close to home.

136 Under a heading in her affidavit, "Goodwill", she gave evidence that a number of specific requests were made for her to undertake particular work based on her previous work and her good performance. She said that she had developed her own goodwill in the interpreting and translating industry. However, she spoke of goodwill only in the context of being requested specifically whilst working for an agency. She did not give evidence of any goodwill enuring to any business of her own.

137 She was provided with a badge to wear by each of the agencies she worked with. She wore those badges. She did not have her own badge. She did not wear a badge when performing work for private clients.

138 She did not hold any insurance to protect against the risk of being sued, loss of income or any other difficulty.

139 She possessed her own dictionary for some language groups and provided writing pads, pencils and pens and other writing equipment which might be necessary to perform her bookings. On Call provided her with a number of specialised glossaries. These are a few pages of special terminology for particular purposes such as a glossary used for Chinese Christians when interpretation work was provided to the Refugee Review Tribunal.

140 Under a heading in her affidavit, "Business Records", all she said was that she keeps the documents relating to the remittances that she receives from the agencies. She had a registered ABN and traded under her own name. She did not advertise her services. She initially said she used to advertise on the NAATI website but clarified that all that this entailed was the inclusion of her name on a directory of interpreters and translators. She no longer used that directory. She was not registered for GST. She claimed her expenses for taxation purposes including postage, stationary, some phone and internet fees, her laptop, printer, transport expenses, parking and mileage. She also included insurance contributions she made to On Call and other agencies.

141 Of all the interpreter witnesses, she was particularly resolute in describing herself as an independent contractor and in insisting that she was not an employee. Her characterisation of herself as an independent contractor was explained by a number of comments she made in her oral evidence, her affidavit made in this proceeding and the affidavit that she made in the AAT proceeding. Her view of herself as an independent contractor did not seem to be founded in her view that she runs a business. It was founded in her view that she had no obligation to accept work and had the freedom to work as and when she chose. This was important to her. Her husband was retired and her mother was in Hong Kong and was unwell. She would only take work if it did not clash with her family responsibilities. She would only take work up to three months ahead in order to deal with the uncertainty of her personal commitments. When first engaged, Ms Lui was told by Mr Hulusi that she was an independent contractor and would be paid on a per job basis and that she was not an employee of On Call.

142 If for some reason Ms Lui was unable to do a job she agreed to take on, she would see if she could find someone to replace her. If so she would let On Call know. She did that in order to save On Call the trouble of calling around to find another interpreter. She was not paid for the assignment for which another person had been substituted.

143 In her AAT affidavit Ms Lui said that she took pride in her work for clients of the agencies. She regarded herself as an independent professional with control over her own work. She was not supervised in the manner in which she provided interpreting or translating services. The agencies relied on her professionalism and skill and she had total discretion as to how she managed or responded to difficulties in any particular assignment and nuances in language.

144 On 25 June 2007 Ms Lui and On Call executed the October 2006 Contract. Ms Lui thought that she also signed a contract in about 2005 but that contract was not in evidence. Her view was that there was no difference in her relationship with On Call as a result of her signing any of the contracts.

Patricia Avila

145 Ms Avila described herself as a self-employed interpreter and translator. She has been an interpreter since 1971 and worked in the United States, in Central America and in Australia. Before coming to Australia she worked for the World

Bank in the United States interpreting for delegations and translating contracts and other documents. She returned to El Salvador and in 1986 started an English language teaching academy and an interpreting and translating business with another two partners. In that business she worked as an interpreter both in El Salvador and other Central American countries specialising in interpreting for high level political delegations. She continued with those activities until migrating to Australia in 1990.

146 She had Level 3 or "Professional Interpreter" NAATI qualifications. She had held high level positions with AUSIT. She had been Chair of the Queensland Branch of AUSIT, Secretary of that Branch and also National Secretary of AUSIT in 2007. She was responsible for the collating and editing of a booklet produced by AUSIT. For the last 15 years she has delivered most of the preparatory workshops for candidates sitting examinations for NAATI in Queensland. She is a very experienced interpreter and part of an established and experienced group of interpreters which is able to be contrasted from other groups. She said in her evidence that it needs to be appreciated that interpreters are "an enormously diverse group". In her view, many don't know what it means to perform professionally. That is particularly the case amongst new interpreters who lack NAATI qualifications or relevant training. Some new interpreters don't have very high education levels or experience in delivering professional services. She was able to make those observations including because she has been conducting NAATI workshops and from her observations at different events.

147 Between 1990 and 2004, she did some freelance interpreting and translating work in combination with a range of employments. During that period she said she did freelance translating privately for direct clients and some freelance translating work for one of the agencies. It was not voluminous.

148 Since 2004 she has undertaken a mix of interpreting and translating work. This has come from direct clients, from On Call and from four other agencies.

149 In relation to direct clients her evidence was more expansive than that of other witnesses (apart from Mr Giovannoni), who simply claimed to have had direct clients but gave no details. She said that she had a varied portfolio of direct clients which have included the CSIRO, "State Development", "DFAT" and other private clients ranging from management consultants to crane manufacturers to circus artists. She referred to direct clients when giving evidence about translating work. In that context she said she had her own clients in translation and enjoyed the variety of work, including "tenders and bids and contracts". It is not clear whether Ms Avila did interpreting work for direct clients. She said that she did not do a lot of translating work for agencies in the context of giving evidence and that she had her own clients for translating work. Unlike most of the witnesses that gave evidence, a very high proportion of her work (approximately 40%) was translating. Given that she does very little translating for agencies, it appears that some 40% of her activities involved translating work for direct clients.

150 Ms Avila is a Spanish to English and English to Spanish interpreter and translator. She lives in Brisbane where she says the Spanish community is small. She said she had a professional reputation amongst that community. Her name is on both the NAATI and AUSIT website directories and she advertised in the Yellow Pages. She had a business card which she distributed to potential direct clients.

151 She had an ABN since 2004 but is not registered for GST. She kept records of her engagements in her office at home along with her other business records. Her business expenses were her laptop and other equipment and she claimed: "my office consumables, business related books, percentage of my electricity, phone and internet bills, the flat tax deduction for the car and anything that is appropriate to claim for the running of my business". She took out her own professional indemnity and public liability insurances.

152 She said that she didn't negotiate fees because — "it is my choice to accept the fees". That evidence appears confined to fee negotiations with agencies alone. For translation work for direct clients she was involved in tendering and bidding for work.

153 Ms Avila did not use sub-contractors. She did not have access to a proper database or the office support or time to chase up interpreters as sub-contractors. She was also concerned as to the adequacy of qualifications of many Spanish interpreters. Her evidence was that sub-contracting is "not a good business decision for me". She values the goodwill that her work generates and was concerned that sub-contractors would damage her goodwill. She occasionally referred private work to other translators when she was busy or negotiated with the client to work with another translator when she needed the assistance. However, the person engaged was not engaged as her sub-contractor.

154 She brought her own laptop and dictionaries when she was conducting conference interpreting, which was also a feature of her work. She had a number of identification badges from a number of different agencies she worked with. She also had a NAATI identification badge. She carried all these badges and would wear the badge of the agency that she was doing a job for.

Susan Halliday

155 The evidence of Ms Halliday was given through her affidavit filed in the proceeding, cross-examination and also through her AAT affidavit. Ms Halliday described herself as a self-employed interpreter and translator. She acknowledged that she was an experienced and proficient interpreter. Her AAT affidavit suggested that at least since 2007 she had ceased translation tasks and confined her work to interpreting assignments. Between 1994 and 1998 Ms Halliday taught interpreting at Deakin University and later at RMIT. She is a Cantonese interpreter.

156 She had worked as an interpreter and translator since 1990. In the period 1 July 2000 to 30 June 2007 all of Ms Halliday's work appears to have been performed for agencies including On Call. During that time she "did not do a material amount of work for direct end users". In the 12 months to 3 December 2007, Ms Halliday worked predominantly for On Call and the Commonwealth Translating and Interpreting Service (TIS). In a typical year she completed approximately 50% of her tasks for On Call and 30% of her tasks for TIS, the balance of her time being spent working for other agencies. Her evidence identified three other agencies for whom she performed work during the period 1 July 2000 to 30 June 2007.

157 Under a heading in her affidavit filed in this proceeding, "My Business", she said that she had a home office, with a computer, dictionaries and text books. She also had software to update her electronic dictionary for legal interpreting. She managed her own accounts during the year and saw an accountant at the end of the financial year to do her tax returns. She had held an ABN since 22 April 2000 and traded under the name "Linguabridge Interpreting and

Translation Service". That trading name was registered by her in the mid-1990s. She deposed that at that time she was in business with another interpreter who also lectured with her at Deakin University. They were in business together for a few years until Ms Halliday left Deakin University. She said that she continued the business alone under its trading name from the end of 1996. There is no evidence that Ms Halliday is registered for GST.

158 Ms Halliday was included on the NAATI directory until 2008. Ms Halliday said that she had not needed to advertise anywhere else. There was no evidence of the use of business cards or any other method of promotion.

159 Ms Halliday considered that the goodwill that she had generated to be that of her own and not belonging to the agencies she accepted work from. Her sole basis for that view was that on occasion clients of the agencies specifically asked the agencies to book her.

160 Ms Halliday wore an On Call identification badge when engaged by On Call.

161 Although she regarded her contract with On Call as allowing her to sub-contract engagements, she had not actually sub-contracted any work. In her AAT affidavit she explained that she had not exercised the right she believes she had to sub-contract because "it is part of my work ethic to always be available to complete the tasks I accept". If she was unavailable to complete an assignment because of illness she would cancel the engagement prior to its commencement.

162 There is no evidence of Ms Halliday having her own standard rates or other terms and conditions of engagement or any transactional systems such as her own invoices. She was engaged upon the standard rates determined by the agencies.

163 She had no permanent engagements and operated to a different schedule week to week. That was an arrangement that suited her, including because she was able to decline assignments that did not suit her personal circumstances. It was by reason of this flexibility that she rejected offers of full-time/permanent work in the past. She had done that because she "would just like to work casually".

164 On 25 July 2007, Ms Halliday and On Call contracted in the terms of the October 2006 contract.

Moreno Giovannoni

165 Mr Giovannoni has an Associate Diploma in Interpreting and Translating as well as a Bachelor of Arts (majoring in Modern Languages) and a Diploma of Education from the University of Melbourne. He has accreditation from NAATI as a Level 3 or Professional Interpreter Level in Italian. He also holds NAATI accreditation as an Advanced Translator in Italian into English and French into English.

166 Mr Giovannoni has held a number of offices within NAATI and AUSIT. He was a member of NAATI's Italian language panel. He was President of AUSIT and more recently its Treasurer. He was recently recognised as a Fellow of AUSIT in recognition of his qualifications, long working experience and professional standing in the industry. For a number of years he also taught translation courses at Deakin University and marked examination papers for RMIT.

167 Between 1979 and 1995 he was employed as a public servant for the Immigration Department in Melbourne. His duties were primarily interpreting

and translating. Whilst with the Department of Immigration, Mr Giovannoni (with the permission of the Department) began performing translation work obtained both through the agencies and also by private referral. He left the public service in 1995 to work for himself as an interpreter and translator.

168 Mr Giovannoni described himself as a self-employed interpreter and translator. He said he became a freelancer because he didn't want to work for anybody and he wanted to work for himself. He wanted to be independent. His aim was to have as many clients as he could — "the more the better".

169 Some 90% of the services which Mr Giovannoni provided was translating work. Some 10% of the services he provided involved interpreting. Over time, Mr Giovannoni had built up a relationship with a number of contacts. Some 50% of his work came to him from agencies and the Institute of Modern Languages (of the faculty of the University of Queensland). The other 50% of his work came from private clients including the Italian consulate.

170 Whilst an accurate breakdown of his work was not provided, it appears on the evidence which he did give that the bulk of Mr Giovannoni's translating work came from private clients with the remainder from the agencies. His translating work typically came to him from private clients such as solicitors, exporters and importers and the like. On the other hand, the interpreting work which Mr Giovannoni did seems to be peripheral to his main function as a translator. He did some interpreting — about six jobs a year — directly for private clients. He also did some interpreting for the agencies but generally, he did not regard that work as very lucrative work and chose to decline it. There are times when that kind of work was convenient for him and he would take it on. There have been periods where he has regularly performed three or four engagements per week. He found interpreting work more demanding upon him than translating because he had to leave his office to do the work. Consequently, he only chose interpreting assignments that were convenient for him — either in his local area or in Melbourne's CBD.

171 His translating engagements routinely involved him translating commercial correspondence, legal documents, personal documents, community information and roof tiling and furniture trade information (from north-eastern Italy). Mr Giovannoni described in detail his basis for charging fees for translating work. In relation to translating work for his private clients, he tended to prepare quotes in advance and sought payment in advance. He would set his charge based on a number of factors including the number of words to be translated, the level of sophistication of the document and the level of skill involved. For instance he would charge more for a website or a document that had more narrative with language that is unique, than he would for basic documentation. His rate would also seek to take into account any time he may have needed to spend with a second translator where the work required a review by a second translator. Additionally, he would charge extra if he needed to attend elsewhere, for instance at a solicitor's office to affirm or swear that his translation was correct. His overall rate would be negotiated with private clients based on these factors and also on whether or not he had come to the view that he would likely sub-contract the work.

172 Mr Giovannoni sub-contracted his translating work when he was too busy to do the job himself. There were two Italians in Italy to whom he sub-contracted Italian translating work. He paid them a rate that was a bit lower than the rate that he received from his client. He checked over the translation when it came

back to him. He was cognisant of the need to ensure that there was a sufficient margin incorporated in the rate he charged so that he could both check the work that he had sub-contracted and "still make a reasonable profit". His evidence was that he often knocked back basic level translating work because he did not make a sufficient margin from it. He quoted a high rate to make it worthwhile — even if that meant he might not get a particular translation job.

173 His evidence indicated that the extent to which he could negotiate with the agencies was very different to that of private clients. In relation to On Call he was paid $18 per 100 words, plus GST. The rate is increased to $20 for technical or complex work and there was an urgency supplement where the work was required the same day or within 24 hours.

174 In relation to interpreting work from On Call (and I infer from other agencies) there was little or no negotiation in relation to his fee. He said that occasionally he found a booking officer who was able to give him an extra $10, but the only negotiation that generally went on was related to getting an engagement close to home or which was otherwise convenient. His evidence in relation to translating work for On Call was that for some time now he had not done certain kinds of translating work for On Call because they did not pay him enough. Mr Giovannoni also did simultaneous conference interpreting but only about once a year.

175 Mr Giovannoni was listed in the Yellow Pages. He was also registered at the Italian Consulate, NAATI and AUSIT. He had his own website since the mid 1990s. For a period of time he placed advertisements in Sydney and other capital cities and obtained a "1-800" phone number which he later discontinued. Mr Giovannoni had business cards and "with-compliments" slips which he distributed where possible.

176 It is apparent from his evidence that he had his own invoicing system for his private clients. He was registered for GST and charged GST on his invoices. When he provided work to On Call the situation was different. On Call prepared the invoices and the GST paid to him was shown on On Call's monthly remittance advice. Mr Giovannoni took out his own professional insurance liability policy. He maintained a separate bank account for his interpreting/translating work. He usually worked from his home office. He kept business records. His business assets included precedent documents, dictionaries, a computer, printer, telephone and internet access. He maintained his business accounts on the MYOB (Mind Your Own Business) accounting system. He used that system for his accounts. Whilst he did not send invoices to On Call, he recorded his fees to On Call on his MYOB system. When preparing his tax return he claimed expenses including in relation to his car, public transport expenses, telephone/internet, advertising, home office expenses, insurance, library and some office consumables.

177 Much of his work came from word-of-mouth. His goodwill was an asset he highly valued. He considered his reputation to be a species of his own creation and a very important aspect of his work.

178 When Mr Giovannoni attended an interpreting assignment for an agency he would wear the identification badge of the particular agency that sent him to the assignment.

179 Despite having seen comments in newsletters provided by On Call that he should not sub-contract, Mr Giovannoni had always sub-contracted his translation work when convenient to him. He had done that despite the AUSIT

Code of Ethics prohibiting sub-contracting without permission from the client. He explained that he didn't consider his sub-contracting to be a breach of the Code because he always checked the work and did not send confidential material to sub-contractors. In relation to interpreting work, his evidence was that he had on occasion "done a swap arrangement with another interpreter". His evidence was not clear as to whether that was done with On Call's consent or not.

180 On the same day that he made his affidavit filed in the AAT proceeding, Mr Giovannoni executed the October 2006 version of On Call's standard contracts.

Mikhail Gutkin

181 Mr Gutkin received his academic qualifications in Russia where he completed the equivalent of a Bachelor of Education. He holds accreditation as a Level 3 translator from English to Russian and a Level 2 interpreter from Russian to English.

182 Mr Gutkin came to Australia in 1991. In 1993 he began working with one of the agencies. Sometime thereafter he approached all of the agencies he could locate and placed his name on their panels in order to get both interpreting and translating work. He described himself as a self-employed interpreter and translator. He had held an ABN since March 2000 and traded under his own name. In the period prior to July 2001 he also got translating work from direct clients. The extent of his involvement with direct clients was not specified. In relation to the period from July 2001 to 2007 his evidence as to the extent of any work he obtained from direct clients was also vague. In relation to that period he said he did a mix of interpreting and translation work "which was mostly referred to me by agencies".

183 He had since 1997 advertised in the "Russian Yellow Pages". He gave no detail as to the nature of that publication. Nevertheless, I would infer that Mr Gutkin was open to accepting work from direct clients and may have done so from time to time. The lack of detail provided by his evidence as to the extent of his work for direct clients suggests that those activities were minor compared to his work for the agencies.

184 His evidence was that the extent of interpreting as opposed to the extent of translating that he did varied but that slightly more of his work, around 60%, was translating work. Mr Gutkin identified five agencies that had provided him work in the period July 2001 to 2007. His evidence was that there were few Russian interpreters around and that he was usually pretty busy although things had quietened down in the last few years. He was offered work from all the agencies, so he took assignments on a "first come, first served" basis. The arrangement he had with On Call since 1993 was that he would work for On Call's set rate. He would accept or reject offers of work based on his availability. There was no evidence that he negotiated his fees with any other agency. For translation work the charge was based on the number of words to be translated. His translating work included personal documents, technical booklets and police audio intercepts for the Victoria Police Force.

185 He did not sub-contract any of the assignments given to him. He had an On Call identification badge which he wore when engaged by On Call. He also had badges from other agencies which he wore when engaged by them. His equipment included a library of dictionaries (approximately twenty) two computers and a printer. He had a home office where he kept his records and did

his translating work. He said he did his own accounts during the year and saw an accountant to prepare his tax return. His major expenses were his computer, his car and petrol. He did not take out insurance but he did pay a small fee for insurance coverage to On Call and one other of the agencies that used him. He was registered for GST and he charged it for his services. He paid GST to the ATO every quarter.

186 Mr Gutkin perceived himself to be self-employed. The extent to which he portrayed his activities and promoted those activities as a business to the public is unclear but seems to be minimal. His work emanated overwhelmingly from the agencies and he seemed to have little or no direct client base.

187 Mr Gutkin and On Call executed the October 2006 Contract on 17 May 2007. He believed (but could not remember) that he may have also signed contracts with On Call in 2005 or 2006. Whether he had or not, "actual working arrangements didn't change".

Legal Principles — Common Law Employee or Independent Contractor?

The Need to Identify the True Nature of the Relationship

188 Whether a person is an employee or alternatively an independent contractor is to be answered by reference to an objective assessment of the nature of the relationship that person has with the entity that takes the benefit of that person's work. Either the relationship is between an employee and an employer or the relationship is between an independent contractor and its client. Whether a person falls on one side or the other of that binary divide is often a question which may not be easy to answer. It is important that in attempting to arrive at the right answer, the correct interpretative tools are utilised.

189 In that regard, it is well settled that what a court will look to is the real substance of the relationship in question. As early as 1914, Isaacs J in *Curtis v Perth & Fremantle Bottle Exchange Co Ltd* (1914) 18 CLR 17 at 25 said:

> Where parties enter into a bargain with one another whereby certain rights and obligations are created, they cannot by a mere consensual label alter the inherent character of the relations they have actually called into existence. Many cases have arisen where Courts have disregarded such labels, because in law they were wrong, and have looked beneath them to the real substance.

190 The plurality in *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; 106 IR 80, also emphasised that the substance or reality of the relationship needed to be identified. In that respect the plurality stated that the terms agreed between the parties are not of themselves determinative because parties cannot deem their relationship to be something it is not: at [58]. The relationship is to be found not simply from the contractual terms agreed to but by the system operated thereunder and the work practices which establish the "totality of the relationship" (at [24]). The application of a practical and realistic approach by the majority in *Hollis* is discernable from the conclusions reached in that case, including that viewed as "a practical matter" the bicycle couriers were not independent contractors (at [47]); and that it would be "unrealistic" to describe those persons as other than employees (at [57]).

191 In *Damevski v Giudice* (2003) 133 FCR 438; 129 IR 53, Merkel J relied upon Isaacs J in *Curtis* and the majority judgment in *Hollis* to apply the "real substance" or "reality" approach: see at [144] and [172]. In that case Marshall J

applied a similar approach asserting the need to look "beyond and beneath the documents": see at [77] and [78]. Wilcox J agreed with the reasons for judgment of each of Marshall and Merkel JJ.

192 To the same effect but in more colourful language, Gray J adopted the language of a former Chief Justice of this Court when he said in *Re Porter; Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184 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". As his Honour stated in relation to the use to be made of evidence of what occurred in practice in the relationship in question:

> …there is no particular reason why a court should ignore the practical circumstances, and cling to the theoretical niceties. (at 184)

193 The trend of Australian courts to look beyond contractual descriptions and at the substance or truth of the relationship, is also shown in the series of cases which have found that market research interviewers engaged by the Roy Morgan company were employees, despite having been labelled and treated as contractors: *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (1997) 37 ATR 528 (*Roy Morgan (1997)*); *Commissioner of State Taxation v Roy Morgan Research Centre Pty Ltd* (2004) 90 SASR 12 (*Roy Morgan (2004)*) and *Roy Morgan (2010)*.

194 The common law's practical approach is consistent with that taken in many jurisdictions, as a major report on the employment relationship produced in 2006 by the International Labour Organisation shows. The report titled "The Employment Relationship" (Report (V)(1) to the International Labour Conference 95th Session 2006) (the ILO Report) surveyed the approach taken by labour legislation around the world. Much of that legislation is based on the principle of the "primacy of fact", the content of which (expressed at [26]) is that:

> The determination of the existence of an employment relationship should be guided by the *facts*, and not by the name or form given to it by the parties. That is why the existence of an employment relationship depends on certain objective conditions being met and not how either or both of the parties describe the relationship. This is known in law as the principle of the *primacy of fact*, which is explicitly enshrined in some national legal systems. This principle is also frequently applied by judges in the absence of an express rule.

195 Orsola Razzolini recently surveyed the position in Europe and concluded that the trend of courts and recent European techniques of legal regulation of personal work relations have reduced the attention paid to formal arrangements and focused instead on the day to day facts of the relationship: Razzolini O, "The Need to Go Beyond the Contract: Economic and Bureaucratic Dependence in Personal Work Relations", (2010) 31 *Comparative Labor Law and Policy Journal* 267, in particular at p 299. Finally, the Supreme Court of the United States (at least in the context of defining "employee" in industrial legislation) has applied what has been called the economic reality test, a test which is focused on the economic facts of the relationship: see *National Labor Relations Board v Hearst Publications* 322 US 111 (1944) at 859; *United States v Silk* 331 US 704 at 712-714 (1947); 67 S Ct 1463 at 1468.

196 The importance of courts focusing on the reality of the relationship and not merely its form arises in the context of the increasing world trend towards the prevalence of what the ILO calls "disguised employment relationships". As the

ILO report recounts, changes in the legal status attributed to workers are a sign of the times and are now commonly observed. Those changes may be real or artificial. As to the artificial, the ILO Report (at [46]) describes 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.

197 As the ILO report identifies, some of the arrangements most frequently used to disguise the employment relationship include a wide variety of civil and commercial contracts which give the relationship the semblance of self-employment at [47].

198 Many observations consistent with that made by the ILO have also been made in relation to Australia by leading academic scholars. Some have emphasised the ease with which cleverly drafted contracts can convert an employment relationship into one which appears to be an agreement between client and independent contractor: Stewart A, "Redefining Employment? Meeting the Challenge of Contract and Agency Labour", (2002) 15 *AJLL* at pp 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 and Riley J, *The Law of Work*, (Oxford University Press, 2007) at p 144.

199 Owens and Riley 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. In that context, contractual arrangements may often be imposed by the dominant party for its own purposes. The learned authors identify the economic incentives for the dominant party to avoid employment relationships with those whose work they acquire. Avoiding an employment relationship avoids the costs of complying with a range of statutes and industrial instruments setting pay and conditions, workers compensation levies, payroll tax, and superannuation contributions.

200 A wide range of entitlements and protections are conferred upon workers by legislation and industrial awards or agreements made pursuant to industrial legislation like the *Fair Work Act 2009* (Cth) (the *Fair Work Act*). It is commonplace for such legislation to identify the recipient of such entitlements or protections by reference to the common law definition of "employee". In that context, it is particularly important that the common law look to the reality of the relationship in determining whether an employment relationship exists. A contrary approach would place many workers who are in truth employees, beyond the protective reach of labour law.

Distinguishing Between an Employee and an Independent Contractor

201 An analysis of the nature of a legal relationship should commence with a proper identification of the parties to that relationship, their role and function and the nature of the interactions which constitute their relations. The employment relationship classically contains two parties. A worker who provides his or her labour and an entity that receives the benefit of that labour. In an employment relationship, labour (being a combination of time, skill and

effort) is traded for remuneration. Like many commercial relationships, there is a provider, a purchaser, an exchange and a contract containing the terms and conditions that regulate that exchange.

202 The exchange involves a form of hire. In return for payment, the time, skill and effort of the employee (the personal services) are provided to the employer for an agreed time or until the completion of an agreed task.

203 How then is an employee, a person providing personal services for hire, to be distinguished from an independent contractor, and in particular an independent contractor who provides personal services for hire?

204 Despite the earlier preoccupation of the law with the degree of control exercised by the putative employer as defining an employment relationship, the modern approach is multi-factorial. As the majority said in *Hollis* at [24] it is "the totality of the relationship" which is to be considered. A range of indicia may be examined. Some will be more useful than others in some work arrangements but less useful in other work arrangements. Because of the multiplicity and diversity of work arrangements and the ingenuity of those fostering disguised relationships, there is value in a multi-factorial test which recognises that one spotlight will not necessarily adequately illuminate the totality of the relationship. Such an approach also involves what may be described as a "smell test", or a level of intuition. The majority in *Hollis* (at [48]) described the notion that bicycle couriers were each running their own business as "intuitively unsound".

205 Lord Wedderburn referred to the use by courts of the multi-factorial test of looking at the whole picture as the "elephant-test" — an animal too difficult to define but easy to recognise when you see it: *The Worker and the Law*, (3rd ed, Penguin Books Ltd, 1986) at p 116. As Mummery J said in *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944.

> The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.

206 However, the absence of a simple and clear definition which explains the distinction between an employee and an independent contractor is problematic. It is troubling that in the circumstances of the bicycle couriers dealt with in *Hollis*, the parties involved needed to travel to the High Court to obtain a clear exposition of the legal status of the couriers. See also *Re Porter; Re Transport Workers Union* at 184. Workers and those who employ or engage them require more clarity from the law. That is particularly so when important legislation such as the *Fair Work Act* (and its predecessors dating back to 1904) have steadfastly avoided defining what is an employee, yet demand (on pain of civil penalty) that there be no misrepresentation as to the nature of the work relationship: see s 357 of the *Fair Work Act*.

207 In the pursuit of greater simplicity and clarity it is of assistance that the majority in *Hollis*, whilst applying a multi-factorial approach, provided a focal point around which relevant indicia can be examined. That focal point has been elsewhere expressed as the "ultimate question" posed by the totality approach:

Abdalla v Viewdaze Pty Ltd (2003) 53 ATR 30; 122 IR 215 at [34] (referred to with approval by Crispin P and Gray J in *Yaraka Holdings Pty Ltd v Giljevic* (2006) 149 IR 339 at [303]); and see Sappideen C, O'Grady P and Warburton G, *Macken's Law of Employment*, (6th ed, Lawbook Co, 2009), at [2.80]. As Wilson and Dawson J in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 observed at 35 "the ultimate question" was posed by Windeyer J in *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217, in a passage which the majority in *Hollis* strongly endorsed at [40]. The majority in *Hollis* (citing Windeyer J) said, the distinction between an employee and an independent contractor is "rooted fundamentally" in the fact that when personal services are provided to another business, an independent contractor provides those services whilst working in and for his or her own business, whereas an employee provides personal services whilst working in the employer's business: at [40]. Unless the work is being provided by an independent contractor as a representative of that entrepreneur's own business and not as a manifestation of the business receiving the work, the person providing the work is an employee: *Hollis* [39], [40], [47], and [57] and see *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; 152 IR 317 at [30]-[32]. The English courts have taken a similar approach. There the "entrepreneur test" seems to be the dominating feature: Selwyn NM, *Laws of Employment* (Oxford University Press, 2006) at [2.34].

208 Simply expressed, the question of whether a person is an independent contractor in relation to the performance of particular work, may be posed and answered as follows:

> Viewed as a "practical matter":
>
> (i) is the person performing the work an entrepreneur who owns and operates a business; and,
>
> (ii) in performing the work, is that person working in and for that person's business as a representative of that business and not of the business receiving the work?

If the answer to that question is yes, in the performance of that particular work, the person is likely to be an independent contractor. If no, then the person is likely to be an employee.

209 The question which this approach poses appears to me to be the central question in the application of the totality test. The question provides the focal point around which the indicia thrown up by the totality test may be examined. The central question has two elements. The first is whether the person has a business. The second is whether the work or the economic activity being performed is being performed in and for the business of that person: *Sweeney* at [31].

210 As to the first element, 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; 138 IR 252 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: *Steven 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].

211 It is not possible to exhaustively enumerate the facts and circumstances which will support the inference that a course of activity is a business: *London Australia Investment Co Ltd v Federal Commissioner of Taxation* (1977) 138 CLR 106 at 129. The nature of a business will vary and some of the typical indicia I have identified will be less important in some settings than in others. Many of the characteristics of a share trading business will be different to those of a retail shop and different again to those of a business selling personal services. It is to the characteristics of the latter and the distinguishing features between it and an employment that, in this case, attention needs to be given.

212 A personal services business is a business which is likely to involve system, repetition and continuity in the pursuit of profit. A genuine personal services business will aspire to make profits and not simply be paid remuneration, as is an employee. Such a business will seek to be remunerated not simply for the provision of the labour of the self-employed entrepreneur that provides the personal services, but also for the risks involved in that person being an entrepreneur.

213 The risk profile of a personal services business is very different to that of an employee. By its very nature, a genuine commercial enterprise is an undertaking which involves risk. Business risk is a product of a need for a business to invest (either in physical assets, time or effort) at a cost and without any certainty or assurance of that cost being recovered and any profit being made. Unlike an employee who generally seeks security, and is not risk-tolerant, a personal services business is prepared to invest time, money and effort with little or no certainty that such investment will be rewarded with a financial return. All of that is done in the hope of making a profit. It is in that sense, that an entrepreneur operating a personal services business seeks profit and not simply remuneration, for the personal services provided.

214 A genuine independent contractor providing personal services will typically be: autonomous rather than subservient in its decision-making; financially self-reliant rather than economically dependent upon the business of another; and, (as I have said), chasing profit (that is a return on risk) rather than simply a payment for the time, skill and effort provided.

215 In an employment relationship, there will typically be an entrepreneur, but that will be the employer, it will never be the employee. The employer will take the risk of profit or loss. The employee seeks the security of fixed and certain remuneration. Unlike the independent contractor, the employee has no business, and typically will have no interest or desire, in exposure to the risk of loss in return for the chance of profit.

216 As Stewart (at 261) has observed:

> There does seem to be a fundamental difference, in a capitalist system, between running your own business and working for somebody else's. It is a distinction that has not only been articulated in these terms by the courts: (*See, eg, Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 217; *Hollis v Vabu Pty*

> *Ltd* (2001) 207 CLR 21 at [39], [41]) but that most people in the community would implicitly understand and accept. The entrepreneur risks whatever capital they have been able to accumulate in a bid to profit from their venture. They may earn a little or a lot, or indeed they may lose money. Within whatever constraints are imposed by the need to raise finance and/or the conditions of the relevant product market, the entrepreneur makes their own decisions as to how the business is to operate.

Indicia of a Business

217 That analysis and an understanding of what constitutes a business and, in particular, a personal services business, suggests the following indicia for consideration in the "Is there a business?" element of the totality test:

- Do the economic activities of the putative business involve the taking of risk in the pursuit of profits?: *Gribbles* at [39]; *Hope v Bathurst City Council* at 9; *Roy Morgan (2010)* at [47]; *Yaraka Holdings* at [41] and [49]; *Montreal (City) v Montreal Locomotive Works Ltd* [1946] 3 WWR 748; [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]; *Steven 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?: *Steven 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 (t/as Wells Plumbing)* [2008] NSWCA 186 at [42]; *Ferguson* at 874-875;
- 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];

Indicia as to Whose Business the Economic Activity is Being Performed In

218 The second element — "Whose business is the economic activity being performed in and for?", raises the following indicia for consideration:

- Does the provision of the economic activity provide an opportunity for profit and involve the risk of loss: *Roy Morgan (2010)* at [47]; *Market Investigations* at 185; *Lee Ting Sang* at 382; or is the payment made largely consistent with the remuneration that an employee would have received for providing the activity?: *Hollis* at [54]; *Federal Commissioner of Taxation v Barrett* (1973) 129 CLR 395 at 405-407; *Yaraka Holdings* at [41] and [49];
- In that respect and in relation to profit:
    - to what extent is the reward for the provision of the activity negotiable and negotiated commercially?: *Hollis* at [54];
    - to what extent does the putative owner/entrepreneur have the capacity to manage the activity so as to maximise the potential for profit?: *Hollis* at [58]; *Roy Morgan (2010)* at [47]; *Market Investigations* at 185; *Lee Ting Sang* at 382;
- In that respect and in relation to risk:
    - to what extent is the agreed payment contingent upon the person providing a satisfactory result (i.e. are there financial consequences for poor performance)?: *Roy Morgan (2010)* at [47]; *Yaraka Holdings* at [49];
    - who bears the risks associated with providing any equipment or assets required for the performance of the economic activity?: *Hollis* at [56].
- Does the putative business or the putative employer's business control and direct or have the capacity to control and direct the manner in which the economic activity is carried out?: *Hollis* at [43]-[45], [49] and [57]; *Stevens v Brodribb* at 24 and 35-36; *Roy Morgan (2010)* at [49].
- Is the economic activity represented or portrayed as the activity of the putative business or that of the putative employer's business?: *Hollis* at [50]-[52] and [57]; *Yaraka Holdings* at [43];
- To what extent is the person providing the economic activity integrated with the business receiving the activity?: *Stevens v Brodribb* at 26-27 and 35-36; *Hollis* at [57];
- To what extent is the person providing the economic activity financially self-reliant from, as opposed to, economically dependent upon or organisationally tied to, the business receiving the activity?: *Re Porter; Re Transport Workers Union* at 184-185. Exclusivity is suggestive of an employment relationship: *Federal Commissioner of Taxation v Barrett* at 407. However, it does not follow that a person who provides casual or part-time work to multiple purchasers is not an employee: *Yaraka Holdings* at [34] and [36]; *Sgobino v South Australia* (1987) 46 SASR 292 at 308;

- Is the person providing the economic activity free to employ his or her own means (employees or contracted agents) to produce the activity or must that person personally perform the work?: *Stevens v Brodribb* at 24-26 and 38; *Neale v Atlas Products (Vic) Pty Ltd* (1955) 94 CLR 419 at 425 and 428; *Yaraka Holdings* at [41]; and see [285] below;
- To whose business does any goodwill created by the economic activity enure?: *Hollis* at [48]; *Stevens v Brodribb* at 37; *Roy Morgan (2010)* at [46]; *Yaraka Holdings* at [52];
- In contracting to provide the economic activity has the person agreed to provide an outcome or result?: *Neale v Atlas Products* at 425; *Roy Morgan (2010)* at [42];
- To what extent is the person providing the economic activity doing so with his or her own tools and equipment?: *Hollis* at [56]; *Sweeney* at [32]; *Roy Morgan (2010)* at [41]; *Yaraka Holdings* at [37]-[40]; *Market Investigations* at 185; *Lee Ting Sang* at 382;
- If the person is providing their own equipment, to what extent can the person be directed in the management and control of that equipment?: *Stevens v Brodribb* at 26;
- Have the parties involved characterised the economic activity as that of the owner/entrepreneur being performed in and for that person's business, or alternatively as part of the receiving business, and to what extent does that characterisation reflect the reality?: See [188]-[200] above.

219 Whether or not income tax has been withheld and whether annual, long service or sick leave is afforded are often also used as relevant indicators: *Stevens v Brodribb* at 37; *Yaraka Holdings* at [44]-[48]. It is not incorrect to have regard to these factors, but there are differing views as to the inference which should be drawn from such arrangements: *Wesfarmers Federation Insurance* at [40]-[42]. Reliance on these factors may involve circularity of reasoning particularly where these factors are based upon the self-assessed and objectively incorrect label that the parties have attached to their relations: see *Hollis* at [37] and Owens and Riley at 140. Further, it is necessary to appreciate that casual employees are not ordinarily entitled to leave or sick pay: *Sgobino* at 293 and 308; *Yaraka Holdings* at [50];

220 The indicia which I have listed reflect various indicators largely taken from the decided cases. In many respects the indicators are differently expressed to accommodate the particular approach that I have taken which, consistently with the approach in *Hollis*, seeks to emphasise what I have described as the central question in the application of the totality test. The indicators listed are not intended as exhaustive and many of them will be the subject of qualification depending upon the nature of the economic activity in question and the circumstances in which it is being carried out. The task to be undertaken is not to be performed mechanically by checking off against a list of indicia and without recognising that different significance may attach to the same indicators in different cases: *Lopez v Deputy Commissioner of Taxation* (2005) 143 FCR 574 at [82].

Did Panel Interpreters Own and Operate A Business?

221 On Call contended that panel interpreters owned and operated their own businesses. Before analysing the evidence on that issue, I first need to identify

the legal and evidentiary burden that On Call carried. The onus of proof falls upon On Call on this issue and every contested issue in the proceeding. On Call carried the burden of establishing affirmatively, and on the balance of probabilities, that the Commissioner's assessments are excessive: *George v Federal Commissioner of Taxation* (1952) 86 CLR 183 at 201. Not only must On Call show that the assessments are wrong but it must show what the correct assessments should be and what corrections should be made to make those assessments right or more nearly right: *Federal Commissioner of Taxation v Dalco* (1990) 168 CLR 614 at 623-624, 632, 634. In the absence of evidence, the Court is not able to infer facts in favour of taxpayers: *McCormack v Federal Commissioner of Taxation* (1979) 143 CLR 284 at 303, 306 and 323.

222 It was for On Call to adduce sufficient evidence to discharge its onus. In relation to each of the panel interpreters utilised by On Call during the relevant period, it was necessary for On Call to establish that the person was not an employee (as the Commissioner's assessment had categorised the person to be) but was instead an independent contractor. In the application of the totality test, that onus called upon On Call to establish that each relevant interpreter owned and operated a business.

223 There is no evidence before me identifying each of the relevant interpreters in question. Nor does the evidence establish the number of interpreters involved other than the very general evidence that in the relevant period On Call had, at any particular time, in the order of 2,500 interpreters on its panel. Of the thousands of panel interpreters in question, On Call called evidence from seven. Beyond that evidence, On Call seeks to rely largely on second-hand observations made by Mr or Mrs Hulusi or seeks to draw upon statistical information gathered from On Call's records (for instance ABN registrations).

224 The question of whether or not a person who provides personal services, owns and operates a business is a complex question in relation to which a wide range of indicators are relevant. Those indicators call for evidence personal to the individual. Generalisations and extrapolations from the circumstances attending one individual to those attending the next are likely to be speculative and unhelpful.

225 Additionally, I do not accept that the seven interpreter witnesses who were called constitute a representative sample of interpreters on the issue of whether the relevant panel interpreters owned and operated their own businesses during the relevant period. In that respect, I accept the contention of the Commissioner that all of the witnesses called were very experienced, well qualified and long-standing interpreters and, that by virtue of those attributes, were more likely to own and operate a business than is the case for interpreters without those attributes. Three of the seven witnesses were either substantially or heavily involved in translation work rather than interpreting. Given that translating accounts for only about 5% of On Call's turnover, the witnesses called were heavily weighted to those interpreters substantially involved in translating and in that respect unrepresentative of panel interpreters generally. That point is of importance as, for the reasons I will shortly address, I consider that translators are more likely than interpreters to own and operate their own businesses.

226 In any event, even if I had been satisfied that the witnesses called were representative of panel interpreters on the issue of whether panel interpreters owned and operated their own businesses, I could not make the finding that On

Call seeks. On Call seeks a finding that all of its panel interpreters utilised during the relevant period owned and operated their own businesses. I could only reach that conclusion by inference from the sample if I was satisfied that all of the interpreters called as witnesses owned and operated their own business. For the reasons that I will shortly address, I am only satisfied that two of the seven interpreter witnesses called owned and operated their own businesses. That finding is of little assistance to On Call on the question of the correctness of the Commissioner's assessments beyond, perhaps, those parts of those assessments which are based on the two individuals in question. Even if I was to find (which I am not prepared to do) that two-sevenths of the interpreters in question owned and operated their own businesses, that finding would be of no assistance in identifying which of the relevant interpreters owned and operated their own business and the extent to which (assuming On Call succeeded on other issues) the assessments objected to are excessive. These observations highlight the unsatisfactory basis upon which On Call conducted its case. Other criticisms are also apt, including: the highly generalised fashion in which the evidence was presented; the lack of detail in the evidence of those witnesses who were called; and, the failure of the interpreter witnesses to link their evidence to their activities in the relevant period let alone to those activities the subject of the Commissioner's assessments.

227 Before analysing the evidence of the individual interpreters called, it is useful that I explain why I have come to the conclusion that translating, rather than interpreting, work is more likely to provide an interpreter with the opportunity to establish a business. As the evidence of On Call's clientele demonstrates, interpreting services are mainly sought by institutional purchasers such as government departments, governmental service providers, hospitals, courts and large corporations. Although those services are used in aid of the needs of ordinary members of the public, the services are not purchased by those persons but by the institutions with whom they interact. There was no evidence that to any significant degree, On Call's clientele was comprised of individual members of the public and small business operators. I would infer that the other private agencies have similar clientele and that the public agencies like VITS and TIS have (by their nature) governmental clients.

228 It is most unlikely that large institutional or corporate clients with ongoing and significant needs for interpreting services will ordinarily utilise a one-person business to meet their requirements. Those purchasers are likely to constitute the vast proportion of the market for interpreting services. They are likely to use an agency provider such as On Call which can satisfy their substantial needs and limit their administrative burdens.

229 Whilst there is some evidence of two institutional purchasers creating their own panels and engaging interpreters directly, I am unable to say on the evidence whether those panels are constituted by independent contractors or employees. In any event, insofar as that occurs, it seems to be the exception rather than the rule. The totality of the evidence strongly suggests to me that the market for interpreting services is serviced by the agencies and that there is little scope for one-person businesses in that market. No doubt, there may be exceptions, but in my view it is unlikely that many interpreters earn their living by providing interpreting services beyond the work performed for the agencies. None of the interpreter witnesses called did so. None of their evidence demonstrated that they had direct clients requiring interpreting services in sufficient numbers to sustain a business.

230 In contrast, at least two of the interpreter witnesses (Ms Avila and Mr Giovannoni) gave evidence of a relatively substantial direct client base in relation to their work as translators. That client base is constituted by ordinary members of the public and small businesses such as importers, exporters and solicitors. Unlike large institutional purchasers, these clients are more likely to use small one-person businesses to meet their translating needs.

231 I do not seek to suggest that all the interpreters in question whose activities were dominated by translating work should be regarded as owning and operating a business. On the facts before me I can only infer that some do and some do not. The only point I seek to make is that relatively speaking, the market for interpreting services is likely to be far less conducive to sustaining a one-person business than is the market for translating services.

232 By reference to the indicia I have identified for testing the existence of a business, I have determined that of the interpreter witnesses called, only Mr Giovannoni and Ms Avila owned and operated a business.

233 Mr Giovannoni perceived himself to be an owner and operator of his own business. His putative business was promoted as a business to the public through advertising and other promotional means including through the Yellow Pages and other publications and by the use of business cards and a website. Mr Giovannoni's business engaged with a multiplicity of purchasers of its services in a repetitive and continuous manner. In *Mr Giovannoni's case* the vast bulk of purchasers of his services were his direct clients and not the agencies. The assets used to support the business were not extensive but were in frequent use. Unlike most of the other witnesses, Mr Giovannoni usually operated from his home office utilising that office and its equipment extensively. Mr Giovannoni did have and did operate transactional systems. He had an invoicing system and he had standard methodologies for quoting or for otherwise assessing what to charge for particular services. He had a separate business banking account. He operated a business-based accounting system.

234 Significantly, Mr Giovannoni's activities involved engaging others to perform work. In that respect, Mr Giovannoni was responsible for making payments to those sub-contractors that he engaged. That activity involved Mr Giovannoni in the taking of risk. It is clear from his evidence that he did so in the pursuit of profits. That his economic activities involved the taking of risk was also acknowledged by the fact that he took out professional liability insurance. The evidence of his regular and substantial clientele demonstrated that his activities generated goodwill which enured to his business. In *Mr Giovannoni's case* the fact that the regulatory requirements of a business (ABN, GST, taxation returns) were being met had a rational connection to the activities in which he was engaged.

235 I am satisfied that Mr Giovannoni owned and conducted a business. That business overwhelmingly involved the provision of translating services. The provision of interpreting services appears to have been a peripheral part of the business and was engaged in by Mr Giovannoni where convenient or when his more lucrative translating work was not available.

236 Ms Avila perceived herself and portrayed herself (through her business cards and advertising) as owning and operating a business. Her economic activities involved the taking of some risk in the pursuit of profits. The fact that at least some risk was involved in her activities is acknowledged by her taking out her own professional indemnity and public liability insurance. Ms Avila tendered

and bid for contracts. She had a multiplicity of purchasers of her services. In particular some 40% of her activities involved a varied portfolio of private clients for whom she did translating work. That demonstrated repetition and continuity of activities. She promoted her activities through the Yellow Pages and by distributing business cards. She had a reputation amongst the Spanish community in Brisbane, which was also likely to contribute to the promotion of her business and which demonstrates that her activities created goodwill which enured to her business.

237 The tangible assets utilised to support her activities were not very significant. There was no direct evidence of Ms Avila operating business transactional systems. I would infer, given the relatively high proportion of the work that she did for private clients that she invoiced and had a rate card or some standard basis upon which she charged for her work. The fact that she participated in tendering and bidding processes suggests that some transactional systems existed, although these may have been rudimentary. Her evidence was that she kept business records but she gave no detail of this. The fact that she was not registered for GST suggests that any business she had is likely to be relatively small in terms of its turnover.

238 The evidence provided to substantiate the existence of a business owned and operated by Ms Avila was not very extensive, although somewhat more detailed than for most of the other witnesses (other than Mr Giovannoni). Of particular significance in my evaluation as to whether there was a business, is the fact that Ms Avila had direct clients which make up in the order of 40% of her work and that she was involved in tendering for work. On balance, it seems to me that Ms Avila had a business which extended at least to include the services (mostly translating) that she provided to her direct clients.

239 I am not satisfied that any of the other interpreters called as witnesses owned and operated a business. To some degree my lack of satisfaction may be the result of the lack of detail in the evidence and the manner in which it was presented. Many of the relevant indicators were simply not addressed in the evidence given by these witnesses. Where those indicators were addressed, the evidence lacked detail and substantiation. An example of that is the evidence given by some of those witnesses that they had direct clients. The extent of or the nature of the clientele was not given.

240 These witnesses did have multiple purchasers of their services. However, overwhelmingly those purchasers were the agencies and I am not satisfied that the provision of services by them to those agencies was an activity of any business they operated, because I consider it more likely that when working for agencies interpreters do so as employees. Insofar as some of them gave evidence of having direct clients, I would infer from the lack of detail and substantiation that if direct clients existed they were minimal and peripheral to the activities of these individuals. In that respect there was no evidence of repetitive and continuous business activities.

241 The interpreters in question performed all of their work personally and did not employ or engage others in the performance of that work. Their evidence of their economic activities did not suggest the taking of risk in the pursuit of profit. Although some mentioned goodwill in the context of gaining and having a reputation, what they regarded as goodwill appears no different to the good reputation which may attach to a valuable employee. There was no evidence of

goodwill enuring to any business of these interpreters. At best, the evidence was simply that the particular individual may, as a result of good work, be requested by a client of an agency.

242 All but Mr Gutkin did not promote a business to the public through advertising or other promotional means. Mr Gutkin advertised in the "Russian Yellow Pages", but no detail of the nature of that publication or the extent of any advertising was provided. Mr Gutkin's work overwhelmingly came from the agencies.

243 Each of these witnesses generally accepted the rates offered by the agencies and did not negotiate their own fees. There was no evidence that any of these witnesses had formulated their own standard terms and conditions of trade. There was no evidence of risk taking of the kind that might ordinarily be attached to the engagement in activities in the pursuit of profit. The fact that none of these witnesses took out their own personal indemnity insurance tends to suggest that they did not regard themselves as at risk, despite the fact that a business providing interpreting services is clearly at risk and potentially substantially so in relation to negligent work. None of the witnesses gave evidence of holding separate business banking accounts. Nor did they suggest the utilisation of business-based accounting systems, even rudimentary systems like MYOB as utilised by Mr Giovannoni. None of the witnesses gave any evidence of tendering or bidding for work in contrast to the evidence of Mr Giovannoni and Ms Avila. The evidence of the utilisation of assets to support their activities was minimal although, given the nature of the work, I attach little significance to that.

244 Each of these interpreters perceived themselves to be self-employed and had an ABN. Their evidence also indicated that they interacted with the ATO on the basis that they conducted a business. I attach little weight to those indicators. Obtaining an ABN is a simple process in which the existence of a business is not required to be demonstrated. Further, it is not surprising that in circumstances where these individuals perceived themselves to be self-employed that some of the regulatory requirements of a business were in evidence. For many of the witnesses, their self-assessment of themselves as independent contractors was largely based on their capacity to accept or reject work as it suited them. That self-assessment was also likely to have been significantly influenced by the characterisation of their status by On Call and other agencies. In the absence of other indicators of the existence of a business, the fact that some of the regulatory requirements of a business were in place, is likely to have had more to do with an incorrect self-assessed conclusion of the existence of a business than the fact of such a business existing.

245 For the reasons I have already adverted to, On Call has failed to satisfy me that any of the relevant interpreters, who were not called as witnesses, owns and operates a business. For the sake of completeness, I should comment on the general (but non-specific) impression that the evidence has created.

246 It can be said that there was some evidence that the relevant persons perceived themselves and portrayed themselves to others as owning and operating a business. All of the relevant interpreters used an ABN and some were registered for GST. Those of the interpreters that executed one or more of On Call's standard contracts adopted, at least for the purpose of the contracts executed, the description "independent contractor" and acknowledged that status. However, the labels that the interpreters have attached to themselves are

of little assistance if those labels are inconsistent with the real substance or reality of the relationship involved. I am not satisfied that the evidence of the reality supports the labelling utilised.

247 In this respect the evidence suggests that little importance was attached to the contracts made as between On Call and some of the interpreters. That lack of importance is demonstrated by a number of matters. Most of the interpreters did not sign contracts. On Call's disregard for the contracts is demonstrated by its failure to insist upon the contracts being executed by most of the interpreters and that it did not keep records sufficient to identify those who had signed contracts and the contracts that they had signed. Ms Hulusi's evidence was that she did not read the October 2006 Contract, or at least had not substantially done so. Her evidence (and that of some of the individual interpreters called) was that, irrespective of whether contracts had been signed or not, or which version of the contract was being utilised by On Call, nothing changed in terms of the operations of On Call and its interactions with interpreters on its panel. That nothing changed, despite the fact that the terms of the different versions of the contracts varied, also suggests that the terms of the contracts made were of little or no importance to the manner in which the relations between On Call and its interpreters were conducted. The findings I later make at [293]-[294] are also of relevance.

248 To the extent that On Call contends that the economic activities of the interpreters involved the taking of risk in the pursuit of profits, those contentions were confined to a number of peripheral matters not particularly demonstrative of entrepreneurial endeavour. It was said that interpreters could profit from the sound selection and management of assignments. In that respect, On Call relied on the evidence of the capacity of interpreters to take on multiple assignments. I accept that to a limited degree interpreters had such a capacity and that to a limited degree that capacity involved some risk, namely the risk of a clash in the interpreter's capacity to carry out multiple assignments. The risk involved was minimal. There is no evidence to suggest that a clash or conflict of that kind carried the risk of detriment. On Call itself encouraged interpreters to take multiple assignments when it suited On Call. I doubt very much that a clash between assignments (whether assignments from the one agency or a multiplicity of agencies) would, given the practices in the industry, have led to loss of further work. Nor, in this regard was the capacity to select multiple assignments particularly significant in the overall context of the work performed by interpreters. That capacity was not very far removed from the capacity of a casual employee working for multiple employers to select and manage their engagements so as to maximise the remuneration earned.

249 On Call also relied on the contention that interpreters exploit the direct dealings they have with On Call's clients for their own business purposes in order to secure those clients to themselves and deal directly with them. The evidence relied upon in support of that contention was evidence of two occasions in which a client of On Call decided to create their own panels of interpreters and that some interpreters who had formerly been provided to those clients by On Call were utilised in that endeavour. Ms Hulusi suggested that this had involved the poaching by panel interpreters of On Call's clients. The evidence does not establish that to be the case. Firstly, the poaching of clients is a breach of the Code of Ethics. Secondly, the evidence does not establish that any interpreter approached a former client. Conversely, the evidence suggests

that former clients recruited the interpreters. Additionally, the evidence does not establish whether when interpreters were recruited, they were recruited as employees of the former client or whether they provided their services through their own businesses. Further, and in any event, if the evidence had supported a finding that some interpreters poach clients, the evidence did not support the existence of that activity to any significant extent.

250 There is little or no evidence of a general nature that supports goodwill (name, brand or reputation) being created by the economic activities of the interpreters. The evidence before me is evidence of the kind that I have already adverted to in relation to the individual interpreters called. From time to time clients of On Call (and I would infer the agencies generally) requested a particular interpreter. Usually that occurred for the purpose of facilitating continuity. That evidence did not establish that any goodwill enured personally to any business of the interpreter concerned. There was no tangible evidence of interpreters being personally advantaged in the conduct of their own businesses as a result of a relationship developed with clients of the agencies.

251 I have dealt with the evidence of advertising by panel interpreters. That evidence does not suggest that generally, interpreters promote their activities as a business to the public through advertising or other promotional means. Instead the evidence suggests that most interpreters do not advertise at all. Consistently with what I have found in relation to the market for translating services, translators are more likely to advertise. The evidence of the extent of that advertising is however not clear and, in any event, translating constitutes a small fraction of the work overall (5% of On Call's turnover). What is apparent is that the vast bulk of interpreters obtain most of, if not all, of their work from the agencies. For that purpose they do not need to advertise. They rely, in the main, on their listings on the websites of AUSIT and NAATI.

252 Whilst I accept that most interpreters have a multiplicity of purchasers of their services, it is likely that for the vast bulk of interpreters (less so for those mainly translating) their purchasers are confined to the agencies. The patterns of work of the vast bulk of interpreters is unlikely to be much different to that of casual or part-time employees working for a small number of employers; *Yaraka Holdings* at [36]; *Sgobino* at 308.

253 I have earlier summarised the extent of use of other persons to carry out assignments given to interpreters. On Call relies on the prevalence of, what it refers to as "sub-contracting". For the reasons I have already explained, there was little evidence of interpreters on On Call's panel engaging in sub-contracting as opposed to the swapping of assignments or substitution which, overwhelmingly occurred with the consent of On Call. As a rule, interpreters did not delegate their work. They performed it personally. The only reliable evidence of delegation related to Mr Giovannoni and, in that respect, his evidence typified the exception rather than the rule.

254 The evidence indicates that overwhelmingly interpreters did not have their own standard rates and terms and conditions of trade. Generally rates were set and applied by On Call and the other agencies and interpreters accepted those rates without negotiation. The only exception related to a number of rare languages where interpreters were particularly scarce.

255 On Call's panel interpreters did not invoice On Call and, except for a limited number of interpreters, even those interpreters who are registered for GST relied on On Call's invoicing and payment systems rather than having and utilising

their own. I would infer that the same situation applied in relation to other agencies. As was the case of bicycle couriers in *Hollis*, the agencies "superintended' the interpreters" finances: see *Hollis* at [54]. There was no evidence of interpreters generally having their own debt collection systems, business accounting systems, budgeting or forecasting systems or business-based banking arrangements.

256 On Call also relied on the existence of business names and some incorporated entities. To the extent that there was evidence of that, it was minimal and indicated that overwhelmingly interpreters do not use business names (other than their own name) or operate through incorporated entities. Whilst On Call correctly contends that some interpreters hold insurance policies, again the evidence suggests that those that do were the exception rather than the rule. On Call also relied on panel interpreters having made contributions to On Call's policy of insurance, but that is not particularly probative of whether or not interpreters operated their own businesses when those businesses are said to extend beyond activities generated by On Call.

257 On Call also contented that panel interpreters were paid for a result. I reject that contention for reasons that I will shortly address. The work of interpreters involves sufficient skill to suggest that a career in interpreting can be pursued through self-employment, but as such a career can also be pursued through employment, it is difficult to generalise as to the extent of interpreters who have chosen the path of self-employment. I would infer that some have.

258 In conclusion, I am satisfied that Mr Giovannoni and Ms Avila owned and operated a business. I am not satisfied that any other of the interpreters called as witnesses owned and operated a business. I am unable, on the evidence before me, to make any definitive finding as to the position of those interpreters not called. However, the evidence before me supports the conclusion that most of those interpreters did not own and operate their own businesses. So far as there were such businesses, they were likely to have been focused upon providing translating services.

Whose Business was the Economic Activity Being Performed in and for?

259 I have set out the indicators which I consider will ordinarily be relevant in analysing the second element of the central question. Given my findings in relation to the first element of that question, it is unnecessary that I should address the second element in relation to relevant interpreters other than for Mr Giovannoni and Ms Avila. However, in case I am wrong as to the conclusions I have already reached, it is appropriate that I should make findings on this issue in relation to all of the relevant interpreters.

260 The question of whether an interpreter owned and operated a business raised for consideration, in the main, matters personal to the individual. However, the evidence relevant to a consideration of the indicators raised by the second element may be more readily answered by evidence going to the general practices and procedures applicable to the work of On Call and generally common to all of the panel interpreters. In that context, I have been able to make findings without the benefit of evidence personal and specific to any particular interpreter.

Control

261 I turn then to consider firstly whether the business of the interpreter or alternatively the business of On Call controlled and directed (or had the

capacity to control and direct) the manner in which the activities of panel interpreters were carried out. The evidence on this issue provided a relatively clear answer. It is On Call's business which had the right to control and, in practical terms, exercised so much control as was necessary to effectuate the provision of interpreting in accordance with standards and practices which On Call desired to achieve.

262 The standards and performance requirements expected by On Call of its panel interpreters were in the main set out in the Code of Ethics. The Code was incorporated into the contracts of those interpreters who made the July 2005 and September 2005 Contracts and by reason of statements in the registration pack and Kit, compliance with the Code is likely to have been a contractual requirement enforceable by On Call, even in the absence of the execution of a standard form contract. At the very least, the range of statements made by On Call, and other conduct engaged in, made On Call's expectation that the Code would be complied with apparent, and constituted a direction from On Call that the Code be complied with.

263 It may well be the case that panel interpreters complied with the Code of Ethics by reason of their own desire (or possibly obligation) to abide by industry norms or standards. However, the voluntary assumption of industry standards did not derogate from the fact that On Call, on the facts I have found, required compliance and thereby reserved to itself the right and capacity to deal with non-compliance irrespective of whether non-compliance could be dealt with elsewhere. The situation is akin to that found in relation to panel interpreters of another agency in *Re Associated Translators & Linguists Pty Ltd and Federal Commissioner of Taxation* (2010) 78 ATR 937 at [81].

264 As the evidence relating to performance, compliance and discipline demonstrates, On Call gave itself the capacity to deal with non-performance including in relation to a range of matters which would constitute non-compliance with the Code of Ethics. The fact that performance, compliance and disciplinary processes existed is demonstrative of On Call's control, although on the whole, the evidence suggested that performance and disciplinary processes were not much utilised, but that counselling of interpreters and reminding them of their professional responsibilities occurred from time to time. On Call systematically recorded complaints from clients and instances of non-performance. Sanctions for non-performance or misbehaviour were imposed, including by On Call limiting or excluding the interpreter from further work. On Call contended that this sanctioning process was to be contrasted with the way in which On Call dealt with those interpreters who it regarded to be its employees, for whom the sanctions of warnings and terminations of employment were applied. But the difference adverted to is of little substance. The availability and use of effective sanctions to deal with non-performance is a manifestation of control. The nature of the sanctions imposed is of little importance as long as the sanction is effective. Further and in any event, the difference adverted to is indistinguishable from the different sanctions an employer may be able to apply to its permanent employees on the one hand and to its ad hoc casual employees on the other.

265 It is true, as On Call contended, that many of the instructions it communicated involved the superintendence of incidental matters such as punctuality and the turning off of mobile phones. However, that kind of superintendence was not demonstrated to be any different to the

superintendence by On Call of those interpreters it regarded as its employees. The superintendence of incidental matters relating to interpreters was held to indicate a contract of services in *Sgobino* at 305. Further and in any event, the peripheral nature of the superintendence is likely explained by the fact that more important matters were dealt with by the Code of Ethics and that the Code was the principal tool of superintendence.

266 I have no doubt that On Call's practical capacity to control its full-time interpreter employees was greater than that available to it in relation to its panel interpreters. Ms Hulusi complained in her evidence about her instructions as to punctuality and other matters being often ignored by panel interpreters. However, the distinction, in the extent of compliance pointed to, is likely to be no different to what might be expected in relation to permanent employees on the one hand, and casual employees on the other. In that respect, the extent of compliance is explained by the diminished extent of economic commitment between provider and user and is not necessarily a reflection of the absence of an employment relationship.

267 The principal basis upon which Ms Hulusi asserted a lack of control was On Call's inability to require panel interpreters to work, either by taking assignments, extending assignments or not cancelling assignments. The contrast on these matters with On Call's capacity to direct its full-time interpreters to carry out work, was central to Ms Hulusi's view that On Call lacked control. That, however, is a matter to which little significance can be attached in this case. Whilst an on-going employee has an obligation to work during the hours for which the employee has been engaged, a casual employee, and in particular an ad hoc casual, has no such obligation. Whilst a lack of an obligation to work is a feature of an independent contractor it is also a feature of casual employment: *Sgobino* at 308.

268 A requirement that a person commence work at a particular time and a prohibition on the refusal of work (as was the case in relation to the bicycle couriers dealt with in *Hollis*: see at [49]) is a manifestation of the existence of control by the putative employer. The absence of those requirements, especially where work is sought by the putative employer on an irregular and ad hoc basis, is not demonstrative of a lack of control: *Wesfarmers Federation Insurance* at [69]-[72]. It does not detract from the conclusion I have otherwise reached that the degree of control available to and exercised by On Call was extensive: see *Roy Morgan (2010)* at [48]-[49]. The situation was no different to very many other employees employed as casuals: *Sgobino* at 307.

269 Lastly, On Call contended that if there was control, that conduct was consistent with "the reservation of a right to direct or superintend the performance of the task which does not impair the essential independence of the person performing that task": *Stevens v Brodribb* at 37. In the passage quoted Wilson and Dawson JJ were citing Dixon J in *Queensland Stations Pty Ltd v Federal Commissioner of Taxation* (1945) 70 CLR 539. What their Honours (and Dixon J) meant by the impairment of the essential independence of the person was not explained, other than to suggest that indicia beyond the question of control are relevant. That seems to be what Wilson and Dawson JJ had in mind (see at 37-38) and, consistently with the totality test, it is the approach that I have taken. Accordingly, whilst I regard the extent to which On Call could and did exercise control as strongly tending to support an employment relationship, I have not regarded that as determinative.

Representation of the User's Business

270 The findings I have made in relation to the representation of On Call by the panel interpreters, substantiate my clear view that the economic activities engaged in by panel interpreters were represented and portrayed as the activities of On Call, and not of the activity of the businesses of the interpreters. Given the particular emphasis placed upon this indicator by the majority in *Hollis*, I regard it as of particular importance.

271 Most of the evidence on this issue concentrated on the position of interpreters as distinct from translators. So far as interpreters are concerned, the evidence was unequivocal. The requirement for panel interpreters to wear On Call's identification badges, and the content of those badges, portrayed panel interpreters as representing On Call and as being an emanation of On Call. The badge display advertised and promoted On Call's business. Statements by On Call that the interpreters were the public face of its business and that the interpreters represented On Call, were an accurate reflection of what I consider to have been the reality.

272 The fact that the work performed by panel interpreters was integral to the business of On Call is also of some importance in supporting the conclusion that I have just expressed: *Hollis* at [57]; *Stevens v Brodribb* at 26-27 and 35. It would commonly be the expectation of those with whom a business deals, including its clients, that the businesses' functions which are integral to that business would be the activities of the business rather than the activities of another business. A different expectation may attend the performance of peripheral functions, which common experience would suggest may sometimes be provided for the business in question, rather than by that business. In this respect, the contention of On Call that its primary function is that of an agency fulfilling requests for interpreting and translation and not actually doing the interpreting and translation itself, is without any evidentiary foundation and is rejected. The evidence was unequivocal that On Call is not an agency and that On Call itself contracts with its clients as a provider of interpreting and translating services, and that the provision of those services was the core activity of On Call's business. On Call's business involved "the marshalling and direction of the labour of the [interpreters], whose efforts comprised the very essence of the public manifestation" of On Call's business: *Hollis* at [57].

273 That the panel interpreters were the public manifestation of On Call is also supported by the evidence of the practice of panel interpreters extending an assignment without obtaining On Call's prior and specific approval. An extension of an assignment involves a further contract between On Call and its client, or at least the variation of the contract initially made. That On Call both authorised and portrayed the panel interpreters as having the authority to make or extend its contracts with its clients, strongly supports the conclusion that in carrying out their functions panel interpreters were portrayed as representing On Call's business.

Goodwill

274 I am also satisfied that goodwill created by the interpreting or translating work performed by the panel interpreters overwhelmingly enured to On Call. The clients for whom the work was conducted were exclusively the clients of On Call and the work provided was not a marketable part of the business of the panel interpreter: *Roy Morgan (2010)* at [46]. The nature of On Call's operation together with the nature of its clientele suggested very strongly that On Call's

business was reliant on repeat custom from large and regular clients. The benefits flowing from good performance of interpreting and translating work and client satisfaction were benefits which flowed to On Call. On Call's concern with the performance of panel interpreters, and with the satisfaction of its clients, is demonstrative of the fact that it was On Call that stood to directly gain as a result of an interpreter's good performance.

275 Although there was evidence of good performance by an interpreter leading to On Call's clients requesting the same interpreter again, that evidence was evidence of repeat work for On Call, including by On Call providing an alternative interpreter where the preferred interpreter was not available. I do not wish to suggest that from time to time good performance by an interpreter may not have led to a direct engagement between that interpreter and a client, or former client, of On Call. On occasion, where that may have occurred, it might be said that an interpreter's goodwill had enured to any business that the interpreter may have had. However, on the evidence before me I am satisfied that overwhelmingly, the name, brand identification and reputation emanating from the work performed by panel interpreters enured to On Call.

An Outcome or Result

276 On Call contended that panel interpreters were paid for a result and not for their time spent interpreting or translating. The Commissioner contended that both interpreting and translating were time-based tasks and that panel interpreters were not remunerated for any given result. In the main the Commissioner relied on the time-based criteria for the duration of assignments and for their payment, including in relation to the extensions of assignments. The Commissioner also relied on a number of comments made in the *Bugle* that On Call's clients purchased language services on a time-basis. I have already dealt with the context in which those statements were made. On Call's main contention was that the evidence of the duration of assignments and interpreters leaving when the job is done, rather than when the block of time purchased has expired, is indicative of a payment for a given result.

277 In my view, great care needs to be taken with the application of this indicator. Its basic premise is that employees are remunerated on a time-basis for the labour provided whereas independent contractors are not and are paid for a result. Yet, there are many examples of employees being paid on a "piece rate" (including the bicycle couriers in *Hollis* who were paid per delivery and the seasonal fruit pickers in *JA & BM Bowden & Sons Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2001) 47 ATR 94; 105 IR 66 who were paid per bin filled or per tree pruned; at [94]-[100]) and of independent contractors (for instance, solicitors) charging on a time-basis. It will commonly be the case in the modern age that where personal services are provided by either an employee or an independent contractor, the charge for those personal services will have a firm connection to either the actual or anticipated time required to be contributed by the person providing the services. A further caution arises from the fact that whilst a theoretical distinction between a contract for labour and a contract for the product of that labour has its attractions, in practice the distinction is usually illusory. Those observations suggest to me that whilst this indicator will be of some use in an obvious case, its utility in other cases will be much diminished.

278 Nevertheless, the clearest example of a contract involving personal services

for a given result, is likely to be a contract in which the fixing of the reward bears little or no reference to the time actually spent or anticipated to be spent.

279 However, not all remuneration paid to a person who is truly an employee is paid by reference to the anticipated or actual time spent working. Remuneration paid to employees is often, to some extent, based on the dislocation associated with taking on work of short duration. Thus, industrial awards and agreements commonly provide for minimum hours of engagement for casual employees and part-time employees and for employees required to perform overtime, additional shifts or to return to work. These payments are designed to remunerate an employee for the disadvantage and dislocation involved in taking on engagements for short periods. Those disadvantages include the time (including travel-time) in getting to and from the engagement and in preparing for it. Given the dislocation involved, minimum payments are likely to be necessary in order to entice employees to accept engagements of short duration. Minimum charges of that kind are also prevalent in the charging practices of independent contractors. For instance, a plumbing business will likely charge a minimum time-based labour charge, a call out fee or some other form of minimum payment, irrespective of the actual time taken to perform the work.

280 I would infer from the evidence that the origins of the charging arrangements for interpreting have been formulated by reference to considerations of the kind that I have just identified. Interpreting assignments are of a relatively short duration. Minimum charges are in place and minimum payments are paid to interpreters. I have no doubt that those payments are founded in part on the time anticipated to be worked and in part on the dislocation involved.

281 An industry standard or rule of thumb applies to the charging of translating. Charges are based on a word count with each unit of 100 words constituting a unit of charge. A premium rate will be applied for non-standard complex documents and an additional premium for translating which is required urgently. Mr Giovannoni's evidence was that the 100 word unit charge was, roughly speaking, based on the time, effort and expertise required to translate a block of 100 words. He agreed that the more complex the document, the more time that is likely to be involved in translating it. Other elements of the fees charged by him, for instance attending at a solicitor's office, would be calculated on the basis of a time-based fee. I accept that there is a connection between the time taken or anticipated to translate a document and the payment received. The dislocation involved in translating very short documents is reflected in the 100 word unit of charge and also in the premium charged for urgent work.

282 This is not a case where the fixing of the reward bears little or no connection to the time actually spent or anticipated. In my view the payments made to the interpreters have a connection with time, that is, a combination of time worked and the time involved in the dislocation to which I have referred. Additionally, this is not a case where there is a discernable product created which is distinct from the labour that created it. In short, this is not the kind of obvious case where the indicator here under consideration has significant utility. I am not satisfied that interpreting or translating was remunerated for an agreed result. The fact, however, that I have come to the view that the work has a connection to time and dislocation does not lead me towards the conclusion that interpreters are employees. As I have already identified, the remuneration of work by

reference to time and dislocation, whilst a common feature of an employment relationship, is also a common feature of the charging practices of independent contractors. In the end, I regard this indicator as of neutral value.

Delegation

283 A key element in an employment relationship is the personal performance of work. A capacity to delegate work tends to strongly suggest against the existence of an employment relationship (*Stevens v Brodribb* at 24-26) although limited or occasional delegation may not (*Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515). The mere right to delegate in the absence of the likelihood or actuality of delegation occurring may be of little consequence: *Neale v Atlas Products* at 428.

284 As I have already found, the evidence in this case does not support the existence of delegation. The absence of delegation tends significantly against the conclusion that the work provided by panel interpreters was performed in and for their own businesses.

Economic Dependency, Extent of Integration and Exclusivity

285 This is not a case in which economic dependency is an indicator of any utility. The evidence does not suggest that panel interpreters were economically dependent or reliant on On Call to the extent that the level of dependency pointed towards an employment relationship. However, the lack of dependency does not point in the other direction because it is explained by the part-time nature of the link between On Call and the panel interpreters.

286 That part-time link needs also to be appreciated on the question of the extent of integration of interpreters with the business of On Call. The evidence of a lack of exclusivity, including the fact that panel interpreters work for On Call's competitors, is demonstrative of a lack of integration. However, the part-time rather than full-time nature of the work requires that the analysis not be overly distracted by what the interpreters did when not performing work for On Call: *Roy Morgan (2010)* at [50]-[51]. The absence of a provision requiring exclusive service is a feature of casual and other employments and not necessarily indicative of an independent contractor: *Sgobino* at 308; *Wesfarmers Federation Insurance* at [74].

287 The evidence suggests that in the performance of work for On Call, the panel interpreters are integrated with the business of On Call to an extent which would not ordinarily attend the relations of an independent contractor and a recipient of that contractor's services. Regular contact and communication between On Call and its regular panel interpreters occurred through the distribution of the *Bugle*. The *Bugle* is a newsletter. Its purpose was to inform panel interpreters about On Call's operations including relevant changes or developments. It was also the means by which On Call invited its panel interpreters to attend both social functions (for example On Call's first birthday party for its Brisbane office) and also training courses. The contents of the *Bugle* publications demonstrated its informational and functional purposes but also demonstrated On Call's desire to build a corporate ethos extending to its panel interpreters. There were frequent references in those publications to the interpreters in possessory terms suggestive of interpreters being part of On Call's business as well as motivational statements which emphasised that On Call and the interpreters are a team working for mutually beneficial outcomes.

288 Additionally, on the issue of integration, training courses and seminars were provided from time to time. Although not compulsory, interpreters were invited to attend. On Call displayed interest in the professional development of the panel interpreters and communicated that interest through the *Bugle* publications. Typically, employers will have a concern and interest in the professional development and skill enhancement of their employees. That concern and interest is demonstrative of the extent of integration, attachment and commitment as between the business of an employer and the employees that work within it. That kind of integration would not readily be expected in the relations between two independent businesses.

289 For those reasons I would conclude that there was a level of integration between On Call and its interpreters of sufficient significance to tend towards supporting the existence of an employment relationship.

Opportunity for Profit and the Risk of Loss

290 A consideration of the evidence, by reference to the sub-indicators that I have earlier identified on the question of the opportunity for profit and the risk of loss, has led me to the conclusion that, in providing their work, the panel interpreters took little or no risk but had some capacity to manage their affairs so as to maximise their remuneration. In terms of risk, it was On Call that bore the responsibility for the work of interpreters failing to meet expected or agreed performance standards or causing others harm or injury. There was nothing in the evidence to suggest a connection between performance and payment. Lack of performance may have led to no future engagements but there was no evidence of it leading to financial penalty or a denial of the remuneration contracted for. Whilst the standard form contracts required that the interpreters indemnify On Call, as a matter of reality, it was On Call that bore the risk of exposure for a failure by an interpreter to perform the work contracted for by On Call's clients. Despite any indemnity, On Call also took out its own policy of insurance protecting it against claims made by its clients including in relation to the work of the panel interpreters. On Call made its interpreters aware of the existence of that cover and its policy was to apply the cover to protect all panel interpreters irrespective of whether or not the interpreter contributed to the cost of that insurance. That demonstrates that On Call did not perceive its panel interpreters as bearing the responsibility for causing harm to others.

291 Whilst I have accepted the existence of some capacity to maximise reward, it is important to distinguish between the maximisation of remuneration and the maximisation of profit. As I have earlier indicated, a genuine self-employed entrepreneur will seek to be remunerated not simply for the provision of that person's personal services, but also for the risks involved in being an entrepreneur. It is in that sense that a distinction between remuneration and profit arises. There was little or no evidence which would support an inference that the interpreters were generating profits in exchange for the taking of risk. Nor was the extent to which remuneration could be maximised of much significance. For all of those reasons, I do not regard the provision of interpreting services by the panel interpreters as demonstrating the risk of loss and an opportunity for profit to an extent that would tend towards a conclusion that those services were provided by independent contractors.

292 Overwhelmingly, the remuneration to be provided to interpreters was not negotiable and not negotiated by reference to the interpreters' standard fees or

standard terms of trade. That consideration points towards the existence of employment relationships and against the conclusion that the interpreters were providing their services as independent contractors.

Characterisation of the Economic Activity

293 As to the manner in which the provision of interpreting services was characterised, it is clear on the evidence that On Call, the interpreter witnesses called and, I would infer, most of the relevant panel interpreters, characterised the work provided by the interpreters as work being performed in and for the business of the interpreter. That conclusion necessarily flows from the fact that On Call characterised the interpreters as self-employed and that the interpreters accepted or acknowledged that characterisation. The legitimacy of that characterisation calls into question the weight that ought to be attached to it. At an earlier time and, prior to the relevant period, On Call characterised its panel interpreters as employees and not independent contractors. As the evidence revealed, the change in On Call's characterisation of its panel interpreters was not based on any re-evaluation of the nature of the relationship but simply the disadvantage On Call regarded itself to be in, relative to its competitors who had characterised panel interpreters as independent contractors. That fluidity in characterisation suggests that On Call's characterisation, including through the various standard forms of contract that On Call had prepared, was based upon On Call's commercial needs rather than upon the reality of the relationship between On Call and the panel interpreters. It is unsurprising that most interpreters would have adopted the characterisation of their relationship that On Call (and other agencies) were asserting. That conclusion seems particularly apt in a context where any insistence by an interpreter upon the characterisation of the relationship as that of employer and employee would probably have led to little or no work from On Call and at the very least would have led to On Call withholding 48.5% of the remuneration earned where an ABN registration number was not provided.

294 Additionally, as the evidence of Ms Hulusi and some of the interpreters called demonstrated, their characterisation of panel interpreters as independent contractors was primarily arrived at by reference to a perceived absence of control of the interpreter by On Call, because there was no obligation on the interpreter to work. Other potent factors demonstrative of control (including those that I have earlier identified) were not appreciated. For all of those reasons it cannot be said that the characterisation or label of independent contractor utilised by On Call and interpreters had a level of validity that justifies significant weight being attached to it as an indicator.

Withholding of Tax and Leave & Supply of Equipment

295 I have already stated my reluctance to utilise the absence of deductions of income tax and the failure to provide leave as indicators of any utility because of the circularity of reasoning involved. Even if these indicators were to be put in the mix, the absence of these factors is a common feature of most casual contracts of service and thus no assistance in this case: *Sgobino* at 308. Finally, the supply of equipment by interpreters was not a matter of any significance for most panel interpreters, although it was more significant in the case of translators working at home.

296 Taking account each of the indicators to which I have referred, including the weight or strength of indication which I regard ought to be attached to each, I

have come to the clear conclusion that the activities of the relevant interpreters were performed in and for the business of On Call. I should say expressly that my conclusion extends to those activities provided to On Call's clients by Mr Giovannoni and Ms Avila. By reference to both the general evidence and the specific evidence given by those witnesses, I am clearly of the view that in performing interpreting work required by On Call, Mr Giovannoni and Ms Avila did so as emanations of On Call and that, in the application of all of the relevant indicators, their work was performed in and for the business of On Call. I may well have been persuaded to treat the translating work performed by Mr Giovannoni, and perhaps Ms Avila, differently if the evidence called had been sufficient to discharge On Call's onus on that issue. It was not. Neither the evidence of Mr Giovannoni or Ms Avila relating to any translating work that might have been performed for On Call during the relevant period was sufficiently detailed or specific to allow me to draw a distinction of the kind that might have assisted On Call.

297 For those reasons I have come to the ultimate conclusion that On Call has failed to satisfy me that the relevant interpreters were not its common law employees over the relevant period.

Do the Interpreters Fall Within the Extended Definition of Employee in Section 12(3)?

298 The Commissioner defended the assessments on a second basis and in that respect relied on s 12(3) of the Superannuation Guarantee Act. The Commissioner contended that even if I was satisfied that the relevant interpreters were not employees of On Call at common law, I could not be satisfied that they were not employees of On Call within the expanded meaning of "employee" provided by s 12(3) of the Superannuation Guarantee Act.

299 Section 12(1) of that Act operates to expand and clarify the ordinary meaning of employee and employer. It does so by specifying that particular categories of persons (identified in sub-sections (2) to (11)) are, for the purposes of the Act, to be regarded as employees.

300 That the Superannuation Guarantee Act intends to expand the ordinary meaning of employee is also apparent from the terms of s 11 which defines "salary or wages". The expression "salary or wages" is important to the scheme of the Act because the total salary or wages paid by an employer to a particular employee is included in the formula set out in s 19 by which an employer's "individual superannuation guarantee shortfall" for an employee is to be calculated. The amount of any superannuation guarantee charge to be imposed on an employer will in turn be referable to the superannuation guarantee shortfall: see ss 16 and 17. As the expression "salary or wages" normally denotes payments by a common law employer to a common law employee (see: *Neale v Atlas Products* at 424-425; *World Book (Aust) Pty Ltd v Federal Commissioner of Taxation* (1992) 27 NSWLR 377 at 380; 46 IR 1 at 3), it was necessary for the Act to provide an expanded definition of "salary or wages" in line with the expanded definition of "employer" and "employee" found in s 12. That, seems to me, the purpose of s 11 which takes the following form:

> (1) In this Act, salary or wages includes:
>
> (a) commission; and
>
> (b) payment for the performance of duties as a member of the executive body (whether described as the board of directors or otherwise) of a body corporate; and

(ba) payments under a contract referred to in subsection 12(3) that are made in respect of the labour of the person working under the contract; and

(c) remuneration of a member of the Parliament of the Commonwealth or a State or the Legislative Assembly of a Territory; and

(d) payments to a person for work referred to in subsection 12(8); and

(e) remuneration of a person referred to in subsection 12(9) or (10).

(2) Remuneration under a contract for the employment of a person, for not more than 30 hours per week, in work that is wholly or principally of a domestic or private nature is not to be taken into account as salary or wages for the purposes of this Act.

(3) Fringe benefits within the meaning of the *Fringe Benefits Tax Assessment Act 1986* are not salary or wages for the purposes of this Act.

301 On Call and the Commissioner disagreed as to the proper construction of s 12(3). That provision should be construed by reference to the plain meaning of the language utilised in the context of s 12 as a whole and the evident purpose of that section conveyed by the Superannuation Guarantee Act. Section 12(3) identifies an employee as a person that works under a contract that is wholly or principally for the labour of a person. The provision identifies that person as a person who "works" and also as a party to the contract that is "wholly or principally for the labour of that person". It is clear then that the person referred to must be both a party to the contract and the person contracted to perform the work required by that contract. In other words, there must be a contract for the personal services of the contracting party who will perform those services.

302 The conclusion that s 12(3) is confined to contracts requiring the personal performance of labour by the contracted worker is also supported by the language of s 11(1)(ba). That provision speaks of "the labour of the person working under the contract" and supports the conclusion that the contract must relate to the personal labour of that person.

303 The contract in question must be "wholly or principally for the labour of that person". Thus, if the remuneration to be paid to the person is partly for that person's labour and partly for other benefits provided, so long as the principal benefit provided is referrable to the provision of labour, the contract in question would fall within s 12(3). In that respect, I see no reason why the word "principally" ought not be given its ordinary meaning, that is, "chiefly" or "mainly": *Macquarie Dictionary* (5th ed, 2009). It is of some assistance to observe that the Explanatory Memorandum to the Bill that became the *Taxation Laws Amendment Act (No 4) 1993* (Cth) shed some light on what Parliament had in mind in relation to a contract "wholly or principally for labour". Section 81 of the amending Act amended the Superannuation Guarantee Act by inserting s 11(1)(ba). The Explanatory Memorandum explained that by that amendment the Superannuation Guarantee Act will specifically include salary or wages payments made to contractors for their labour under a contract that is wholly or principally for the person's labour. In that context, the Explanatory Memorandum stated (at 13.21):

> A contract is considered to be wholly or principally for labour if more than half of the value of the contract is for labour.

304 The plain words of s 12(3) are potentially very wide in their operation. They clearly extend to persons who provide personal services who are not employees at common law. In that respect, s 12(3) extends to independent contractors who

provide personal services under a contract which is wholly or principally for their labour. On a wide construction of the sub-section a contract between a solicitor and a client which is wholly or principally for the provision of the labour of the solicitor would fall within the scope of s 12(3). It seems unlikely that Parliament intended to include within the scope of s 12(3) contracts of that kind. Once it is recognised that some contracts with independent contractors are included within the scope of s 12(3), it becomes difficult to know by reference to the words of s 12(3) alone, where the line is to be drawn. However, the words utilised in the sub-section must be construed in the context of the section as a whole and by reference to the evident purpose of the Act in which the section is found. It seems to me that the dividing line becomes more apparent when attention is given to those matters.

305 The Explanatory Memorandum to the Bills which were later enacted as the Superannuation Guarantee Act and the Superannuation Guarantee Charge Act described the purpose of the Bills as "to encourage employers to provide a minimum level of superannuation support for employees". An analysis of the second reading speech for the *Superannuation Guarantee (Administration) Bill 1992* (Cth) together with the Second Report of the Senate Select Committee on Superannuation (a Committee of the Senate charged with reporting on that Bill and other related Bills) demonstrates that Parliament was concerned with promoting and enhancing the provision of occupational superannuation by employers to their employees. Occupational superannuation was seen as a key element in encouraging retirement provision by employees during their working lives in order to achieve adequate living standards in retirement. At the time the Bills were introduced, occupational superannuation was available to many employees through industrial awards but was not universally provided for and the proposed legislation aimed to substantially extend the coverage of occupational superannuation. It is evident from a proper understanding of the history of occupational superannuation, and the circumstances in which compulsory superannuation was introduced, that the source of funding for occupational superannuation was not intended to be governmental but was instead to be sourced from the remuneration paid by employers to their employees. In that respect, occupational superannuation is a compulsory form of retirement saving for employees and is achieved by the imposition of an obligation on the employer of those employees to remit part of the remuneration which would otherwise have been earned, into a superannuation fund which cannot be accessed prior to the employee's retirement.

306 Whilst s 12 of the Superannuation Guarantee Act makes it clear that the scheme for enhancing occupational superannuation was not intended to be restricted to common law employees, it is also clear that the extent of that expansion is to be limited by the evident purpose of the legislation. Parliament did not intend that a client of a sole practitioner solicitor provide for the retirement savings of the solicitor out of the exchange of labour for remuneration that arises out of the relationship of solicitor and client. However, Parliament did intend to cover employment-like relationships in which work is performed for remuneration or payment despite the fact that the relationship in question may not be recognised by the common law as a relationship between an employer and employee. Each of the categories of persons dealt with in sub-paragraphs (2) and (4)-(10) of s 12 are persons who may not be common law employees but who earn remuneration in exchange for the provision of personal services in the context of an employment-like setting. Those categories

include: parliamentarians; directors of corporations; statutory office holders; and, public servants (including police officers and Defence Force personnel). In my view, Parliament's intent in relation to s 12(3) is similar. The sub-section seeks to facilitate occupational superannuation being paid out of the exchange of work for remuneration when an independent contractor provides personal services in an employment-like setting which is not of a domestic or private nature (see s 12(11)). Whether an employment-like setting exists may be best answered by asking: Whether, in all the circumstances, the labour component of the contract in question could have been provided by the recipient of the labour employing an employee?

307 The search for the correct result, will be guided by bearing in mind the underlying purpose of the Superannuation Guarantee Act of facilitating occupational superannuation for workers who sell their labour in employment and employment-like settings.

308 The expression "under a contract that is wholly or principally for the labour of the person" utilised in s 12(3), has been the subject of earlier judicial consideration. That consideration occurred in the context of a judicial examination of the meaning of the phrase "salary or wages" as utilised in the *Income Tax Assessment Act 1936* (Cth) (the *Income Tax Assessment Act*). In that context, the High Court in *Neale v Atlas Products* was called upon to determine whether tilers who were considered not to be common law employees received payments which were within the definition of "salary and wages". The Court determined at 425 that the payments were not salary or wages because the tilers had contracts which left them free to do the contracted work themselves or delegate that work for the performance of others.

309 Although the context is quite different, the decision in *Neale v Atlas Products* supports the construction of s 12(3) which I have arrived at, insofar as I have concluded that s 12(3) only applies in relation to contracts for the personal performance of work by the worker who is a party to the contract.

310 Some thirty years after *Neale v Atlas Products* was decided, an amendment was made to the definition of "salary and wages" as then found in s 221A(1) of the *Income Tax Assessment Act*. That provision was considered by the New South Wales Court of Appeal in *World Book*. As Meagher JA stated at 381; 4 the amendment was designed to reverse the effect of *Neale v Atlas Products* so that the existence of the right to delegate no longer prevented a contract from coming within the statutory definition. His Honour held that the language utilised by the amendment failed to effectuate Parliament's intention. Furthermore, each member of the Court was of the view that a contract for a result was outside the scope of the description "a contract that is wholly or principally for the labour of the person". The Court seems to have been driven to that view in that case by the potential consequences of a wide view of the definition. The Court was obviously concerned that without a limitation of the kind it identified, the definition would extend to cover payments made by a client to his solicitor, an owner to his estate agent and a patient to his doctor (at 382; 5) or payments made to a distinguished portrait painter, a champion jockey or a skilled barrister (at 385; 8). It was that potential for an extreme operation that led to the qualification or limitation arrived at, that the contract in question needed to be a contract for work and not for a result.

311 For reasons that I have described, the potential for s 12(3) to have an extreme operation is negated when reference is given to the context in which the

sub-section is found together with the underlying purpose of the Superannuation Guarantee Act. That context and underlying purpose is very different to the legislation which was considered in *World Book*. Additionally, the focus upon the single criterion of whether the contract is a contract for an outcome or result is somewhat out of step with the modern day acceptance of the multi-factorial totality test. Furthermore, for the reasons I have dealt with at [277]-[278] the distinction between a contract for labour and a contract for the product of that labour is illusory in all but the most obvious cases. For those reasons, the approach taken in *World Book* is to be distinguished. I have come to that view despite the fact that in *Vabu Pty Ltd v Federal Commissioner of Taxation* (1996) 33 ATR 537; 81 IR 150 the New South Wales Court of Appeal applied *World Book* in construing s 12(3) of the Superannuation Guarantee Act. In that case both Meagher and Sheller JA applied their reasoning in *World Book* without any apparent consideration of sub-paragraphs (2) and (4)-(10) of s 12, or of the purpose of the Act to which I have previously referred. With great respect to that Court, I have been driven to the conclusion that it is not appropriate to construe s 12(3) on the basis that a contract for a given result or outcome is outside its scope.

312 In coming to the view that I have arrived at, I necessarily reject On Call's contention that the expansionary or clarifying effect of s 12(3) is related only to contracts involving the provision of tools and equipment. That contention has no textual support nor can I discern any underlying policy reason why the intended extension should be limited to that reason alone. Whilst the authorities relied upon by On Call refer to the provision of tools and equipment by the person providing the labour as the kind of contract upon which s 12(3) may operate, they do so by way of example and not in an attempt to suggest that the expansionary operation or clarification by the sub-section is limited to those contracts alone: see *Roy Morgan (2010)* at [68] and [69]. On Call also contended that a contract which required the exercise by a person of their professional skills was not a contract wholly or principally for the labour of that person. That contention denies the fact that the provision of labour involves the combination of time, skill and physical or mental effort. The provision of labour is not confined to physical toil: *Deputy Commissioner of Taxation v Bolwell* (1967) 1 ATR 862 at 873.

313 Turning then to the facts of this case, I agree with the Commissioner's contention that I could not be satisfied that the panel interpreters were not employees of On Call within the expanded meaning provided by s 12(3). For the reasons already addressed, I have not been satisfied that the panel interpreters worked under contracts which, either expressly or as a matter of reality, provided a right to delegate. I am not satisfied that the contracts concerned were not contracts for the interpreters to perform work personally. Given that On Call has failed to satisfy me that the relationship between it and the panel interpreters is not an employment relationship, it logically follows that On Call has failed to satisfy me that the relationship is not employment-like. I have come to that view including by reference to a consideration of the underlying purpose of the Superannuation Guarantee Act of facilitating occupational superannuation for workers who sell their labour in employment and employment-like settings. Even if I had been satisfied that panel interpreters were not common law employees, on the findings I have made, I would nevertheless have been satisfied that they are workers personally performing work in an employment-like setting.

314 If I am wrong in my construction of s 12(3) and a contract for a given result falls outside of the scope of the subsection, for the reasons I have already given, I am not satisfied that the contracts of the relevant interpreters were not for their labour but were instead contracts for an agreed result.

Conclusion

315 It follows that On Call has failed to establish that the relevant interpreters were not its common law employees and were not its employees within the extended meaning given in s 12(3) of the Superannuation Guarantee Act. On Call's application to set aside and or vary the Commissioner's decision of 6 April 2009 to disallow On Call's objections to the Commissioner's assessments, should be dismissed.

316 As I have not received submissions on the question of costs, I will make orders for the exchange of written submissions on that issue. If the parties are agreed as to that issue, proposed consent orders should be promptly filed.

Application dismissed; submissions to be filed on costs

Solicitors for the applicant: *McNab Lawyers*.

Solicitors for the respondent: *Maddocks Lawyers*.

ALEX LAZAREVICH